

<b>Massachusetts Department of Transportation Highway Division Standard Operating Procedures</b>			<b>S.O.P. No. ALJ-01-01-2-000 Page 1 of 6</b>
<b>Subject: Direct Payment Demands</b>			<b>Distribution:</b>
<b>Effective: 11/1/16</b>	<b>Issued: 11/1/16</b>	<b>Supersedes:</b>	<b>Authorized: Albert Caldarelli (signature on original)</b>

**I. PURPOSE**

To establish procedures for handling direct payment demands made on the Department pursuant to M.G.L. c.30, §39F.

**II. SCOPE**

These procedures govern the evaluation and disposition of demands for direct payment made on the Department pursuant to M.G.L. c.30, §39F.

**III. DEFINITIONS**

- A. Administrative Law Judge.** The hearing examiner appointed pursuant to M.G.L. c. 6C, §40.
- B. Department.** The Massachusetts Department of Transportation established pursuant to M.G.L. c. 6C.
- C. Direct Payment Demand.** A demand for direct payment made on the Department by a subcontractor pursuant to M.G.L. c.30, §39F.
- D. General Contractor.** A person awarded a contract by the Department pursuant to sections forty-four A to L, inclusive, of chapter one hundred and forty-nine, or pursuant to section thirty-nine M of chapter thirty.
- E. Subcontractor.** Defined in M.G.L. c.30, §39F(3) as follows:
  - 1. for contracts awarded as provided in sections forty-four A to forty-four H, inclusive, of chapter one hundred forty-nine shall mean a person who files a sub-bid and receives a subcontract as a result of that filed sub-bid or who is 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,
  - 2. for contracts awarded as provided in paragraph (a) of section thirty-nine M of chapter thirty shall mean 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, and
  - 3. for contracts with the commonwealth not awarded as provided in forty-four A to forty-four H, inclusive, of chapter one hundred forty-nine shall also mean 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.

**IV. RECEIPT OF DIRECT PAYMENT DEMANDS**

- A. Receipt.** The Department’s Chief Financial Officer, through his/her Director of Accounts Payable, is designated to receive all direct payment demands made on the Department.

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- B. Initial Intake.** The Director of Accounts Payable shall record the date of the Department's receipt of the direct payment demand and other pertinent information, including the name and address of subcontractor, name and address of general contractor, the Department contract, location of project, federal aid number (if applicable), the amount claimed due under the subcontract, and whether the demand is by a subcontractor or a material supplier.
- C. Lien on Payments to General Contractor.** Upon receipt of the direct payment demand, the Director of Accounts Payable shall place a lien in the amount of the demand on contract payments due the general contractor. The lien shall remain until a determination is made by the Administrative Law Judge on the merits of the demand.
- D. Contractor's Reply to the Demand.** The Director of Accounts Payable is designated to receive any reply from the general contractor made pursuant to M.G.L. c.30, §39F.
- E. Referral to ALJ.** After initial intake, the direct payment demand and any reply by the general contractor shall be referred to the Administrative Law Judge for a determination on the merits of the demand.

**V. EVALUATION OF DIRECT PAYMENT DEMANDS**

- A. Evaluation.** The Administrative Law Judge is responsible for the evaluation and disposition of all direct payment demands received by the Department.
- B. Formal Requirements of Section 39F.** The demand will be reviewed for compliance with statutory procedures, such as proof of timely delivery to the general contractor, a sworn statement, a statement of the status of completion of the subcontract work, and a detailed breakdown of the balance due under the subcontract.
- C. Substantive Review.** The demand will be reviewed on the merits, including whether the subcontract work has been substantially completed, whether the Department has paid the general contractor for such subcontract work, whether the general contractor has failed to make timely payment to the subcontractor for such work, whether the Department is retaining any of the balance due under the subcontract as a result of incomplete or unsatisfactory items of work, and whether the general contractor has disputed such amounts in its sworn reply.
- D. Replies.** Any reply from the general contractor will be reviewed for compliance with statutory requirements.
- E. Consultation with District and Construction Staff.** In making evaluations and determinations on direct payment demands, the Administrative Law Judge shall consult with district and construction staff concerning the status of the project and the subcontract work described in the demand, including but not limited to:
  1. Whether the subcontractor was approved in writing to perform the sublet work.
  2. Whether the subcontractor substantially completed the work, and if so, the date of substantial completion.
  3. Whether the subcontract work was inspected and approved for payment.

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4. Whether the District intends to file a claim against the general contractor for defective or incomplete work performed by the subcontractor.

F. **Determination.** The Administrative Law Judge shall make a timely determination on the direct payment demand. The determination shall be in writing, which may be in the form of a memorandum to the Director of Accounts Payable, with copies to the subcontractor and general contractor.

G. **Department Distribution.** A copy of the determination shall be sent to the Chief Engineer, Deputy Chief Engineer for Construction, and the District Highway Director overseeing the project.

## VI. DISPOSITION

A. **Denied.** When a direct payment demand is denied, the Department shall take no further action with respect to the demand. In such case, the Director of Accounts Payable shall also remove any lien on payments to the general contractor.

1. **Without Prejudice.** If a direct payment demand is denied without prejudice, the subcontractor may refile a new demand that remedies any procedural or substantive issue(s) which formed the basis of the denial.

2. **With Prejudice.** If a direct payment demand is denied with prejudice, such denial is final and binding.

B. **Approved.** When a direct payment demand is approved, the Department shall make the direct payment to the subcontractor out of amounts payable to the general contractor at the time of receipt of the demand and out of amounts which later become payable to the general contractor. The Director of Accounts Payable shall complete any necessary financial documentation to effectuate the direct payment.

C. **Amounts Disputed by General Contractor.** When a determination is made to deposit amounts disputed by the general contractor in an interest-bearing joint account as provided in G.L.c.30, §39F(1)(f), the Department shall proceed in accordance with Section VII below entitled "Depositing Disputed Amounts."

## VII. DEPOSITING DISPUTED AMOUNTS

A. **Policy.** It is the Department's policy to deposit disputed amounts in an interest-bearing joint account in a bank agreed upon by the general contractor and the subcontractor as provided in G.L.c.30, §39F(1)(f), and not in a bank selected by the Department.

B. **Process.** The Department shall take the following actions to ensure timely deposit of disputed amounts in an interest-bearing joint account:

1. **Notice:** Notify the general contractor and subcontractor in writing that the Department will deposit the disputed amount in an interest-bearing joint account in the names of both the general contractor and the subcontractor in a Massachusetts bank agreed upon by the general contractor and the subcontractor, and request bank

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and account information. This notice and request will be satisfied as part of the determination issued by the Administrative Law Judge, a copy of which will be provided to the general contractor and the subcontractor.

2. **Joint Check:** To ensure a timely deposit, upon receipt of the determination, the Director of Accounts Payable will process required financial documentation for issuance of a check in the disputed amount payable jointly to the general contractor and the subcontractor for deposit in the interest-bearing joint account in the bank agreed upon by the general contractor and the subcontractor.
3. **Second Notice:** If the bank and account information is not received within 30 days, the Department will provide a second notice in writing, including a copy of the joint check, to the general contractor and the subcontractor. The notice will reiterate that the Department is prepared to deposit the disputed amount forthwith in the interest-bearing joint account in the bank agreed upon by the general contractor and the subcontractor. The notice shall also advise the general contractor and the subcontractor of the requirements of G.L. c.29, §32. The second Notice shall be in the form provided at Exhibit A.
4. **Depositing Joint Check:** The Department shall provide the joint check to the general contractor and the subcontractor for deposit in accordance with c.30, §39F upon receipt of appropriate supporting documentation evidencing the joint account and/or pursuant to an agreement between the general contractor and the subcontractor concerning the matter.
5. **Release and Discharge of Obligations:** Prior to releasing the joint check, the Department may require execution of a release. See form provided at Exhibit B.

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**EXHIBIT A  
DEPOSITING DISPUTED AMOUNTS  
SECOND NOTICE**

Date

To:   General Contractor                      Subcontractor  
       Address                                      Address  
       \_\_\_\_\_                                      \_\_\_\_\_  
       \_\_\_\_\_                                      \_\_\_\_\_

Subject:   **Demand for Direct Payment**  
               **MassDOT Contract #**  
               **Ruling of the Administrative Law Judge dated \_\_\_\_\_**

Dear:

In the above referenced ruling, the Administrative Law Judge determined that the Massachusetts Department of Transportation is obligated to deposit disputed amounts into an interest bearing joint account as provided in M.G.L. c.30, §39F(1)(f). The deposit must be made into “an interest-bearing joint account in the names of both the general contractor and the subcontractor in a bank in Massachusetts selected by the awarding authority or agreed upon by the general contractor and the subcontractor ...”

MassDOT elects to deposit the disputed amount into a joint account in a bank agreed upon by the general contractor and the subcontractor. To expedite the deposit, MassDOT has issued a check (copy enclosed) payable jointly to the general contractor and the subcontractor. The parties should contact my office to provide documentation of their agreement and make arrangements to pick up the original check for deposit in the bank upon which they have agreed.<sup>1</sup>

I can be reached at \_\_\_\_\_.

Sincerely,

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<sup>1</sup> The parties should be aware of the requirements of G.L. c.29, §32: “Any check issued by the state treasurer or by any agent or agency of the commonwealth ... , which is not presented for payment within 1 year after its issue date, shall be payable only at the office of the state treasurer .... Annually, on June 30, the comptroller shall transfer to the Unclaimed Property Fund, established in section 9 of chapter 200A, all funds that are identified by the state treasurer as funds of the commonwealth that have remained in the unclaimed check fund for not less than 1 year.”

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**EXHIBIT B**

**RELEASE AND DISCHARGE OF OBLIGATIONS  
PURSUANT TO M.G.L. c.30, §39F**

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Subcontractor:  
Contractor:  
Contract: #  
City/Town:  
Amount: \$

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The above-referenced Contractor and Subcontractor (jointly, "the Parties") hereby agree and acknowledge the following:

1. On the date below, the Parties took possession of a joint check issued by the Commonwealth of Massachusetts payable to the Parties (check #\_\_\_\_\_).
2. Said check constitutes a "direct payment" as defined in M.G.L. c.30, §39F and is being provided by the Massachusetts Department of Transportation ("MassDOT") pursuant to that statute for deposit into an interest bearing joint account in the names of the general contractor and the subcontractor in a bank agreed upon by the general contractor and subcontractor.
3. In accordance with G.L. c.30, §39F, this direct payment shall discharge the obligation of MassDOT to the Contractor to the extent of such payment.
4. The Subcontractor hereby releases MassDOT from any and all claims for direct payment for subcontract work performed on the above-referenced contract.

\_\_\_\_\_  
print name:

\_\_\_\_\_  
print name:

General Contractor

Subcontractor

Date: \_\_\_\_\_