OFFICE
OF
THE ADMINISTRATIVE LAW JUDGE

PRE-2000
SELECTED DECISIONS/RULINGS

Volume 1
Construction Contract Appeals

APPENDIX OF DECISIONS/RULINGS

Construction Contract Appeals

APPENDIX A-1

DECISIONS/RULINGS

Claims re: Changes to Scope

INTEROFFICE CORRESPONDENCE

TO: Massachusetts Highway Commission

FROM: Peter Milano, Chief Administrative Law Judge

DATE: February 1, 1994

RE: Board of Contract Appeals

The attached is a copy of my recommendation on the claim of:

CONTRACTOR:	**Hanover Contracting Co., Inc.**
CONTRACT #:	**24868**
CITY/TOWN:	**Billerica**
RECOMMENDATION:	**The Board of Contract Appeals rescind its vote of December 1, 1993, as this claim was originally voted by the BCA on September 13, 1989, Appeal #2, Item #1, and as such can only be reheard at the direction of the Board of Contract Appeals.**

- -

Please place this recommendation on the Docket Agenda

WEDNESDAY, FEBRUARY 9, 1994, for action of the Massachusetts

Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:

Dep. Comm. Steffens
Assoc. Comm. Eidelman
Assoc. Comm. Church
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis
Chief Engineer Dindio
Ned Corcoran, Ch. Counsel
Joseph Crescio, Dep.Ch.Eng.,Constr.
Secretary's Office
C.Mistretta,DHD,Dist.4
C.Fedele, Finals
F.Garvey, Fisc.Mgmt

Hanover Contract. Co.
79 Plymouth Road
Malden, MA 02148

INTRODUCTION:

Hanover Contracting Co., Inc. (the Contractor) aggrieved by the Department's failure to pay for costs for driving piles during weekend hours in the amount of $3837.44 appealed to the Board of Contract Appeals

Contract #24868, (the Contract), was for the reconstruction of Pond Street and the construction of a prestressed concrete box beam bridge over the M.B.T.A and B & M railroad tracks.

The work included furnishing and installing signing, pavement markings, pavement, bituminous concrete berm, guard rail, a water main, drainage structures, a sewer manhole, removing and stacking miscellaneous signs and other incidental items as shown on the plans or listed in the Contract.

The proposed single span bridge provided a 38 foot wide roadway, curb to curb, with a 6 foot sidewalk on the east side and a 9 inch safety walk on the west side. The roadway was to be carried by a 27 inch deep prestressed concrete butted box beams. The box beams were supported by reinforced concrete abutments (Bridge B-12-15).

All work done under this contract had to be in conformance with the Department of Public Works STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1973, the SUPPLEMENTAL SPECIFICATIONS dated June 19, 1985, the 1977 CONSTRUCTION STANDARDS, the 1978 Manual on Uniform Traffic Control Devices, the 1981 Standard Drawings for Signs and Supports, the American Standard for Nursery Stock (ANSI Z60-1980), the Plans, Special Provisions and Amendments included in the Contract.

The Contract was awarded on April 2, 1986, Item #30. The Contract is dated April 9, 1986. The original completion date was May 30, 1987.

A hearing was held on November 18, 1993. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Philip Melillo	Resident Engineer - Contract #24868
Kenneth C. Ravioli	Resident Engineer - Contract #24586
David Mullen	Department Counsel
Paul J. Ruggiero	Hanover Contracting Co., Inc.

Entered as exhibits at the Hearing were:

Exhibit #1.....Contract #24586
Exhibit #2.....Contract #24868
Exhibit #3.....Statement of Claim - Woburn
Exhibit #4.....Statement of Claim - Billerica

FACTS AND ISSUES PRESENTED:

The Department's Claims Committee denied this claim for premium time based on the Special Provisions page 6 which states:

> WORK SCHEDULE
>
> No work is to be performed on Saturdays, Sundays or holidays. Work on this project is restricted to a normal 8 hour day, 5-day week, with the prime contractor and all subcontractors working on the same shift, except for emergency work necessary to maintain safety standards or unless specifically approved by the Engineer.
>
> **The Contractor's attention is hereby directed to the fact that certain work on the proposed Bridge No. B-12-15, may have to be performed during hours other than the normal work hours when requested by the Railroad** and approved by the Engineer. Therefore, it is understood that the Contractor has made allowance in his bid for all

> additional expense, loss, risk and damage due to work being performed at such hours of the day or night as may be necessary. No additional compensation will be paid to the Contractor for such work.

These Special Provisions deal with the possibility that the Contractor may have to work other than normal hours as that work related to the railroads impacted.

Based on the Contract Documents Pg. 6, it was assumed by the Department and the Contractor that only normal work hours would be anticipated or allowed, except when requested by the Railroad, or for emergency safety situations.

The New England Power Company would not permit the Contractor to drive piles in the vicinity of their high voltage lines nor would they deactivate the power during "Normal Working Hours". The Contractor was told this work would have to be performed on weekends only.

The Contractor felt, that if the Contract Documents informed them that the New England Power Company would require weekend work as it informed them that the Railroad would, they could have made the proper adjustments for pile installation while preparing their bid proposal.

The district did not oppose this claim. They felt the dollar value was reasonable. Since the weekend work could only have been triggered by the railroads, the work done to accommodate New England Power would be extra work as defined in Section 1.20 of the Standard Specifications which states:

> Extra Work... Work which
> 1. was not originally anticipated and/or contained in the contract; and therefore
> 2. is determined by the Engineer to be necessary for the proper completion on the project; and

3. bears a reasonable subsidiary relation to the full execution of the work originally described in the Contract.

FINDINGS:

I find that driving piles on weekends to accommodate New England Power Company which would only deactivate their power lines on the weekend constituted extra work.

RECOMMENDATION:

The appeal of Hanover Contracting Company on Contract #24868 for driving piles during the weekend should be approved in the amount of $3837.44.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: January 9, 1997

RE: Board of Contract Appeals
(PFN-092010)

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **The Middlesex Corp. & Affiliates**
CONTRACT #: **95052**
CITY/TOWN: **Franklin**
CLAIM: **Additional cost to excavate for drainage below the inverts set in the Contract in the amount of $27,078.67.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, JANUARY 15, 1997**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro

Chief Eng. Broderick
E.Botterman, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
M. O'Meara, DHD, District #3
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

The Middlesex Corporation
& Affiliates
17 Progress Avenue
Chelmsford, MA 01824

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **THE MIDDLESEX CORP. & AFFILIATES**, 17 Progress Avenue, Chelmsford, MA 01824, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, JANUARY 15, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The Middlesex Corporation & Affiliates (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) failure to pay a claim for an alleged changed condition for increased costs due to field changes that lowered the inverts for much of the drainage from those shown on the plans in the amount of $27,078.67 on Contract #95052, appealed to the Board of Contract Appeals.

Contract #95052 (the Contract) was for reconstruction of a section of Route 140 in the Town of Franklin.

The work done under this contract consisted of furnishing all necessary labor, materials and equipment required for the reconstruction of Route 140 and upgrading and installation of traffic signals in Franklin. The project included other improvements in accordance with the plans and the Special Provisions.

The work included excavation, roadway construction and reconstruction, roadway widening, cold planing and resurfacing, geometric improvements, sidewalk construction, wheelchair ramps, upgrading and installation of traffic signals, interconnect system, installation of curbing, removing and resetting of curbing, drainage improvements including culverts, water system improvements, landscaping, tree planting, signing, pavement markings and the provision of safety controls and signing for construction operations and other incidental items included in the Contract.

Work included rehabilitation of the bridge (F-8-7) over the railroad tracks at Main Street. Work involved replacement of superstructure and portions of the substructure. The bridge work included, but was not limited to, the removal of the entire existing superstructure and the replacement with prestressed precast concrete deck beams with steel bridge rail and protective screen; the construction of a median island supported by steel stringers; the removal of the top courses of the granite block abutments to the extent shown on the Plans and their replacement with reinforced concrete caps;

the removal of portions of the existing retaining walls and their replacement with gravity wingwalls; and the addition of 10" deep approach slabs. The bridge work was to be performed in three stages of construction.

All work done under this contract was to be in conformance with Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES, dated 1988, the SUPPLEMENTAL SPECIFICATIONS, dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the AMERICAN STANDARD FOR NURSERY STOCK (ANSI 2601-1986), the PLANS, and these SPECIAL PROVISIONS.

Contract #95052 was awarded July 13, 1994, Item #58. The Contract was dated August 24, 1994. The original completion date was September 26, 1996. The Contract award price was $5,777,559.72.

A hearing was held on October 24, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Deputy Chief Counsel
John Donahue	Construction Eng. - District 3
Michael Hartnett	Resident Engineer
James Hayes	Boston Construction Office
David Skerrett	Middlesex Corp.

Entered as Exhibits were:

Exhibit #1.....	Contract #95052
Exhibit #2.....	Statement of Claim

A post hearing submission was requested of the Contractor and is now a part of the file.

FACTS, ISSUES AND GENERAL DISCUSSIONS OF LAW:

The claim is based on the fact that specific invert elevations for each drainage line were given on the plans. To avoid unanticipated conflicts encountered in the field and to maintain the required pitch,

the Resident Engineer lowered a significant network of pipe inverts. Although the inverts shown on the plans were no deeper than five feet, the revised inverts ranged from eight to twelve feet deep.

Testimony from both the Contractor and MassHighway clearly stated that invert elevations for proposed drainage systems generally are not given on the plans. However, the plans for this project clearly defined the inverts. Neither MassHighway nor the Contractor had any indication that the drainage system would significantly change. Once the Contractor began the pipe run, it was apparent that the information contained in the drawings was erroneous. The new line came in conflict with drainage pipes. Consequently, the Contractor was ordered to set the drainage pipe below the inverts (five feet) reflected in the drawings.

The Contractor was paid for these trenches under Items 140.22 and 140.23 which state:

> **140.22 Class A Trench Excavation.**
>
> Unless otherwise shown on the plans, Class A Trench Excavation shall include the removal and satisfactory disposal of all materials, except Class B Rock Excavation that are encountered in the construction or demolition of masonry culverts and other structures having a clear square span of less than 8 feet, masonry inlets, culvert ends, masonry walls, revetment, test pits, paved waterways, construction of drains for slope or subgrade stabilization and in the construction, widening, straightening or deepening of drainage ditches and water resources in connection with pipes or structures having a clear span of less than 8 feet.
>
> Test pits to locate underground services shall be excavated where directed and will be classed as Class A Trench Excavation. The Contractor shall take special care during this excavation to avoid damage to any underground structures or utilities. When necessary the Contractor shall cooperate with representatives of public service companies in order to avoid damage to their structures by permitting them to erect suitable supports, props, shoring or other means of protection.

140.23 Class B Trench Excavation.

Class B Trench Excavation shall include the removal and satisfactory disposal of all materials, except Class B Rock Excavation, encountered in the construction of drainage and water pipes greater than the 5 foot maximum depth specified in Section 200.

Trench excavation for pipe laying in roadway cuts shall include only that portion of the trench which is below the roadway excavation except where the Engineer orders in writing, that the trench excavation and its backfill shall be completed before the roadway excavation is begun.

The Contractor penny bid the Class B Trench Excavation based on his belief that the inverts would be set at five feet.

The Supreme Judicial Court in the case of Alpert v. Commonwealth (1970) 258 N.E. 2d 755 stated:

> "It is well established that where one party furnishes plans and specifications for a contractor to follow in a construction job, and the contractor in good faith relies thereon, the party furnishing such plans impliedly warrants their sufficiency for the purpose intended. M.L. Shalloo, Inc. v. Ricciardi & Sons Constr. Inc., 348 Mass. 682, 687-688, 205 N.E. 2d 239; Hollerbach v. United States, 233 U.S. 165--172, 34 S.Ct. 553, 58 L. Ed 898; Christie v. United States, 237 U.S. 234, 239--242, 35 S.Ct. 565, 59 L. Ed. 933; United States v. Spearin, 248 U.S. 132, 39 S. Ct. 59, 63 L. Ed. 166; Faber v. New York, 222 N.Y. 255, 259--261, 118 N.E. 609."

By positively identifying the inverts at five feet MassHighway warranted that the excavation would be to that depth. (Note: normal practice is not to list the inverts on the drawings). In positively asserting the inverts at the five foot depth, MassHighway made a representation upon which the Contractor had a right to rely without further investigation and irrespective of the general language of several exculpatory clauses in the Contract.

FINDINGS:

I find that the inverts shown in the drawings warranted that the depth of excavation would be five feet.

I find that the inverts had to be set at a greater depth to establish a gravity flow due to conflicts with other pipes and the Contractor should be compensated for his additional cost.

RECOMMENDATION:

The claim filed by the Middlesex Corporation & Affiliates on Contract #95052 for additional cost to excavate for the drainage pipes below the inverts set in the drawings should be approved in the amount of $27,078.67.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: February 21, 1997

RE: Board of Contract Appeals
(PFN-117600)

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **Kiewit Construction Company**
CONTRACT #: **95214**
CITY/TOWN: **New Bedford-Fairhaven**
CLAIM: **Additional costs in the amount of $101,111.05.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, FEBRUARY 26, 1997**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro
Assoc. Comm. Botterman

Assoc. Comm. Broz
Assoc. Comm. Blundo
Chief Eng. Broderick
E.Botterman, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
B. McCourt, DHD, District #5
Alex Bardow, Br. Eng.
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

Kiewit Construction Co.
191 Pope's Island
New Bedford, MA 02740

Joel Lewin, Esq.
Hinckley, Allen & Snyder
Suite 4600
One Financial Center
Boston, MA 02111-2625

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **KIEWIT CONSTRUCTION CO.**, 191 Pope's Island, New Bedford, MA 02740, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, FEBRUARY 26, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The Kiewit Construction Company (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) failure to pay four claims totaling $101,111.05 on Contract #95214 (the Contract) appealed to the Board of Contract Appeals.

The Contract was a bridge reconstruction job - Route 6 over the Acushnet River in New Bedford-Fairhaven.

The work to be done on the existing Route 6 Swing Bridge over Acushnet River (MHD Bridge No. F-1-2=N-6-1: Middle Bridge) in the City of New Bedford under this contract consisted of the installation of a tieback and tiedown anchor system at the West abutment, installation of a tiedown anchor system at the East abutment and wall type piers, installation of a tiedown dowel system at the swing pier, removal and replacement of existing fasteners, removal and replacement of the fender system, removal and replacement of the swing span sidewalk, removal and replacement of the pedestrian railing on the swing span, approach spans, and roadway approaches, repair of cracked masonry stones, removal and replacement of walkways and ships ladders, removal and replacement of the swing span deck grating, removal of welds and miscellaneous appurtenances on the approach span girders, removal and replacement of the swing span stringers, stub stringers, lacing bars, top bracing members, bottom bracing members, pins and pin plates, portions of the vertical members, and utility vault support framing members, removal and replacement of the curved girders at the floorberms, removal and replacement of drum girder bracing, removal and replacement of the swing span end floorbeams, removal and replacement of the approach span floorbeam bottom flanges, retrofit of the drum girder tip flange, installation of a web repair plate to the swing span loading beam, installation of steel framing around sidewalk openings, installation of support steel for the new Operator's House and Control House, other unclassified steel repairs, removal and replacement of end cantilever brackets and interior

cantilever brackets on the swing span, installation of a decorative ornament on the swing span, installation of light weight fill at the swing pier, installation of new steel bridge guard rail on both the swing span and approach spans, installation of a new concrete barrier on both the approach spans and approach roadway, installation of cement concrete masonry in the new swing span grating, in the new steel pipe piles, and on the new toe rest support within the fender system, restoration of the cement masonry joints at each substructure unit, repair of tremie cracks and voids, tremie jacketing of the West abutment, installation of steel reinforcing bars, removal and replacement of both fixed and expansion bearings on the approach spans, installation of treated timber piles, installation of 12 inch and 18 inch steel pipe piles, installation of timber for the fender system removal and replacement of the Operator's House adjacent to the West approach spans and of the Control House on the swing span, removal and replacement of the bridge end lift hydraulic system, removal and replacement of the mechanical and electrical systems, removal and replacement of various utility items, jacking of the truss verticals and the entire swing span, cleaning and painting of the steel bridge, and maintenance and protection of traffic on the bridge during repairs, as indicated on the plans, and as was directed by the Engineer.

Routine Maintenance - lubricating, cleaning, etcetera - of the swing span was the responsibility of the Contractor. Navigation had to be maintained at all times as indicated on the plans and as was directed by the Engineer.

In addition, development of an environmental health and safety plan was required as well as sampling and analysis of the piles for PCB's and the treated timber by TCLP, disposal of treated wood products, PCB contaminated pile sections, and excavated material behind the abutments.

All work done under this Contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR

HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the PLANS and these SPECIAL PROVISIONS.

The Contract was awarded November 2, 1994, Item #5. The Contract was dated November 10, 1994. The original completion date was November 30, 1996.

A hearing was held on February 12, 1997. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Deputy Chief Counsel - MassHighway
Robert L. Fierra	Asst. Dist. Constr. Eng., Dist. #5
Joel Lewin	Attorney for Kiewit
Brian M. Williams	Area Manager - Kiewit
Jeffrey J. Gordon	Project Manager – Kiewit

Entered as Exhibits were:

Exhibit #1.....	Contract #95214
Exhibit #2.....	Statement of Claim for payment of $14,413.47 due on EWO #19
Exhibit #3.....	Statement of Claim for Operator's House Timber Piling $4867.38
Exhibit #4.....	Statement of Claim for Additional Builders' Risk Insurance $27,013.20
Exhibit #5.....	Statement of Claim for Steel Reinforcement for Structures $54,817.00

FACTS:

Evidence on all four claims were presented on February 12, 1997. MassHighway withheld $14,413.47 for mobilization/demobilization of additional barge and crane. The Contractor was paid a lump sum for the Operator's House. However, the piles that were driven under the House were not paid under the unit price for Item 941 - Treated Timber Piles - LF. The Contractor bid the Item at $14. per L.F. The Contractor requested to float the spans of the bridge to land as it did work on each span. The Contractor had $20,000,000.00 Excess

Liability Insurance which would have adequately have covered the loss of a span in the water. The MassHighway required an additional $4,000,000.00 Builder's Risk Policy which cost was $27,013.20. No discussion of Exhibit #5 is necessary.

After the hearing, I was notified by counsels for both parties that they agreed to settle these claim for the reduced amount of $39,086.00 (see Settlement Agreement and Release attached hereto and made a part hereof and marked ATTACHMENT #1). I find the settlement to be fair and reasonable and adopt same as my findings.

RECOMMENDATION:

It is recommended that the Kiewit Construction Company's claims for additional costs totaling $101,111.05 be paid in the reduced amount of $39,086.00.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release made as of the _____ day of February, 1997 by and between the Commonwealth of Massachusetts Highway Department (hereinafter referred to as "MassHighway"), by and through its Board of Commissioners, and Kiewit Construction Company, a corporation duly authorized by law with offices at 191 Pope's Island, New Bedford, Massachusetts 02740 (herein referred to as "Kiewit").

W I T N E S S E T H T H A T:

WHEREAS, MassHighway and Kiewit entered into a certain contract known as Contract No. 95214 (hereinafter referred to as the "Contract") consisting of New Bedford/Fairhaven Swing Bridge Rehabilitation, and

WHEREAS, Kiewit has submitted the following claims to the Claims Committee:

1.	Mobilization/Demobilization of Additional Barge and Crane:	$ 14,413.47
2.	Operator's House Timber Piling:	4,867.38
3.	Additional Builder' Risk Insurance:	27,013.20
4.	Steel Reinforcement for Structures:	54,817.00
	Total:	$101,111.05

WHEREAS, following denial of Claim Nos. 1 through 4, Kiewit appealed to the Board of Appeals; and

WHEREAS, during presentation of evidence at the hearing before the Administrative Law Judge, the parties agreed upon a settlement of the foregoing claims.

NOW, THEREFORE, in consideration of the covenants set forth below, the parties hereby agree as follows:

1. Kiewit has withdrawn with prejudice Claim No. 4 -- Steel Reinforcement for Structures: $54,817.00.

2. MassHighway agrees to pay, and Kiewit agrees to accept, the

sum of $39,086.00 in full settlement of Claim Nos. 1 through 3 enumerated above.

3. Kiewit, for itself, its successors, and assigns, does hereby release, remise, and forever discharge the Commonwealth and all its political subdivisions, departments, offices, agencies, agents, employees, and assigns of and from any and all debts, demands, causes of action, suits, accounts, covenants, contracts, guarantees, bonds, warranties, agreements, torts, damages' statutes, and any other claims and liabilities whatsoever of every name and nature, both in law and in equity, however arising, which Kiewit may have, or may hereafter have, on account of, or arising out of, or in connection with Claim Nos. 1 through 4 enumerated above on Contract No. 95214.

4. This Settlement Agreement and Release shall be governed by the laws of the Commonwealth of Massachusetts.

5. Nothing contained herein shall constitute an admission or evidence of liability on the part of the Commonwealth.

IN WITNESS WHEREOF, the parties have set their hands and seals hereto as of the year and day first above written.

Kiewit Construction Company,
By its attorney,

Joel Lewin, Esquire
Hinckley, Allen & Snyder
One Financial Center
Suite 4600
Boston, MA 02111-2625
(617) 345-9000

Commonwealth of Massachusetts
Highway Department,
By its attorney,

David P. Mullen, Esquire,
Deputy Chief Counsel
MassHighway
Ten Park Plaza
Boston, MA 02116-3973
(617) 973-7813

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: February 28, 1997

RE: Board of Contract Appeals
(PFN-01790)

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **RDA Construction Company**
CONTRACT #: **94193**
CITY/TOWN: **Boston (Cummins Highway)**
CLAIM: **Two claims for fixed cost incurred in the amount of $25,875.92 and unabsorbed home office overhead in the amount of $28,480.00, totaling $54,355.92.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, MARCH 5, 1997**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro

Assoc. Comm. Botterman
Assoc. Comm. Broz
Assoc. Comm. Blundo
Chief Eng. Broderick
E.Botterman, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
E. Botterman, DHD, District #4
A. Bardow, Br. Eng.
Beth Pellegrini, Audit
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

Lewis Eisenberg, Esq.
Cosgrove, Eisenberg &
Kiley, P.C.
803 Hancock St.
P.O. Box 189
Quincy, MA 02170-0997

RDA Construction Corp.
111 Sumner Street
P.O. Box 285354
East Boston, MA 02128

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **RDA CONSTRUCTION CORP.**, 111 Sumner Street, P.O. Box 285354, East Boston, MA 02128, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, MARCH 5, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The RDA Construction Corporation (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) failure to approve two claims for fixed cost incurred in the amount of $25,875.92 and unabsorbed home office overhead in the amount of $28,480.00 on Contract #94193 (the Contract) appealed to the Board of Contract Appeals.

These two claims were referred to the Audit Section by the Claims Committee for review of a multiple part (20) claim in the total amount of $138,102.76. Audit Section has approved approximately $83,796.00± but raised questions of liability relative to the above two claims which were parts N and R of the original submission. I was asked to review the legal issues involved and render a recommendation to the Board of Contract Appeals. Audit has reviewed the dollar value of the claims and determined if liability is established accepted cost are $30,528.74 (see MHD Audit #97A-557).

The Contract was a bridge reconstruction job - Cummins Highway over AMTRAK/MBTA in the Hyde Park section of Boston.

The work under this contract consisted of the demolition and reconstruction of Bridge Number B-16-106 carrying Cummins Highway over the AMTRAK/MBTA railroad right-of-way and the reconstruction of the approaches to the structure.

Work also included in this project consisted of installing drain lines and structures, installing cement concrete sidewalks, installing granite curb, installing a 16" water main; installing highway guard and bridge railing; loam and seeding; furnishing and installing pavement markings; and other incidental items of work listed in the Contract.

All work done under this Contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS DATED August 7, 1991, THE 1977 CONSTRUCTION STANDARDS, THE 1988 MANUAL ON

UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the PLANS and these SPECIAL PROVISIONS.

The Contract was awarded June 22, 1994, Item #2. The Contract was dated August 24, 1994. The original completion date was September 17, 1994. The Contract bid price was $1,106,948.80.

A conference was held on February 20, 1997. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Deputy Chief Counsel - MHD
Gene Kelley	RDA - President
Lewis C. Eisenberg	Atty. for RDA
William Q. McLean	RDA

FACTS AND ISSUES OF LAW:

Since these claims were all referred to the Audit Section by the claims committee there was a recognition by MHD as to the difficulties encountered on this job. On parts N and R which were originally submitted as delay claims, audit raised the issue that no written stop work order existed.

This job was advertised and bid on three separate occasions. Modern Continental was first awarded this job in 1986. At that time it was to be executed in two phases. MassHighway terminated this job for convenience when it was determined the steel, as fabricated per our plans, was too short. In 1991, John Mahoney Construction Company (Mahoney) was awarded this job. RDA's attorney, Lewis Eisenberg represented Mahoney also.

Mr. Eisenberg wrote Sherman Eidelman DHD, District #4 and stated:

> "Previously, I represented John Mahoney Construction Company and was their counsel when they were awarded the same contract in late 1991. I have reviewed the project as proposed then with the specifications and requirements of your current contract. I am sure that you are aware of the problems that developed in 1992 with the Mahoney project based in part on the one phase nature of the bridge demolition and reconstruction, and the existing utilities of New England Telephone Company and Boston Edison Company. In reviewing my old file of that matter I noted that the problem that appeared insurmountable was the existing

utilities and the inability of the contractor to perform the work on one phase as designed.

The culmination of the problems resulted in several meetings that I attended with the legal department of the D.P.W. It was clear that the earliest spec book for the project as bid and awarded to Modern Continental in 1986 was in **two phases**.

Yet in the 1991 rebidding the design and method was in one phase of construction. When the Department agreed to terminate the project for convenience in 1992 it appeared to me that some of the basic reasons for the action were:

- The Department was convinced that one phase construction was next to impossible.
- Existing utilities in the location of new steel beams prevented the Department and the contractor from doing the work in one phase.
- Fragile utilities prevented any movement of the existing lines to allow for removal of the steel beams.

All of these issues were clear and known to the owner. The parties mutually agreed that one phase operation was impractical and a change to two phases would add more cost and time to the project.

With that background in mind I reviewed in detail your ‘new Specifications’ to see how the Department was going to revisit the issue to be fair with all bidders and to assure that construction would be performed in a design that was of sound engineering method. The project still requires one phase for demolition and reconstruction. In looking at Section 114.1 ‘Demolition of Superstructure’ I note that the Department made no changes in the scope of the work and left the contractor with the same problem that resulted in a termination of the project in 1992. I also looked to see if the Department made any alterations in the utility issues that it knew existed and found that none were made as well, see ‘Maintenance of Boston Edison, New England Telephone and Boston Gas Service Throughout the Contract Duration’. Some of the new steel (beam n. 8) is directly in line with existing utilities and no solution is set out. Hence, you have asked RDA to inherit the same problems as Mahoney without any redesign. Equipped with the knowledge that you had from the utilities and the negotiations with the previous contractor, I find the actions of the Department to be less than reasonable and fair. Yet it does appear that the Department rewrote some of the railroad requirements for the project. It is noteworthy that Mahoney, in 1992, raised issues to the Department regarding confusion in the specifications regarding the bidders' requirements for flagmen that apparently resulted in a revamping of ‘Work Schedule’ (at

> 4) and the Specifications for Safety and Protection of Railroad Traffic and Property (rev. 8/31/93)."

There appears to be adequate evidence to support the positions stated in Mr. Eisenberg's letter of November 6, 1995. Even I was peripherally involved in the Mahoney situation in the early 90's. MassHighway was clearly in possession of information that it did not make available to RDA at the time of bid on the Contract. However, we never redesigned the project as a two phase construction.

The Supreme Judical Court in the case of Alpert v. Commonwealth (1970) 258 N.E. 2d 755 stated:

> "It is well established that where one party furnishes plans and specifications for a contractor to follow in a construction job, and the contractor in good faith relies thereon, the party furnishing such plans impliedly warrants their sufficiency for the purpose intended. M.L. Shalloo, Inc. v. Ricciardi & Sons Constr. Inc., 348 Mass. 682, 687-688, 205 N.E. 2d 239; Hollerbach v. United States, 233 U.S. 165, 169--172, 34 S. Ct. 553, 58 L. Ed 898; Christie v. United States, 237 U.S. 234, 239--242, 35 S. Ct. 565, 59 L. Ed. 933; United States v. Spearin, 248 U.S. 132, 39 S. Ct. 59, 63 L. Ed. 166; Faber v. New York, 222 N.Y. 255, 259--261, 118 N.E. 609."

By positively identifying the method as a phase construction, MassHighway warranted that the project could be built as such. MassHighway made a representation upon which the Contractor had a right to rely without further investigation and irrespective of the general language of several exculpatory clauses in the Contract.

FINDINGS:

I find that MassHighway breached an implied warranty that our plans were sufficient to reconstruct bridge No. B-16-106 knowing full well that the history of this project required a design change to a two phased construction.

RECOMMENDATION:

The claim filed by RDA on Contract #94193 for fixed cost incurred in the amount of $25,875.92 and unabsorbed home office overhead cost in the amount of $28,480.00 for a total of $54,355.92 should be paid in the lesser amount, as determined by MHD Audit #97A-557, totaling $30,528.74.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: May 9, 1997

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR:	**O'Regan Painting Company**
CONTRACT #'S:	**92085 & 92089**
CITY/TOWN:	**Springfield**
CLAIM:	**Two claims for additional cost for greater workplace safety hazards due to abrasive blasting, totaling $139,659.00.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, MAY 14, 1997**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro

Assoc. Comm. Botterman
Assoc. Comm. Broz
Assoc. Comm. Blundo
Chief Eng. Broderick
D.Anderson,Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
John Hoey, DHD, Dist. 2
Beth Pellegrini, Audit
John Gendall, Hwy.Oper.Eng.
Cosmo Fedele, Fin.Rev.Eng.
Frank Garvey, Fisc. Mgmt.

Hinckley, Allen & Snyder
One Financial Center
Boston, MA 02111-2625
Attn: Anthony Buccitelli

O'Regan Painting Co.
P.O. Box 3211
Newport, RI 02840

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **O'REGAN PAINTING COMPANY**, P.O. Box 3211, Newport, RI 02840, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, MAY 14, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

O'Regan Painting Company (O'Regan) aggrieved by the Massachusetts Highway Department's (MassHighway) failure to pay additional cost for greater work place safety measures due to abrasive blasting in the amount of $128,572.00 on Contract #92085 and $11,087.00 on Contract #92089 appealed to the Board of Contract Appeals.

Contract #92085 was for the cleaning and painting of bridge P-20-9 carrying I-91 NB and SB over city streets and the Springfield parking garage. Contract #92089 was for the cleaning and painting of bridge P-20-13 carrying I-291 westbound to I-91 southbound over Main Street, Springfield.

The work done under these contracts included the following:

1. Cleaning and painting all structural steel, steel railings, drainage systems, utility supports and steel lamp posts.
2. Removal of all graffiti from concrete surfaces.
3. Removal and disposal of all debris on abutments and pier caps.
4. Containment and disposal of blast residue.
5. Bridge site clean up.
6. Related traffic control.

All work done under this contract had to be in conformance with the Department of Public Works STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the PLANS and these SPECIAL PROVISIONS.

Contract #92085 was awarded July 31, 1991, Item #47. It was dated August 15, 1991. The original completion date was June 28, 1992. The Contract award price was $668,412.00.

Contract #92089 was awarded July 31, 1991, Item #45. It was dated August 12, 1991. The original completion date was June 30, 1992. The Contract award price was $24,157.60.

A hearing was held on June 20, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
John T. Driscoll, Jr.	Dep. Chief Counsel, MHD
Ken Wanar	Resident Engineer, MHD
John MacDonald	Bridge Inspection Eng., MHD
Anthony Buccitelli	Atty. for O'Regan
Jeff O'Regan	Pres., O'Regan Painting Co.
John Cignatta	Expert witness - Datanet Eng., Inc., Baltimore, Md.

Entered as Exhibits were:

Exhibit #1.....	Contract #92085
Exhibit #2.....	Contract #92089
Exhibit #3.....	Statement of Claim
Exhibit #4.....	Letter from Robert Morin, Area Director of OSHA to Jeff O'Regan dated July 8, 1993
Exhibit #5.....	Letter from Jeff O'Regan to Robert Morin dated May 26, 1993
Exhibit #6.....	Seven pages of photos showing the job sites during the painting operations
Exhibit #7.....	Seven page transmission from the Department of Labor Subject: Local Emphasis Program (LEP) Lead in Construction
Exhibit #8.....	Chart showing OSHA'S total construction inspections between January 1, 1980 to December 31, 1991
Exhibit #9.....	Print out of OSHA'S Region I report of inspections between July 10, 1992 and November 19, 1993
Exhibit #10.....	Two OSHA Citations, one issued to Par Painting, Inc. and one issued to Tri-State Painting, Inc.

Post hearing submissions were requested. Contractor's submissions are in and are part of the file. An Agreed Statement of the Facts (ASF) has been signed by both counsels and the parties have stipulated that damages were $139,659.00. Also, the Contractor submitted a Statement of Proposed Additional Facts (SPAF) which I am adopting.

DISCUSSION:

A. FACTUAL BACKGROUND

When it executed the subject contracts in August, 1991, O'Regan reasonably contemplated performing the required abrasive blasting in the manner it had successfully done so for the MassHighway in each of the several years prior. That is, in essence, O'Regan expected merely to enclose the areas to be abrasive blast cleaned with substantial canvas, polyethylene drop cloths or the like (including ones to cover the ground). Since the principal purpose of such a "containment" was to prevent the lead paint chips and dust from getting into the surrounding environment, this type of containment was appropriate. Beyond the containment described, O'Regan planned, as a health and safety measure, to provide his abrasive blaster with a blast helmet and his other workers (including himself) with appropriate respirators.

Since this method has been used by O'Regan and other bridge painting contractors and accepted by the MassHighway in each of the several years prior to the subject contracts, no doubt the MassHighway expected this work method as well. Indeed, its technical specifications for the subject projects - Item 106.31 - Clean and Paint Steel Bridge, Part A - Cleaning (Exhibits 1 and 2) - clearly contemplated such an approach.

However, an event occurred in late 1991 that dramatically affected the way the abrasive blasting on the subject projects was to be performed. Specifically, the U.S. Department of Health and Human Services, National Institute of Occupational Safety and Health (NIOSH) issued Alert No. 91-116, - "Preventing Lead Poisoning in Construction Workers" (the "Alert") (Attachment B) (ASF ¶9).[1]

In the Alert, NIOSH warned that, "Lead poisoning may occur in

[1]In April, 1992 NIOSH issued Alert No. 91-116A in which it amended Alert No. 91-116 in ways not relevant hereto. (Attachment C) (ASF, Note 2).

workers during abrasive blasting, sanding, cutting, burning, or welding of bridges or other steel structures coated with lead containing paints." In support of its warning, NIOSH noted, among other things, that:

> NIOSH recently learned of 42 workers who developed lead poisoning while working on bridges. Operations such as abrasive blasting, sanding, burning, cutting, or welding on steel structures coated with lead containing paints may produce very high concentrations of lead and fumes. **Furthermore, the recent introduction of containment structures (enclosures designed to reduce environmental contamination by capturing particles of paint and used blasting material) may result in even higher airborne concentrations of lead..."**
>
> For the construction industry, NIOSH and the Occupational Safety and Health Administration (OSHA) **have recently recommended that exposure to lead dust and fumes be minimized by the use of engineering controls and work practice,** and by the use of personal protective equipment – including respirators - for additional protection ...(SPAF ¶2).

NIOSH went on to state, among other things, that:

> **... At a minimum, airborne lead exposures should not exceed the current OSHA PEL (Permissible Exposure Limit) for general industry (50 ug/m3).** (Emphasis supplied). (SPAF ¶3).

and that:

> ... **a prudent policy is to minimize the risk of adverse health effects by keeping lead concentrations as low as possible and by using all available controls - including engineering, work practices, and respiratory protection … NIOSH recommends the following measures for reducing lead exposure and preventing lead poisoning among workers involved in demolishing or maintaining bridges and other steel structures.**

Thus, in essence, in the Alert, NIOSH formally warned the construction industry of the dangers to workers from abrasive blasting of lead paint in containment structures and called for application of the then existing general industry Permissible Exposure Limit (PEL)

of 50 ug/m3 [2] rather than the then existing higher construction industry PEL of 200 ug/m3.[3] Moreover, in the Alert, NIOSH called for this standard to be reached through the use of engineering, administrative and work practice controls.

In the fall of 1991, Jeff O'Regan, owner of O'Regan Painting Company, attended the national conference of the Steel Structures Painting Council in Long Beach California. At that conference, a principal topic of discussion was the then recent issuance by NIOSH of the Alert. (ASF ¶9)

On January 21, 1992, after learning of the Alert, Jeff O'Regan met with G. Flint Berry, Maintenance Engineer, at the MassHighway District 2 office. At that meeting, Mr. O'Regan went over the information about that Alert and the General Duty Clause of the federal Occupational Safety and Health Act (29 U.S.C. et. seq.)[4]. Mr. O'Regan indicated that he believed that the process by which O'Regan was going to have to do the abrasive blasting on the subject projects would be completely changed and that, as a result, O'Regan's additional costs would be substantial. Mr. O'Regan also suggested that the abrasive blasting portion of the subject project be eliminated and that O'Regan give MassHighway a credit. Mr. O'Regan also noted that the new paint system that O'Regan previously had proposed using on the subject projects was a "surface tolerant coating" that could be applied over non-abrasive blasted areas. Mr. Berry stated that John MacDonald, State Bridge Engineer would decide the matter, not the District. (ASF ¶10)

On that same day, Mr. O'Regan spoke with the State Bridge Engineer's assistant at MassHighway's offices in Boston. He was informed that that office did not have a copy of the Alert and has not

[2] As then set forth in 29 CFR 1910.1025, the general industry standard for exposure to inorganic lead was 50 ug/m3 (micrograms per cubic meter) of air as an 8-hour time-weighted average (TWA).

[3] The construction industry was exempted from the general industry standard and instead, was subject to the 200 ug/m3 standard then set forth in 29 CFR 1926.55.

[4] The General Duty Clause if found at 29 U.S.C. 654(a)(1). (Attached)

seen one. He was also told that MassHighway was going ahead with the abrasive blasting portion of the specifications as written but that it had approved the new paint system changes that had been requested by O'Regan. (ASF ¶11)

On January 22, 1992, Mr. O'Regan met with Mr. MacDonald, at MassHighway's offices in Boston to discuss the subject projects. Mr. O'Regan gave Mr. MacDonald a copy of the Alert and a copy of the General Duty Clause and explained to him all the additional measures that he believed would be required under the General Duty Clause in light of the Alert. Mr. O'Regan suggested that the abrasive blasting portions of the projects be changed - eliminating the abrasive blasting of the beam ends and just overcoating them with the new approved paint system. Mr. O'Regan also indicated that, in turn, O'Regan would offer MassHighway a credit of $20-$40,000.00. Mr. MacDonald stated that he was not aware of changes in Federal or State rules or regulations which would affect the subject contracts and that the portion of the specifications concerning abrasive blasting would remain the same. (ASF ¶12)

On February 24, 1992, Mr. O'Regan spoke again with Mr. Berry about the subject projects. Again, he suggested that the District change the cleaning specifications to eliminate abrasive blasting and offered as much as a $50,000.00 discount. Mr. Berry did not agree to this proposal. Mr. O'Regan also informed Mr. Berry that if O'Regan went ahead with the abrasive blasting portion of the job it would submit an extra work order on each of the subject projects. (ASF ¶13)

Later that same day, Mr. O'Regan spoke with Mr. MacDonald and inquired if his office had reconsidered its decision concerning the abrasive blasting portion of the work. Mr. MacDonald replied that the cleaning and abrasive blasting portion of the subject projects would remain the same. (ASF ¶14)

Notwithstanding the refusal of MassHighway to eliminate abrasive blasting on the subject projects, at least two other districts,

Districts 6 and 8, eliminated said requirement in four projects that were awarded in 1991 and that were performed in the summer of 1992. (Contract Nos. 92066, 92067, 92070 and 92093). (ASF ¶15).[5]

After completing the work on the contracts, O'Regan submitted to MassHighway, two claims in the above-noted amounts based on the actual costs it has incurred.[6] On April 12, 1993, MassHighway denied O'Regan's claims stating, among other things, that, "additional safety measures were not required under the contracts nor any existing state or federal law or regulation in effect during the performance of the contract." (ASF ¶25). O'Regan appealed that decision to MassHighway's Board of Contract Appeals in the instant case. MassHighway has stipulated to the quantum of damages, $139,659.00, although it contests its liability therefore (ASF ¶26).

B. LEGAL DISCUSSION

For quite some time, employers have been subject to various state and federal laws regarding worker safety, including the federal Occupational Safety and Health Act (29 (U.S.C. 651 et. seq.) (the OSH Act). In the first instance, the OSH Act requires employers to comply with all safety and health standards set forth in the regulations of the Occupational Safety and Health Administration (OSHA) (See 29 U.S.C. 654 (a)(2)).

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[5] In the specifications for all projects it let in 1993, MassHighway eliminated all abrasive blasting for lead paint removal. Instead, it called for power tool cleaning only. (ASF ¶31)

Moveover, since the new federal regulations on lead in construction (29 CFR 1926.62) became fully effective in October, 1993, MassHighway has totally revised its painting specifications to conform thereto. Currently, MassHighway specifications essentially call for abrasive blasting utilizing the engineering, administrative, and work practice controls prescribed by the Alert and used by O'Regan on the subject projects. (ASF ¶32)

[6] While its work was underway on the subject contracts, O'Regan submitted requests for Extra Work Orders for each contract totaling $158,282.00, based on its estimates to complete the extra work. The amount it now claims, based on its actual costs, $139,659.00 is some $18,500.00 less than it originally estimated its costs would be. (Exhibit 3; ASF ¶¶ 17-19, 24).

However, in the absence of such regulations, or if the safety and health standards in such regulations are inadequate to properly protect the health and safety of the workers, the so-called General Duty Clause of the OSH Act (29 U.S.C. 654 (a)(i)) comes into play. That provision requires that each employer shall furnish each of its employees a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to the employee. UAW v. General Dynamics Land System Division, 815 F.2d 1570 (D.C. Cir.), cert. denied, 108 S. Ct 485 (1987).

In this connection, it should be noted that, if an employer actually knows (or should know because it is well known in its industry)[7] that a particular safety and health standard set forth in an OSHA regulation is not adequate to deal with a recognized hazard, the employer is required by the General Duty Clause to take those additional steps necessary to render its workplace free from that hazard. It is not sufficient for the employer merely to comply with the applicable but inadequate safety and health standard in the OSHA regulation.

[7] As the United States Appeals Court recognized in the case of National Realty and Construction Co., Inc. v. Occupational and Safety and Health Review Commission:

> An activity may be a "recognized hazard" even if the defendant employer is ignorant of the activity's existence or its potential for harm. The term received a concise definition in a floor speech by Representative Daniels when he proposed an amendment which became the present version of the general duty clause:
>
> A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry. In other words, whether or not a hazard is "recognized" is a matter for objective determination: it does not depend on whether the particular employer is aware of it. 116 Cong. Rec. (Part 28) 38377 (1970). The standard would be the common knowledge of safety experts who are familiar with the circumstances of the industry or activity in question. 489 F2d 1257 at 1265, n.32.

As the United States Court of Appeals stated in the UAW case, supra:

> … the duty to protect employees is imposed on the employer, and the hazards against which he has the obligation to protect necessarily include those of which he has specific knowledge. Therefore if . . . an employer knows a particular safety standard is inadequate to protect his workers against the specific hazard it is intended to address, or that the conditions in his place of employment are such that the safety standard will not adequately deal with the hazards to which his employees are exposed, he has a duty under . . . (the General Duty Clause) . . . to take whatever measures may be required by the Act, over and above those mandated by the safety standard, to safeguard his workers. In sum, if an employer knows that a specific standard will not protect his workers against a particular hazard, his duty . . . (the General Duty Clause) . . . will not be discharged no matter how faithfully he observes that standard. . . . (Emphasis supplied).

In this case, prior to O'Regan's execution of the subject contracts, OSHA had promulgated various regulations containing safety and health standards specifically applicable to the construction industry. (29 CFR Part 1926). Certain of those standards explicitly or implicitly were applicable to lead paint removal operations. In particular, the construction industry was subject to a "regulatory standard" for exposure to inorganic lead setting the Permissible Exposure Limit (PEL at 200 ug/m3 (Micrograms per cubic meter) of air as an 8 hour time-weighted average (TWA).

After the execution of the instant contracts, however, the federal safety and health standards for lead paint removal operations to which O'Regan was required to comply changed. In late 1991, NIOSH issued the Alert. In the Alert, NIOSH formally warned the construction industry of the hazard to workers from abrasive blasting of lead paint in containment structures and called for the application of the then existing general industry PEL of 50 ug/m3 rather than the then existing

higher construction industry PEL of 200 ug/m3.[8] Moreover, in the Alert, NIOSH prescribed engineering administrative and work practice controls to protect the workers from that hazard.

As a result of the NIOSH Alert, O'Regan (and the entire bridge painting industry) necessarily became aware of the hazard posed by the abrasive blasting of lead paint in containment structures and of the

[8] Although state regulations addressed the PEL for lead in 1991-1992, in a letter dated August 14, 1996, the Commonwealth of Massachusetts, Department of Labor and Industries, Division of Asbestos and Lead Licensing and Enforcement (the Agency), explained its enforcement policy concerning those regulations during that period. Among other things, the Agency stated:

> ...although the 50 ug/m3 permissible exposure limit for the inorganic lead in table 1 (of 454 CMR 11.00) was enforceable** during the 1991-1992 period the Department commonly deferred to OSHA for enforcement of its own analogous permissible exposure limits. The Department is not therefore, able to document any instances where notices of violation for noncompliance with the 50 ug/m3 permissible exposure level were issued during the 1991-1992 period...
>
> ... the Department did not require or enforce the use of dust collectors or vacuum retrieval systems in connection with the removal of lead paint from superstructures, as the use of such was not specified by 454 CMR 11. During the 1991-1992 period, however, the Agency was anticipating amendments to Bulletin No. 13 which would have required among other things, work area containments and ventilation systems for work involving the removal of lead paint from steel structures by abrasive blasting. These proposed amendments were presented for public comment in accordance with MGL. c. 30A, but were never promulgated. (ASF Attachment D, and ¶33).

**In an October 16, 1996 telephone conversation with O'Regan's attorney, Spencer Demetros, General Counsel of the Agency, stated that, although the U.S. Supreme Court's decision on June 18, 1992 in Gade v. National Solid Waste Mgmt. Ass'n, 505 U.S. 88, 112 S. Ct 2374 (1992) made it clear that the OSH Act preempted 454 CMR 11.00 (including the state PEL for inorganic lead), until the Massachusetts courts explicitly recognized the same, the Agency, nevertheless, continued to consider said regulation "enforceable." In 1994, the SJC explicitly acknowledged the preemptive effect of the OSH Act in Commonwealth v. College Pro Painters (U.S.) Ltd. 419 Mass 726 (1994), (Attached) and upheld the dismissal of two complaints by which the state attempted to enforce certain provisions of 454 CMR 11.00. Thus, it is clear that the state PEL for inorganic lead of 50 ug/M3 was unenforceable in 1992, since any attempt by DOLI to enforce the same, if challenged, would have been dismissed by the Massachusetts courts under the principal of preemption. I also spoke with Mr. Demetros about this claim and he reaffirmed this conversation with Mr. O'Regan.

inadequacy of the construction industry PEL of 200 ug/M3 then set forth in OSHA's regulations. Accordingly, in light of the recognized hazard, it became incumbent upon O'Regan, under the requirements of the General Duty Clause, to take such action as were necessary to achieve the general industry PEL of 50 ug/m3 and to take such other actions as were necessary to eliminate the hazard effectively. That is, O'Regan was no longer entitled merely to comply with the applicable but inadequate safety and health standard (i.e., the construction industry PEL of 200 mg/m3) set forth in OSHA's regulations.

Moveover, since NIOSH also specified the measures to be taken to achieve such results, O'Regan, in essence, was required to employ all of those measures. In light of its knowledge of the hazard, to not employ those measures, or to pick and choose among them, was to invite citation for a willful violation of the Act.

Furthermore, in July 1992, subsequent to the issuance of the Alert, OSHA's Region I[9] established and implemented a Local Emphasis Program (LEP), entitled "Lead in Construction" (ASF ¶21). In the LEP, pursuant to the authority of the General Duty Clause, OSHA explicitly imposed on the construction industry in Region I, the more stringent general industry PEL of 50 ug/m3 as prescribed in the Alert. Moreover, it explicitly required the use of the engineering, administrative and work practice controls prescribed in the Alert to achieve this standard. (Exhibits 4, 5 and 7; ASF ¶¶ 21-23, 27 and 28).

Subsequent to the establishment and implementation of the LEP "Lead in Construction", Region I of OSHA commenced an historically unprecedented enforcement effort, conducting 25 such inspections in the 18 month period between July, 1992 and November, 1993. By contrast, Region I had conducted only five such inspections in the 12 year period prior to July, 1992.

Among other things, these inspections resulted in the issuance

[9] OSHA's Region I include all six New England states.

by Region I of OSHA of several citations to painting contractors for violations of the General Duty Clause because the employees of said companies were exposed to inhalation/hazard of inorganic lead at concentrations that exceeded the new, more stringent standard of 50 ug/m3, even though the exposure level was below the construction industry standard of 200 ug/m3 then set forth in OSHA's regulations. For example, in one case, Tri-State Painting, Inc., was cited on a Maine project for employee exposure, on July 17, 1992, to an 8 hour Time Weighted Average (TWA) of 78 ug/m3 and for failure to use feasible administrative engineering and work practice controls. In doing so, OSHA stated:

> The employer did not furnish … (as required by the General Duty Clause) … employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to: inhalation/hazard of inorganic lead at concentrations that exceed 50 micrograms (ug) per cubic meter of air. … On 7/17/92, … While operating/tending the blasting unit, … (an) … employee was exposed to an 8 hour time weighted average (TWA) of 78 ug/cubic meter of air. … The sources of exposure included the openings in the blasting containment and possibly dust exposure from the shot reclaiming process.
>
> (This condition could have been abated by improving)… engineering controls to reduce airborne concentrations of dust containing lead into the outside work areas. … (including) …:
>
> a) Creating a tighter enclosed blasting containment to prevent airborne lead containing dust from being released into the surrounding atmosphere.
>
> b) Developing a closed system on the blasting unit for the steel shot reclaiming process.
>
> c) Increasing the volume of air (CFM) exhausting from the containment structure.
>
> d) Utilizing a dustless system for removing lead based paint, such as a needle gun... (emphasis supplied)

In another case, Par Painting, Inc., was cited on a Connecticut project for employee exposure, on August 31, 1992, to an 8 hour Time

Weighted Average (TWA) of 129 ug/m3. (Exhibits 8, 9, 10A and 10B; ASF ¶29). In that citation, OSHA stated:

> The employer did not furnish … (as required by the General Duty clause) … employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to: The hazard of inhalation of inorganic lead that exceeded 50 micrograms per cubic meter of air. …
>
> Documented personal air monitoring indicated significant amounts of lead exceeding 50 micrograms per cubic meter of air inside the abrasive blasting respirator. … the employee was exposed to an 8 hour time weighted average (TWA) of 129 micrograms of lead per cubic meter of air. …[10]

In a 1993 letter to O'Regan (Exhibit 4), the OSHA Area Director for Massachusetts explained OSHA's enforcement standards for exposure to lead in the construction industry in 1991 and 1992 in the following way:

> Since 1971, the Permissible Exposure Limit (PEL) for lead exposure in construction has been 200 micrograms per cubic meter (ug/M3). Prior to June of 1992, when exposures greater than 200 ug/M3 were documented on a construction job, compliance with OSHA's requirements for employee protection would be evaluated and the appropriate citation for noncompliance would be issued...
>
> On July 27, 1992, OSHA, in Region I, embarked on a local emphasis program to control construction employee exposure to lead. Industry knowledge of the effects of lead exposure at 50 ug/M3 or greater was widespread. Publications such as … (the Alert) … had been disseminated in an attempt to educate employers and employees about the hazards associated with lead exposure exceeding 50 ug/M3. The Regional Administrator obtained approval from OSHA's National Office to enforce, for construction, employee exposure to lead in excess of 50 ug/M3. **In addition to the above standards, (i.e., the 200 ug/M3 standard) section 5(a)(1) of the OSHA act (The General Duty clause) was cited where employee exposure exceeding 50 ug/M3 was documented. Feasible methods of abatement included engineering and work practice controls, respiratory protection, hygiene**

[10] By contrast, An OSHA inspection of the subject O'Regan projects, on July 22, 1992, led to only two minor noise related citations. In light of its use of the administrative engineering and work practice controls prescribed in the Alert, O'Regan received no citations for its lead paid related activities. (ASF ¶30).

> **facilities, medical and exposure monitoring, training and medical removal protection**. …
>
> **The control measures used by your company in 1992 such as medical monitoring, a strict respiratory protection program, protective clothing, health training, work practices and hygiene facilities were required by OSHA where employees were overexposed to lead** … (i.e., to amounts in excess of 50 ug/M3) … OSHA requires the use of engineering and/or administrative controls to reduce employee exposure to below the PEL, … (i.e. 50 ug/M3 … or to the lowest feasible level when reduction below the PEL is not possible. (emphasis supplied)

Thus, it is clear that, beginning in the summer of 1992, OSHA was enforcing on the construction industry a PEL of 50 ug/m3, pursuant to the General Duty Clause, rather than the construction industry standard of 200 ug/M3 then set forth in its applicable regulations. It is also clear that OSHA required the use of feasible regulations. It is also clear that OSHA required the use of feasible administrative, engineering and work practice controls to meet this lower standard.

FINDINGS:

1. I find the NIOSH alert 91-116 entitled Preventing Lead Poisoning in Construction Workers was dated August 1991.

2. I find Contract #'s 92085 and 92089 were bid prior to August 1991 and were fully executed on August 15, 1991 and August 12, 1991 respectively.

3. I find the actions taken by O'Regan to improve workplace safety were reasonable.

4. I find that workplace safety hazards have an indirect effect on taxpayers. (See National Realty and Construction Company, Inc., Supra which cited a July 9, 1970 House of Representatives report stating:

> "The on-the-job health and safety crisis is the worst problem confronting American workers, because each year as a result of their jobs over 14,500 workers die. In only four years time, as many people have died because of their employment as have been killed in almost a decade of

> American involvement in Vietnam. Over two million workers are disabled annually through job-related accidents.
>
> The economic impact of occupational accidents and diseases is overwhelming. Over $1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is over $8 billion. Ten times as many man-days are lost from job-related as from strikes. . .
>
> ... These problems seem to be getting worse, not better."

5. I find Region I of OSHA was enforcing a Permissible Exposure Level of 50 ug/M3 rather than the 200 ug/M3 permitted in the construction industries.

6. I find that since 1993 MassHighway has changed its specification for painting bridges so that it can be in compliance with the more stringent PEL levels.

RECOMMENDATION:

The O'Regan Painting Company's claim for additional cost to conform with NIOSH ALERT 91-116 and the General Duty Clause of the OSH Act in meeting Permissible Exposure Levels of its workers during the abrasive cleaning portions on Contract #'s 92085 and 92089 should be paid $128,572.00 for Contract #92085 and $11,087.00 for Contract #92089.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTRODUCTION:

The Middlesex Corporation (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) denial of two claims: 1) to ream existing rivet holes from ¾" to 7/8" for a total of $87,640.95 and 2) the removal and replacement of rivets from the floor beams near the hangers totaling $68,000.00 on Contract #97449 (the Contract), appealed to the Board of Contract Appeals.

The work on this Contract was for a bridge reconstruction - Aiken Street over the Merrimack River.

All work done under this Contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated November 30, 1994, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES with latest revisions, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the latest edition of AMERICAN STANDARD FOR NURSERY STOCK, the PLANS and these SPECIAL PROVISIONS.

The work under this Contract consisted of the reconstruction of a total of approximately 300 ft. of Aiken Street (150 feet of approach roadway on both ends of the bridge). The work also included the rehabilitation of Bridge No. L-15-20 carrying Aiken Street over the Merrimack River.

The work was comprised of excavation, borrow, grading, installation of, bituminous pavements, curbing, sidewalks, fencing, pavement markings, relocation and/or adjustment of existing utilities and other incidental items of work as listed in the Contract.

Contract #97449 was dated April 18, 1997. The Contract bid price was $7,012,976.00.

Hearings were held on December 15, 1998 and March 4, 1999. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Isaac Machado	MHD - Counsel
David Mullen	MHD - Chief Counsel
Edward Mirka	MHD - District #4
Raymond Surette	MHD - Bridge
Mary Grieco	MHD - Metals Control Eng.
Paul Dalida	Middlesex Corp.
Peter Salinder	Middlesex Corp.
David Skerrett	Middlesex Corp.

Entered as Exhibits were:

Exhibit #1 ……..……	Contract #97449
Exhibit #2 ……..	Statement of Claim on size of rivet holes and MassHighway's response.
Exhibit #3 ……..	Statement of Claim on basis of payment of Item #911.60 or Item #995.01.

FACTS AND ISSUES PRESENTED:

The factual issue raised by Exhibit #2 was an item on Sheet 17 of 22 of the plans which are a part of the contract documents that the existing rivets were 7/8" diameter. In fact all rivets on this bridge were ¾". According to testimony of Mary Grieco, a contractor could not tell the difference between a ¾" rivet from a 7/8" rivet by a visual

inspection of the site. The bridge section notes that on Sheet 1 of 22 "Dimensions" states: "All dimensions and details shown for existing structure shall be field certified by the Contractor."

The cost of this claim is for the increase in cost by the Contractor to ream the rivet holes from ¾" to 7/8" because ultimately the holes had to be reamed to 15/16" whether they were ¾" rivets or 7/8" rivets.

The Contractor at the second hearing showed by means of a piece of steel with three holes bored in it (3/4", 7/8" and 15/16") that a 15/16 inch bit could not be used on a ¾" hole. It could be used on a 7/8" hole. Thus, it appears that all rivet holes were reamed twice, once with a smaller bit and then by a 15/16" bit.

MassHighway denies any liability for this claim but does state that if there is liability the cost were only about 15% greater. The Contractor claims that his cost for reaming increased 83%.

In the case of Alpert v. Commonwealth 258 N.E. 2d 755 (1970), the SJC stated:

> "It is well established that where one party furnishes plans and specifications for a contractor to follow in a construction job, and the contractor in good faith relies thereon, the party furnishing such plans impliedly warrants their sufficiency for the purpose intended (emphasis added). M.L. Shaloo, Inc. v. Ricciardi & Sons Constr. Inc., 348 Mass. 682 687-688, 205 N.E. 2d 239; Hollerbach v. United States, 233 U.S. 165, 169-172, 34 S.Ct. 553, 58 L.Ed. 898; Christie v. United States, 237 U.S. 234, 239-242, 35 S.Ct. 565. 59 L.Ed. 933; United States v. Spearin, 248 U.S. 1321, 39 S.Ct. 59, 63 L. Ed. 166; Faber v. New York, 222 N.Y. 255, 259-261, 118 N.E. 609."

In the instant case, MassHighway made a positive representation as to the size of the rivets on sheet 17 of 22 of the plans were to be 7/8" which the Contractor could

expect to encounter on the job site. The MassHighway easily on sheet 17 could have stated that all existing rivets on the bridge were ¾" but must be replaced by 7/8" rivets. MassHighway then disclaims any liability in the present matter by stating Section 2.03 of the STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES (1988 amended) which states:

> **2.03 Examination of Plans, Specifications, Special Provisions, and Site of Work.**
>
> The Department will prepare plans and specifications giving directions which will enable any competent mechanic or contractor to carry them out. The Bidder is expected to examine carefully the site of the proposed work, the proposal, plans, specifications, supplemental specifications, special provisions, and contract forms, before submitting a Proposal. The submission of a bid shall be considered prima facie evidence that the Bidder has made such examination of the site of the proposed work, plans, proposal, etc. and is familiar with the conditions to be encountered in performing the work and as to the requirements of the plans, specifications, supplemental specifications, special provisions, and Contract.

The Contractor did inspect the site but as Ms. Grieco testified it would be impossible for anyone to tell if the rivets were ¾" or 7/8".

By alluding to 7/8" rivets on sheet 17 of 22 and furnishing plans and specifications to the Contractor to follow in this construction project, MassHighway impliedly warrants their sufficiency for the purpose intended. MassHighway breached an implied warranty to the Contractor relative to the size of the rivets.

Exhibit #3 was in the amount of $68,000.00 for removing and replacing rivets as shown on sheet 14 of 22 of the Contract Plans. The Contractor is requesting payment for this work under Item 911.601 - Replace Existing Rivet with High Strength Bolt.

The subject rivets as shown on sheet 14 of 22 of the contract plans are located in the floor beam near the hangers and as such are considered a floor beam repair. Payment for floor beam repairs is clearly covered under Item 995.01 - Bridge Structure - Bridge No. L-15-20 which is a lump sum item.

The purpose of Item 911.601 as shown in the Special Provisions is for replacing loose, missing, or broken rivets with high strength bolts. The rivets in question were not loose, missing, or broken but were removed and replaced with high strength bolts in order to repair the floor beam.

FINDINGS:

I find that MassHighway breached a warranty in this Contract that the rivets encountered thereon would be 7/8".

I find that all rivets were replaced in the floor beam area and were paid for under the lump sum price.

I further find that the Contractor should be paid an additional 49% (MassHighway used a 15% factor and the Contractor used an 83% factor for the added cost).

RECOMMENDATION:

The claim of the Middlesex Corporation for the cost of rivets ($68,000.00) used in the floor beam area should be denied as that cost was included in the lump sum price of Item 995.01. Further, I find that the Contractor's cost for reaming all rivets outside the floor beam area totaling $87,640.95 should be paid in the lesser amount of $42,944.07.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

APPENDIX B-1

DECISIONS/RULINGS

Claims re: Delay Damages

INTRODUCTION:

Northern Construction Service, LLC (the Contractor), aggrieved by the Massachusetts Highway Department's (MassHighway) failure to pay a delay claim on Contract #98382 (the Contract) in the amount of $33,453.03, appealed to the Board of Contract Appeals.

Contract #98382 was a bridge rehabilitation job in Springfield, Roosevelt Avenue over Watershops Pond.

The work done under this Contract consisted of the rehabilitation of Bridge No. S-24-33 over Watershops Pond connecting Roosevelt Avenue to Island Pond Road.

The work included but was not limited to, the partial replacement of the superstructure (portion between the curb lines), the rehabilitation of the utility bays and sidewalks between the bridge abutments and other drainage modifications and repaving operations so as to successfully accomplish the project. Curb cuts were made off the north end of the bridge so as to provide adequate handicapped access. Traffic lane markings were to be improved from the past configuration so as to provide a safer vehicle turning pattern with Island Pond Road and to provide three (3) full 12 foot wide lanes on the bridge with HS20-44 live loading. Care was to be taken to preserve the existing stone arch facades which has historical significance.

All work done under this Contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS

dated November 30, 1994, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES with latest revisions, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the latest edition of AMERICAN STANDARD FOR NURSERY STOCK, the PLANS and these SPECIAL PROVISIONS.

The Contract date of award was May 6, 1998, Item #39. The Contract was dated May 13, 1998. The original completion date was June 30, 1999. The original bid price was $2,030,774.10.

A hearing was held on March 21, 2000. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Kathleen Pendergast	Deputy Chief Counsel
Neil A. Hansen	District #2 MHD
John Rahkonen	Northern Construction
John DiVito	Northern Construction

Entered as Exhibits were:

Exhibit #1 ……..Contract #98382
Exhibit #2 ……..Statement of Claim
Exhibit #3 ……..District's report dated: 2/10/00

Post hearing submissions were requested of both sides. MassHighway's Counsel has submitted her brief. No submissions were received from the Contractor even though

I expressed concerns about the amount of damage requested and specifically instructed the Contractor to substantiate his damage. Thirty days were allowed for each party, but again I have not received any submission from the Contractor.

FACTS AND ISSUES PRESENTED:

On January 5, 1999, the Contractor discovered that the centerline of bearing at the two existing bridge piers, which had been laid out based on the location of the piles for the new integral abutments were offset 7 inches ± southerly from each pier centerline. The bearing centerlines were supposed to be at the pier centerlines. The Resident Engineer had MassHighway's survey party check the layout of the piles and the centerline of bearing to determine why there was a discrepancy. In the meantime, the Contractor stopped work on the bridge until the centerline discrepancy and how to deal with it, were resolved.

MassHighway's representative, the Resident Engineer on the project, testified without dispute that during this time, the Contractor worked on other parts of the project, primarily the arch fascia repair, a masonry item. For this work, the contractor was required to utilize a scissors lift on a barge, to get at the arches; and a boat, to get out to the barge. The Contractor stated that its manpower and efficiency were reduced on the

project due to the inability to work on the bridge structure, which it had planned to do simultaneously with its work on the arch repair. It incurred costs due to lost productivity and inability to access the work in the sequence planned. It seeks damages "due to survey delay" (see claim) for several hours for its foreman and carpenter, but primarily seeks 24 days "idle cost" for its equipment, which it owns, at lease rates.

The first issue to consider is whether the 24 day delay caused by the centerline discrepancy is actionable and if so what were the damages. In the alternative, if there was no actionable delay, was the misrepresentation of the centerline a breach of an implied warranty, if so, what damages would then be due the Contractor.

> The Contract states:
>
> **8.05 Claim for delay or suspension of the work.**
>
> The Contractor hereby agrees that he shall have no claim for damages of any kind on account of any delay in commencement of the work or any delay or suspension of any portion thereof, except as hereinafter provided. (emphasis added)
>
> Provided, however, that if the Commission in their judgment shall determine that the work is suspended, delayed, or interrupted for an unreasonable period of time by an act of the Department in the administration of the Contract, or by the Department's failure to act as required by the Contract within the time specified in the Contract

(or if no time is specified, within a reasonable time), and without the fault or negligence of the Contractor, an adjustment shall be made by the Department for any increase in the actual cost of performance of the Contract (excluding profit and overhead) necessarily caused by the period of such suspension, delay, or interruption. No adjustment shall be made if the performance by the Contractor would have been prevented by the other causes even if the work has not been so suspended, delayed, or interrupted by the Department.

No claim shall be allowed under this Subsection for the Department's failure to act as required by the Contract within the time specified in the Contract (or if no time is specified, within a reasonable time) for any cost incurred more than two weeks before the Contractor shall have notified the Department in writing of his claim due to the Department's failure to act.

The Contractor shall submit in writing not later than 30 days after the termination of such suspension delay or interruption the amount of the claim and breakdown of how the amount was computed in accordance with Subsection 9.03B except no allowance for overhead and profit shall be allowed.

Any dispute concerning whether the delay or suspension is unreasonable or any other question of fact arising under this paragraph shall be determined by the Commission, and such determination and decision, in case any question shall arise, shall be a condition precedent to the right of the Contractor to receive any money hereunder.

The Contractor further agrees that the sole allowance for any such delay or suspension, other than as provided above, is an extension of time as provided in Subsection 8.10. (emphasis added)

By statutory insertion, all MHD construction contacts also provide pursuant to M.G.L. c. 30 § 39 (O):

(a) The awarding authority may order the general contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the awarding authority; provided however, that if there is suspension, delay, or interruption for fifteen days or more or due to a failure of the awarding authority to act within the time specified in this contract, the awarding authority shall make an adjustment in the contract price for any increase in the cost of performance of this contract but shall not include any profit to the general contractor on such increase; and provided further, that the awarding authority shall not make any adjustment in the contract price under this provision for any suspension, delay, or interruption or failure to act to the extent that such is due to any cause for which this contract provides for an equitable adjustment of the contract price under any other contract provisions. (emphasis added)

(b) The general contractor must submit the amount of a claim under provision (a) to the awarding authority in writing as soon as practicable after the end of the suspension,

> delay, or interruption or failure to act and, in any event, not later than the date of final payment under this contract and, except for costs due to a suspension order, the awarding authority shall not approve any costs in the claim incurred more than twenty days before the general contractor notified the awarding authority in writing of the act or failure to act involved in the claim.

In Massachusetts, a "no damages for delay" provision in a public contract is valid and enforceable. City of Worcester v. Granger Bros., Inc., 19 Mass. App. 379, 474 N. E. 2d 1151, 1157 (1985) citing Wes Julian Constr. Corp. v. Commonwealth, 351 Mass. 588, 595, 223 N.E. 2d 72 (1967), where the court stated:

> "These provisions of the contract exculpate the (Commonwealth) from any liability it would otherwise have for delays which it caused, even if its actions were "negligent, unreasonable or due to the indecision," quoting Charles I. Hosmer, Inc. v. Commonwealth, 302 Mass. 495, 503, 19 N.E. 2nd 800, 805 (1939); citing in accord: Coleman Bros. Corp. v. Commonwealth, 307 Mass. 205, 261, 29 N.E. 2nd 832 (1940); Chas. T. Main, Inc. v. Massachusetts Turnpike Authority, 347 Mass. 154, 162, 163, 196 N.E. 2nd 821 (1964).

The Wes Julian court stated further that:

> (e)ven if we assume…that the conduct of the Commonwealth as "arbitrary and

> capricious," the (contractor) is not entitled to recover damages for delays caused by the (Commonwealth) in view of specific provisions of the contract regarding delay.

Wes Julian, supra, at 72 (N.E. 2d).

So firm have been our courts in applying "no damages for delay" clauses that Massachusetts cases, particularly Wes Julian are cited in the legal literature to illustrate the strictest of the various positions taken by different courts. (See, for example, 74 ALR 3rd 239: "In one jurisdiction a "no damage" clause has been held to relieve the contractee from liability for delay even though the delay was caused by its conduct which was arbitrary, willful, and capricious.") (Emphasis added)

Only where "the Commonwealth in effect (had) used the delay provisions to whipsaw the contractor, "Farina Bros. Co. v. Commonwealth, 257 N.E. 2d 450, 455 (1970) or where the Commonwealth had violated an express condition of site availability which was the "essence" of an extra work agreement, State Line Contractors, Inc. v. Commonwealth, 249 N.E. 2nd 619, 624 (1969) did the Contractor overcome a "no damages for delay" provision[1] (Emphasis added).

[1] In Farina the Department refused to grant an extension of time promptly; thus the Court dealt with "damages caused the Contractor by the failure to grant seasonable extensions for performance made necessary by delay and failure of the Commonwealth to assist the contractor properly in rescheduling the work: rather than "damages caused by delay itself." Farina, supra, at 456 (N.E. 2d). In State Line the Contractor was "induced" to enter into an extra work agreement by the Department's assurance that it could work simultaneously on adjacent sites. State Line, supra, at 624 (N.E. 2d).

But where "the Commonwealth assented to extension in (the Contractor's) date of completion and agreed to its shutting down the job in the interest of better coordination" the exculpatory provision was applied even though (the Contractor) was doubtless discommoded and caused significant expense by inadequate job coordination." Joseph E. Bennett Co., Inc. v. Commonwealth, 486 N.E. 2nd 1454, 1150 (1985).[2]

Thus, Subsection 5.05 operates to exculpate the Department from any liability it might otherwise have for utility delays provided the MHD has not "whipsawed" the Contractor by refusing a time extension or violated an essential express condition of the contract.[3]

Two recently decided SJC decisions have clarified the issue of no claim for delay. They are Reynolds Bros., Inc. et al v. Commonwealth of Massachusetts 412 Mass. 1 and Sutton Corporation v. Commonwealth of Massachusetts 412 Mass. 1003. Reynolds Bros. dealt with a job at downtown crossings. Reynolds contended that he was delayed by the Department and was hindered and interfered with in the performance of its work by the Department. Sutton involved a bridge reconstruction in Danvers where the telephone company delayed relocating its lines over the bridge after numerous requests by the Department and the Contractor to move them.

The Court in the Reynolds case states:

[2] In Bennett, certain amounts were paid to (the Contractor) to compensate it for expenses incident to delay and poor job coordination (between Contractors), but apparently, the amounts paid did not cover the "significant expense" incurred as a result of the delay.

"General Laws c. 30, § 39 (0) (a), (supra) is far from a model of clarity. However, it appears that the second clause, beginning with the words, "provided however," was intended by the Legislature to modify or qualify the first clause, that is, the function of the second clause is to lessen the scope, impact, or severity of the first clause. That construction would be consistent with the meaning ordinarily given to the term "provided". See Black's Law Dictionary 1224 (6th ed. 1990). Thus, we read the second clause to mean that the contractor will be entitled to a price adjustment only when the awarding authority, here the Department, exercises its statutory right to order the contractor in writing to delay its performance, and there is either (1) a delay of fifteen or more days resulting from that order or (2) following such a written order, the authority fails to take action within a specified time as required by the contract which results in a delay of any length. Here, there was no written order as called for in the first clause of c. 30, § 39 (0). The result is that the second clause, on which Reynolds relies, was not triggered."

The Reynolds case goes on to state:

"Afforded no relief by G.L. c. 30, § 39 (0), Reynolds claims are precluded by the "no damages for delay" provision of the contract. Section 8.05 specifically precludes

[3] All of the cases discussed above including Bennett dealt with contracts executed before the enactment of c. 30 § 39(o).

damages for delays "in commencement of the work or any delay or suspension of any portion thereof, except…that if the Commission in (its) judgment shall determine that the performance of all or any major portion of the work is suspended, delayed, or interrupted for an unreasonable time by an act of the Department in the administration of the Contract, or by the Department's failure to act as required by the Contract…an adjustment shall be made." Here, since it is clear that the commission did not make the requisite determination, the exception does not apply, and the claims based on delay are precluded. We reject the argument that, because Reynolds does not assert "delay" as much as it claims "hindrances" and "interferences" with the orderly performance of its work resulting in a loss of productivity, the no damages for delay provision is inapplicable. Hindrances and interferences, Reynolds contends, are not covered by § 8.05. We are satisfied that there is no significant distinction between the hindrances and interferences to which Reynolds points and the alleged delay in the start of the project and delays caused by the work of other contractors, which are precluded by the no damages for delay provision."

In the Sutton case, decided the same day as the Reynolds case, the Court held:

"Sutton argues that the second clause of c. 30, § 39(O), should be read to provide an adjustment in the contract price for increased cost of performance any time there is a suspension, delay, or interruption for fifteen days or more, regardless of whether it was ordered or caused by the awarding authority or caused by a third party. As we have said in Reynolds Bros. v. Commonwealth, ante, (1992), the second clause only takes effect when the first clause is satisfied by the awarding authority ordering the contractor in writing to suspend, delay, or interrupt the work. The Department issued no written order in this case. Thus, c. 30, § 39 (O), does not provide any relief to the plaintiff.

Sutton's claim is precluded by the § 8.05 "no damages for delay" provision in the contract. As we said in Reynolds Bros. v. Commonwealth, supra § 8.05 specifically precludes damages for delays in the commencement or performance of work, unless the Mass. Highway Commission (Commission) in its discretion determines that an adjustment should be made for an unreasonable delay caused either by an action of the department in administering the contract or by the department's failure to act as required in the contract. Here, as in Reynolds Bros. v. Commonwealth, supra, it is clear that the commission did not make the requisite determination. Therefore, the exception does not apply, and the claim based on delay is precluded."

In the present matter there was no written stop work order. Consequently, it invokes the "no damages for delay clauses" of our contracts. In order for the Board of Contract Appeals to honor the verbal actions of the district in this matter they have to invoke the provisions of subsection 8.05 of the Standard Specifications.

I find that the delay in this matter was not unreasonable, 24 days from January 5 through January 25, 1999. MassHighway acted expeditiously in laying out a new centerline and it would appear that the Contractor worked elsewhere on the project while the centerlines were being laid out.

The second issue to be determined is whether or not MassHighway has responsibility for the damages due to breach of warranty.

It is well established that where one party furnishes plans and specifications for a contractor to follow in a construction job, and the contractor in good faith relies thereon, the party furnishing such plans impliedly warrants their sufficiency for the purpose intended. Alpert v. Commonwealth, 357 Mass. 306, 320 (1970), citing M.L. Shalloo, Inc. v. Ricciardi & Sons Constr. Inc., 348 Mass. 682, 687-688, and cases cited. In Alpert, the Department's bid package included plans, specifications, and detailed sheets including 16 pages of quantity sheets containing detailed estimates of the work to be done, including estimates of the gravel borrow needed for the job. According to the

Department's estimate, relied upon by the contractor, only 34,735 cubic yards of unsuitable material would be on the site. However, the site actually contained 165,015 cubic yards of such material. The Department had failed to disclose the results of its own very limited borings. The contractor, relying upon the department's underrepresentation of the amount of borrow needed, was forced to purchase new borrow pits at a greater distance form the job site in order to supply an extraordinary amount of additional borrow. The court held that the contractor was entitled to be compensated for the additional borrow it had to purchase, as an "extra".

I find there was a breach of an implied warranty i.e., the centerline given the Contractor was wrong. However, damages in this type of case are related directly to correcting the misrepresentation. MassHighway immediately sent a survey party to the bridge. The district is of the opinion that if the Contractor was entitled to any damages at all, they would be limited to labor costs for January 5th, 6th and 18th 1999 and for the heater rental and fuel cost to heat the forms for February 1 through February 5, 1999. They calculate that cost to be $1396.91.

RECOMMENDATION:

The claim of Northern Construction Service, LLC on Contract #98382 for delay damages in the amount of $33,453.00 should be approved in the lesser amount of $1396.91.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

ADDENDUM I

The foregoing report was withdrawn from the Board of Contract Appeals on May 23, 2000. The Board instructed me to review the Contractor's amended damages. I have met with Dale Lutz of MassHighway's Audit staff. After our review it was determined that Contractor's damages were no greater than the damages awarded in my original report. Therefore, I have resubmitted to the Board my original report under a new date.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTRODUCTION:

Coastal Energy, Inc. (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) denial of claims for a changed condition due to escalation in disposal cost on two Contracts, #98298 and #98429, (the Contracts) as a result of delays between the dates of bids and the notices to proceed in the amount of $14,999.04 on Contract #98298 and $16,447.18 on Contract #98429, appealed to the Board of Contract Appeals.

Contract #98298 was for the Demolition of Structures (Group 2) in the Route 146 Interchange Project in Worcester/Millbury.

Contract #98429 was for the Demolition of Structures (Group 3) in the Route 146 Interchange Project in Worcester/Millbury.

The actual scopes of work on these two Contracts are not really significant to the claims raised in the present matter.

Contract #98298 was bid on October 21, 1997. The date of award was October 31, 1997. The date of the Contract was November 6, 1997. The Notice to Proceed was May 22, 1998.

Contract #98429 was bid on March 10, 1998. The date of award was August 5, 1998. The date of the Contract was August 21, 1998. The Notice to Proceed was

October 14, 1998.

A hearing was held on December 14, 1999. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Isaac Machado	Deputy Chief Counsel
Fran Miele	MHD
Linda Terry	MHD
Mark Johnson	MHD
Dan Messier	Coastal Energy
Louis Ciavarra	Bowditch & Dewey, Attorney for Coastal Energy

Entered as Exhibits were:

Exhibit #1 ……	Contract #98298
Exhibit #2 ……	Contract #98429
Exhibit #3 ……	Statement of Claim – Contract #98298
Exhibit #4 ……	Statement of Claim – Contract #98429
Exhibit #5 ……	Letter to Coastal Energy dated August 21, 1998 from Margaret O'Meara, District Highway Director, District #3

Post hearing submissions were asked of both parties. MassHighway's submission is in the file. No submission was ever submitted by the Contractor.

FACTS AND ISSUES OF LAW PRESENTED:

The Contractor was awarded two Contracts for the demolition and disposal of structures in the Worcester/Millbury area as part of the Route 146 Interchange Project.

Contract # 98298 provided for the demolition and disposal of 12 structures at a price of $195,862.00. The Contract was signed on November 6, 1997 and the Notice to Proceed (hereinafter "Notice") was issued on May 22, 1998. Contract #98429 provided for the demolition and disposal of 19 structures at a price of $299,913.00. The second contract was signed on August 21, 1998 and the Notice was issued on October 14, 1998.

The Contractor alleges that a changed condition resulted by having a delay between the date of award of the contracts and the Notice. Coastal bases it argument that because of the delay, they incurred additional expenses in trucking and demolition. As evidence, they presented a letter from KTI Bio Fuels, L.P. (wood disposal) and Worcester Sand & Gravel (concrete disposal) dated March 18, 1998 and September 10, 1998 announcing an increase in quoted prices for disposal of debris.

Based on the KTI price increase, the Contractor wrote to the District 3 Highway Director on August 12, 1998, requesting an increase in compensation in Contract #98298. In her response, she stated that she agreed with the request for increased costs for the work (see Exhibit #5). At this time Worcester Sand & Gravel had not notified the Contractor of the increase in concrete disposal, nor had they been given the Notice of the second Contract.

On August 31, 1998, the Contractor again wrote to the District, this time requesting an increase based on the concrete disposal costs. The Contractor supplied the District quotes for increased concrete disposal costs by letter dated September 10, 1998.

The Contractor, in an October 20, 1998 letter, again requested that additional payment be made for the increase in disposal costs for wood and concrete for Contract #98298. On December 7, 1998, the District responded to the Contractor denying their request. The Contractor appealed to the Claims Committee, and on February 10, 1999, their claim was denied.

Similarly, with Contract #98429, The Contractor requested a cost increase on November 3, 1998. The Contractor's argument, as in Contract #98298, stated that its disposal costs increased prior to the Notice being issued. Documentation of the price increases was supplied to the District by the Contractor on February 8, 1999. On March 8, 1999, the District denied the request stating that the increases occurred prior to the issuance of the Notice and that the Contractor had the opportunity to withdraw its bid. The District also stated that any pricing concerns should have been addressed prior to the execution of the contract.

The Contractor appealed the District's determination to the Claim's Committee, which denied their claim on July 14, 1999.

Coastal stated in their claim and argued at the hearing that the difference in its supplier's prices between the time of bid and the issuance of the Notice, was a "classic changed condition." This is patently incorrect. Changed conditions as defined in M.G.L. Chapter 30 section 39N and in section 4.04 of the Standard Specifications for Highways and Bridges (hereinafter "Bluebook"), do not refer to changes in price as meeting the requirements. Changed conditions refer to subsurface or latent physical conditions encountered at the work site, which differ substantially from those shown on the plans or indicated in the contract or a change in the construction methods. Clearly there is no correlation between the Contractor's claims and the definition of changed conditions in the statute and Bluebook.

The Contractor signed two Contracts whereby the Bluebook was incorporated by reference. Each Contract included a section titled "Scope of Work." The language of that clause states, "all work done under this Contract shall be in conformance with the Massachusetts Highway Department Standard Specifications for Highways and Bridges…"

A reasonable prudent contractor would not bring a claim based on changed conditions where there had been no changed condition. A delay in obtaining the Notice is not a changed condition. A damage claim based on changed condition must be denied when, in fact, there has been no changed condition.

The Contractor's claims are addressed in section 8.10 of the Bluebook. Section 8.10 in part states:

> The maximum time limit for the satisfactory completion of the work set forth in the Proposal is based upon the requirements of public convenience and the assumption that the Contractor will prosecute the work efficiently and with the least possible delay, in accordance with the maximum allowable working time per week as specified herein.
>
> It is an essential part of this Contract that the Contractor shall perform fully, entirely, and in an acceptable manner, the work required within the time stated in the Contract, except that the contract time for completion shall be adjusted as follows:
>
> A. If the Contractor does not receive the Notice to Proceed for a Federally Aided project within 70 days of bid opening (or for a Non-Federally Aided project, within 55 days of bid opening), it shall be entitled to an extension of time equivalent to the number of days beyond 70 (or 55) that it takes for the Contractor to receive the Notice to Proceed. Any such extension of time shall be reduced by the number of days beyond 14 days from the date of receipt of the Notice of Award that the Contractor takes to return the executed Contract and the required surety.

By executing the Contract, the Contractor should have known of the remedies afforded by the Contract.

The Standard Specifications for Highways and Bridges defines Contract at Section 1.11:

1.11 Contract

> The written agreement executed between the Party of the First Part and the Contractor setting forth the obligations of the Parties thereunder, including, but not limited to, the performance of the work, the furnishing of labor and materials, and the basis of payment.
>
> The Contract includes the Notice to Contractors, proposal, contract form and contract bond, specification, supplemental specifications, special provisions, general and detailed plans, any extra work orders and agreements that are required to complete the construction of the work in an acceptable manner, including authorized extensions thereof, all of which constitute one instrument. (emphasis added)

The damages in this claim are delay type damages as defined in the case of Reynolds Bros., Inc. v. Commonwealth 412 Mass. 1. The Reynolds decision also dealt with a late notice to proceed. The contractor in "Reynolds" claimed "hindrances" and "interferences" with the orderly performance of its work which allegedly resulted in loss of productivity. The court in "Reynolds" at page 4 stated:

> "We are satisfied that there is no significant distinction between hindrances and interferences to which Reynolds points and the alleged delay in the start of project and delays caused by [412 Mass 8] the work of other contractors; which are precluded by the no damages for delay provision." (see Section 8.05 of the Standard Specifications)

The troubling issue in this matter is the effect of Margaret O'Meara's letter (see Exhibit #5). In her letter to the Contractor, Ms. O'Meara agreed that the Contractor

should be entitled to an adjustment in its increase cost of disposal "due to the delay in starting the project".(emphasis added) See letter from the Contractor dated August 12, 1998 to Margaret O'Meara (Exhibit #3). No matter what the impact of this letter on Contract #98298, it could have no impact on Contract #98429 since that Contract was dated August 21, 1998. In any event, Ms. O'Meara could not bind MassHighway for delay type damages since that responsibility is clearly within the discretion of the Board of Commissioners.

Section 8.05 of the Standard Specifications states:

> **8.05 Claim for Delay or Suspension of the Work.**
>
> The Contractor hereby agrees that he shall have no claim for damages of any kind on account of any delay in commencement of the work or any delay or suspension of any portion thereof, except as hereinafter provided.
>
> Provided, however, that if the Commission in their judgment shall determine that the performance of all or any major portion of the work is suspended, delayed, or interrupted for an unreasonable period of time by an act of the Department in the administration of the Contract, or by the Department's failure to act as required by the Contract within the time specified in the Contract (or if no time is specified, within a reasonable time) and without the fault or negligence of the Contractor, an adjustment shall be made by the Department for any increase in the actual cost of performance of the Contract (excluding profit and overhead) necessarily caused by the period of such suspension, delay or interruption. No

> adjustment shall be made if the performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted by the department.
>
> No claims shall be allowed under this Subsection for the Department's failure to act as required by the Contract within the time specified in the Contract (or if no time is specified, within a reasonable time) for any cost incurred more than two weeks before the Contractor shall have notified the Department in writing of his claim due to the Department's failure to act.
>
> The Contractor shall submit in writing not later than 30 days after the termination of such suspension, delay or interruption the amount of the claim and breakdown of how the amount was computed in accordance with Subsection 9.03B except no allowance for overhead and profit shall be allowed.
>
> Any dispute concerning whether the delay or suspension is unreasonable or any other question of fact arising under this paragraph shall be determined by the Commission and such determination and decision, in case any question shall arise, shall be a condition precedent to the right of the Contractor to receive any money hereunder.
>
> The Contractor further agrees that the sole allowance for any such delay or suspension, other than as provided above, is an extension of time as provided in Subsection 8.10. (emphasis added)

Finally, looking toward the Reynolds case for direction in this matter, the SJC states at page 4:

> (2) There is a second reason why Reynolds cannot prevail on its argument that it was entitled to a notice to proceed in mid-July. Despite the phraseology of the July notice announcing that, at a meeting of the Public Works Commission (commission), the contract had been awarded to Reynolds, subject to the "concurrence of the Federal Highway Administration," the contract as a matter of law was not "awarded" within the meaning of that contract term until it was executed and delivered on August 7, 1978. In this connection, we note that the department audit report dated January 23, 1986, one of the documents submitted by the Commonwealth in support of its summary judgment motion, states: "It is difficult to read the contract statement … that 'all work may begin upon award of the contract' as meaning that the (Commission) vote constitutes 'award.' Completion of the award process (including execution and completion of the contract document) is clearly implied." The Commonwealth (412 Mass. 7) does not make this argument. In fact, the Commonwealth states in its brief that the contract was awarded on July 12, 1978. Nevertheless, we are satisfied that the contract was not "awarded" within the meaning of the parties' contract before it was executed and delivered. It would not make sense to interpret the contract, which did not become effective until August 7, 1978, as providing that the contractor was entitled to commence work before that date.

Basically, these comments say that the Contract with MassHighway is not fully executed until the Notice to Proceed is issued.

This language is consistent with the definition of Contract at Section 1.11 of the Standard Specifications (see above).

FINDINGS:

I find no liability on the part of MassHighway in this present matter.

I further find that the ruling in this present matter should establish a precedent in any other matters before the Board of Contract Appeals that involve late notice to proceed.

RECOMMENDATION:

The claims of Coastal Energy, Inc. on Contracts #98298 and 98429 due to increase cost of disposal of material that occurred due to late notices to proceed in the amount of $31,446.22 should be denied.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: April 28, 1994

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **John J. Petruzzi - William J. Forrester, Inc.**
CONTRACT #: **91603**
CITY/TOWN: **Conway**
CLAIM: **Job completely shut down by MHD**

- -

Please place this report and recommendation on the Docket Agenda WEDNESDAY, MAY 4, 1994, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Church
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis
Chief Engineer Dindio
Ned Corcoran, Ch. Counsel
Joseph Crescio, Dep.Ch.Eng.,Constr.
Secretary's Office
P. Sullivan,,DHD,Dist.2
Cosmo Fedele,Fin.Rev.Eng.
Frank Garvey,Fisc.Mgmt.
John J. Petruzzi
William E. Forrester, Inc.
115 West Main Street
East Brookfield, MA 01515

Michael V. Caplette
Attorney At Law
Three Bowlen Avenue
Southbridge, MA 01550

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **JOHN J. PETRUZZI-WILLIAM E. FORRESTER, INC.**, 115 West Main Street, East Brookfield, MA 01515, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, MAY 4, 1994** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

John J. Petruzzi - William E. Forrester, Inc. (the Contractor) aggrieved by the Department's failure to pay a delay claim in the amount of $41,793.68 on Contract #91603, appealed to the Board of Contract Appeals.

Contract #91603 (the Contract) was for the replacement of the bridge carrying Shelburne Falls Road over the Bear River.

The work to be done consisted of replacing the existing substandard bridge C-20-18 with a new structure designed in accordance with current load capacity and safety standards. The existing bridge C-20-18 was to be demolished and removed as described in the Special Provisions.

The new bridge was to be built 120 feet east downstream of the existing bridge.

The work limits included Shelburne Falls Road from a point 1500' southwest of Webster Road (Station 158+50) to a point 1400' north of Pine Hill Road (Station 175+50).

The work also included, but was not limited to, full depth construction of the bridge approaches, waterways, drainage pipes and structures, driveway aprons, signing, pavement markings, landscaping, and other incidental items as shown on the plans or described in the Special Provisions.

The work also included erosion control and siltation control measures to minimize disruption to the Bear River.

All in-stream work described below was to be done between June 1 and September 1 only:

1. Placement of sandbags and siltation fence at top of excavation for abutment footing.
2. Placement of sandbags and siltation fence around center pier of existing bridge prior to its removal.
3. Removal of sandbags and siltation fence in the locations in 1. + 2. after bridge erection and removal is completed.

The following list of Specifications and Standards were included by reference in this contract:

1988 Standard Specifications for Highways and Bridges
1977 Construction Standards
1990 Manual on Uniform Traffic Control Devices
1990 Standard Drawings for Signs and Supports
1986 American Standard for Nursery Stock

The Contract was awarded May 29, 1991, Item #61. The Contract was dated June 4, 1991. The original completion date was September 11, 1992. The Contract award price was $1,263,923.55.

A hearing was held on August 24, 1993. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Michael V. Caplette	Attorney for John J. Petruzzi-William E. Forrester, Inc.
John J. Petruzzi,Pres.	Petruzzi-Forrester, Inc.
William E. Forrester, Treas.	Petruzzi-Forrester, Inc.
David D. Mullen	Assistant Chief Counsel-MHD
Paul J. Sullivan	District Construction Eng.
James T. Hayes	Area Engineer Boston Constr.
Edmund H. Newton	Bridge Design Section, MHD
Edward L. Serwa	Resident Engineer, MHD

Entered as exhibits were:

Exhibit #1.....Contract #91603
Exhibit #2.....Statement of Claim
Exhibit #3.....Stop Work Order dated September 30, 1991
Exhibit #4.....Bar Schedule of Job Proposed job progress: June, 1991
Exhibit #5.....Picture of South Abutment
Exhibit #6.....Proposed corrective procedure of Contractor with cover letter dated October 11, 1991 to Joseph Superneau, MHD
Exhibit #7.....Letter to Joseph Superneau, dated November 8, 1991
Exhibit #8.....Department's transmission letter of corrective procedures dated December 27, 1991 signed by Joseph Superneau
Exhibit #9.....Department letter to the Contractor dated February 24, 1992 telling him to do muck excavation

Proposed findings of facts and rulings of laws were submitted by both counsels. On December 24, 1993 I requested the Contractor's counsel to further brief the issue of mitigation. In February 1994, the Contractor was informed of my desires for further comments on the issue of mitigation. As of this writing, I have not received any further briefs from the Contractor.

FACTS AND ISSUES, AND GENERAL DISCUSSION OF THE LAW

The Contractor began construction work on or about July 1, 1991 and by late September, 1991 was engaged in the construction of the north and south abutment walls for the new bridge. At the time, the Contractor was also performing other items of work as shown on the Progress Chart, Exhibit #14, including gravel borrow and general excavation. The Progress Chart called for winter shutdown on approximately December 15, 1991.

On Friday, September 20, 1991, the resident engineer informed the Contractor that reinforcing steel in the south abutment wall of the subject bridge was inaccurately placed and did not conform to the 1988 Specifications for Highway and Bridges. The Contractor was directed to delay the placement of cement concrete at that portion of the structure.

The Contractor was also informed that two of the three reinforcing bars at the top of a previously constructed section of wall were not properly placed. Discrepancies of up to seventeen inches in the embedment length of one set of bars were noted. Another set of bars was placed in the wrong orientation.

In spite of these deficiencies, and contrary to direction given at the site by the Resident Engineer, the Contractor unilaterally decided to proceed with the pouring of cement concrete. As a result, on September 30, 1991, the Department issued a stop work order, Exhibit #3, which stated that the Contractor was "...hereby ordered to suspend all further work on the project until: 1.) the defective work is corrected, and 2.) measures are taken which will ensure the

integrity of all future work on the project."

On or about October 11, 1991, the Contractor submitted a plan for corrective work, Exhibit #6, to the District 2 Northampton Office which was transported immediately to the Bridges Division in Boston. The plan for corrective work was returned from the Bridge Division to District 2 in late November, 1991.

The District 2 Office notified the Contractor on December 27, 1991 that the plan, with certain changes, would be acceptable and to submit the requested changes for approval. On or about January 13, 1992, the Contractor submitted the plan with the changes. The cost of all corrective plans and, ultimately, all corrective works was paid by the Contractor.

On February 20, 1992, a meeting was held and the Department gave the Contractor permission to return to work on other areas of work besides the bridge abutments. The Contractor returned to work in late March, 1992.

This claim consisted of five (5) items:

1)	Claim for equipment standby for the period of October 1, 1991 to December 13, 1991 ..	$23,022.45
2)	Claim for field office costs.....	581.40
3)	Claim for material escalation cost.....	1,162.48
4)	Claim for demobilization and remobilization.....	12,000.00
5)	Claim for differential in wages/benefits for period May 5, 1992 to October 3, 1992.....	5,027.53
	Total Claim	$41,763.68

All MHD construction contracts fully incorporate by reference the Standard Specifications for Highways and Bridges (Standard Specification or Blue Book). Subsections 5.05 and 8.10 of the Blue Book contain express references to utility delay. Subsection 8.05 contains a general "no damages for delay" clause.

Subsection 8.05 provides:

> **8.05 Claim for Delay or Suspension of the Work.**
>
> The Contractor hereby agrees that he shall have no claim for damages of any kind on account of any delay in commencement of the work or any delay or suspension of

any portion thereof, except as hereinafter provided.

Provided, however, that if the Commission in their judgment shall determine that the performance of all or any major portion of the work is suspended, delayed, or interrupted for an unreasonable period of time by an act of the Department in the administration of the Contractor, or by the Department's failure to act as required by the Contract within the time specified in the Contract (or if no time is specified, within a reasonable time) and without the fault or negligence of the Contractor, an adjustment shall be made by the Department for any increase in the actual cost of performance of the Contract (excluding profit and overhead) necessarily caused by the period of such suspension, delay or interruption. No adjustment shall be made if the performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted by the department.

No claims shall be allowed under this Subsection for the Department's failure to act as required by the Contract within the time specified in the Contract (or if no time is specified, within a reasonable time) for any cost incurred more than two weeks before the Contractor shall have notified the Department in writing of his claim due to the Department's failure to act.

The Contractor shall submit in writing not later than 30 days after the termination of such suspension, delay or interruption the amount of the claim and breakdown of how the amount was computed in accordance with Sub- section 9.03B except no allowance for over- head and profit shall be allowed.

Any dispute concerning whether the delay or suspension is unreasonable or any other question of fact arising under this paragraph shall be determined by the Commission, and such determination and decision, in case any question shall arise, shall be a condition precedent to the right of the Contractor to receive any money hereunder.

The Contractor further agrees that the sole allowance for any such delay or suspension, other than as provided above, in an extension of time as provided in Subsection 8.10.

By statutory insertion, all MHD construction contracts also provide that:

(a) The awarding authority may order the general contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the

> awarding authority; provided however, that if there is suspension, delay, or interruption for fifteen days or more or due to a failure of the awarding authority to act with the time specified in this contract, the awarding authority shall make an adjustment in the contract price for any increase in the cost of performance of this contract but shall not include any profit to the general contractor on such increase; and provided further, that the awarding authority shall not make any adjustment in the contract price under this provision for any suspension, delay, or interruption failure to act to the extent that such is due to any cause for which this contract provides for an equitable adjustment of the contract price under any other contract provision. (emphasis added)
>
> (b) The general contractor must submit the amount of a claim under provision (a) to the awarding authority in writing as soon as practicable after the end of the suspension, delay, or interruption or failure to act and, in any event, not later than the date of final payment under this contract and, except for costs due to a suspension order, the awarding authority shall not any costs in the claim incurred more than twenty days before the general contractor notified the awarding authority in writing of the act or failure to act involved in the claim.[1]

In Massachusetts, a "no damages for delay" provision in a public contract is valid and enforceable. City of Worcester v. Granger Bros., Inc., 19 Mass. App. 379, 474 N.E. 2d 1151, 1157 (1985) citing Wes Julian Constr. Corp. v. Commonwealth, 351 Mass. 588, 595, 223 N.E. 2d 72 (1967), where the court stated:

> "These provisions of the contract exculpate the (Commonwealth) from any liability it would otherwise have for delays which it caused, even if its actions were "negligent, unreasonable or due to indecision," quoting Charles I. Hosmer, Inc. v. Commonwealth, 302 Mass, 495, 503, 19 N.E. 2nd 800, 805 (1939); citing in accord: Coleman Bros., Corp. v. Commonwealth, 307 Mass. 205, 261, 29 N.E. 2nd 832 (1940); Chas. T. Main, Inc. v. Massachusetts Turnpike Authority, 347 Mass. 154 162, 163, 196 N.E. 2nd 821 (1964).

The Wes Julian court stated further that:

> (e)ven if we assume...that the conduct of the Commonwealth was "arbitrary and capricious," the (contractor) is not entitled to recover damages for

[1] Paragraphs (a) and (b) of M.G.L. c. 30, §39O (required in every contract subject to the provisions of c. 30 §39M or c. 149 §44A).

> delays caused by the (Commonwealth) in view of specific provisions of the contract regarding delay.
>
> Wes Julian, supra, at 72 (N.E. 2d).

So firm have been our courts in applying "no damages for delay" clauses that Massachusetts cases, particularly Wes Julian are cited in the legal literature to illustrate the strictest of the various positions taken by different courts. (See, for example, 74 ALR 3rd 239: "In one jurisdiction a "no damage" clause has been held to relieve the contractee from liability for delay even though the delay was caused by its conduct which was arbitrary, willful, and capricious.") (Emphasis added).

Only where "the Commonwealth in effect (had) used the delay provisions to whipsaw the contractor, "Farina Bros. Co. v. Commonwealth, 257 N.E. 2d 450, 455 (1970) or where the Commonwealth had violated an express condition of site availability which was the "essence" of an extra work agreement, State Line Contractors, Inc. v. Commonwealth, 249 N.E. 2nd 619, 624 (1969) did the Contractor overcome a "no damages for delay" provision.[2] (Emphasis added.)

But where "the Commonwealth assented to extension in (the Contractor's) date of completion and agreed to its shutting down the job in the interest of better coordination" the exculpatory provision as applied even though (the Contractor) was doubtless discommoded and caused significant expense by inadequate job coordination." Joseph E. Bennett Co., Inc. v. Commonwealth, 486 N.E. 2nd 1454, 1150 (1985).[3]

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[2]In Farina the Department refused to grant an extension of time promptly; thus the Court dealt with "damages caused the Contractor by the failure to grant seasonable extensions for performance made necessary by delay and failure of the Commonwealth to assist the contractor properly in rescheduling the work: rather than "damages caused by delay itself." Farina supra, at 456 (N.E. 2d). In State Line, the Contractor was "induced" to enter into an extra work agreement by the Department's assurance that it could work simultaneously on adjacent sites. State Line, supra, at 624 (N.E. 2d).

[3] In Bennett, certain amounts were paid to (the Contractor) to compensate it for expenses incident to delay and poor job coordination (between contractors), but apparently, the amounts paid did not cover the "significant expense" incurred as

Two recently decided SJC decisions have clarified the issue of no claim for delay. They are Reynolds Bros., Inc. et al v. Commonwealth of Massachusetts 412 Mass. 1 and Sutton Corporation v. Commonwealth of Massachusetts 412 Mass. 1003. Reynolds Bros. dealt with a job at downtown crossings. Reynolds contended that he was delayed by the Department and was hindered and interfered with in the performance of its work by the Department. Sutton involved a bridge reconstruction in Danvers where the telephone company delayed relocating its lines over the bridge after numerous requests by the Department and the Contractor to move them.

The Court in the Reynolds case states:

> General Laws c. 30, § 39O(a), is far from a model of clarity. However, it appears that the second clause, beginning with the words, "provided however," was intended by the Legislature to modify or qualify the first clause, that is, the function of the second clause is to lessen the scope, impact, or severity of the first clause. That construction would be consistent with the meaning ordinarily given to the term "provided." See Black's Law Dictionary 1224 (6th ed. 1990). Thus, we read the second clause to mean that the contractor will be entitled to a price adjustment only when the awarding authority, here the department, exercises its statutory right to order the contractor in writing to delay its performance, and there is either (1) a delay of fifteen or more days resulting from that order or (2) following such a written order, the authority fails to take action within a specified time as required by the contract which results in a delay of any length.

In the present matter, the statute is triggered by a written stop work order (see Exhibit #3). The threshold issue then is whether the Contractor can recover damages in a delay situation where he is the direct cause of the delay. Simply answered: No.

The issue involved in this matter is a simple one. The Contractor did not perform work in accordance with the plans and Specifications. The Contractor did not cooperate with the Resident Engineer by its failure to follow the Resident's directives.

---

a result of the delay. All of the cases discussed above including Bennett dealt with contracts executed before the enactment of c. 30 §39(O).

Section 5.09 of the Specifications states that,

> **"Any work done or materials used without authorization by the Engineer my be ordered removed and replaced at the Contractor's expense."**

As the result of the Contractor's actions, the Contractor incurred expenses due to the "down time." The Contractor was ordered to halt any and all work on the contract until corrective measures were approved by the Department. The damages incurred by the Contractor are the expenses the Contractor must bear as a result of the defective work performed by it.

FINDINGS:

I find that the Contractor's delay was as a result of his own actions and as such he cannot recover damages.

RECOMMENDATION:

The John J. Petruzzi-William E. Forrester, Inc. claim on Contract #91603 for delay cost totaling $41,793.68 should be denied.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: December 15, 1995

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **The Middlesex Corp. & Affiliates**
CONTRACT #: **94043**
CITY/TOWN: **East Brookfield**
CLAIM: **Delay Damages**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, JANUARY 3, 1996**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Bedingfield
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis

Chief Eng. Dindio
J. Crescio, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
P. Donohue, DHD, District #3
Alex Bardow, Bridge Eng.
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

Middlesex Corp.
17 Progress Ave.
Chelmsford, MA 01824

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **MIDDLESEX CORPORATION**, 17 Progress Ave., Chelmsford, MA 01824, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, JANUARY 3, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The Middlesex Corporation & Affiliates (the Contractor) aggrieved by the Department's failure to pay $58,455.68 in delay damages on Contract #94043 (the Contract) appealed to the Board of Contract Appeals.

Contract #94043 was a bridge replacement job on the Bridges No. E-2-6 and E-2-7, Cottage Street over Seven Mile River and Cottage Street over Conrail in East Brookfield.

The work under this contract consisted of the construction of Bridge No. E-2-6, Cottage Street over the Seven Mile River and Bridge No. E-2-7, Cottage Street over Conrail in the Town of East Brookfield. Also included in this contract was the construction of the proposed roadway approaches, a new Town Garage Drive and reconstruction of portions of the existing streets.

The work included demolition, excavation, embankment, drainage, full depth pavement construction, curbing, highway guard, signs, pavement markings, erosion control devices and other incidental items of work as listed in the Contract.

BRIDGE NO. E-2-6

Work consisted of the demolition of the existing superstructure, partial demolition of the existing piers, south abutment, and north abutment, and the construction of a new bridge carrying relocated Cottage Street over Seven Mile River.

The new bridge featured a pile bent and stub abutment substructure supporting a prestressed concrete deck beam superstructure.

BRIDGE NO. E-2-7

Work consisted of the demolition of the existing superstructure and the construction of a new bridge carrying relocated Cottage Street over Conrail.

The new bridge featured a hammer head pier and stub abutment substructure supporting a 3-span prestressed concrete deck beam superstructure.

All work done under this Contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the PLANS and these SPECIAL PROVISIONS.

The Contract was awarded July 21, 1993, Item #2. The Contract is dated July 27, 1993. The original completion date was July 8, 1994. The Contract award price totaled $1,933,219.25.

A hearing was held on November 21, 1995. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Skerrett	The Middlesex Corp.
James Hayes	MHD - Boston Construction
Cameron Smith	MHD - District #3
Paul Thompson	Resident Engineer
John Donahue	Construction Engineer, Dist. #3
Dean Kalavritinos	Asst. Chief Counsel

Entered as Exhibits were:

Exhibit #1.....Contract #94043
Exhibit #2.....Statement of Claim
Exhibit #3.....Board Vote dated 1/25/95,
Item #52

FACTS, ISSUES AND GENERAL DISCUSSION OF THE LAW:

Bridge E-3-7 was completed within the allotted contract time. However, Bridge E-2-6 could not be built as proposed and work was orally suspended on October 27, 1993. Test pits at the location of proposed piles found hard pan, glacial till and boulders. These pits were done on October 26, 1993.

On November 12, 1993, additional test pits were dug with the same result. The Department then proceeded to redesign the piles and a delay occurred until the Contractor was orally told to resume work on October 6, 1994. No written stop work order was issued.

By statutory insertion, all MHD construction contracts also provide that:

> (a) The awarding authority may order the general contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the awarding authority; providing however, that if there is suspension, delay, or interruption for fifteen days or more or due to a failure of the awarding authority to act within the time specified in this contract, the awarding authority shall make an adjustment in the contract price for any increase in the cost of performance of this contract but shall not include any profit to the general contractor on such increase; and provided further, that the awarding authority shall not make any adjustment in the contract price under this provision for any suspension, delay, or interruption or failure to act to the extent that such is due to any cause for which this contract provides for an equitable adjustment of the contract price under any other contract provisions.
>
> (b) The general contractor must submit the amount of a claim under provision (a) to the awarding authority in writing as soon as practicable after the end of the suspension, delay, or interruption or failure to act and, in any event, not later than the date of final payment under this contract and, except for costs due to a suspension order, the awarding authority shall not approve any cost in the claim incurred more than twenty days before the general contractor notified the awarding authority in writing of the act or failure to act involved in the claim.

Paragraphs (a) and (b) of M.G.L. c. 30 § (O) (required in every contract subject to the provisions of c. 30 § 39M or c. 149 § 44A).

Also, the Standard Specifications provides at Subsection 8.05:

> **8.05 Claim for Delay or Suspension of the Work.**
>
> The Contractor hereby agrees that he shall have no claim for damages of any kind on account of any delay in commencement of the work or any delay or suspension of any portion thereof, except as hereinafter provided.
>
> Provided, however, that if the Commission in their judgment shall determine that the performance of all or any major portion of the work is suspended, delayed, or interrupted for an unreasonable period of time by an act of the Department in the administration of the Contract, or by the Department's failure to act as required by the Contract within the time specified in the Contract (or if no time is specified, within a reasonable time) and without the

> fault or negligence of the Contractor, an adjustment shall be made by the Department for any increase in the actual cost of performance of the Contract (excluding profit and overhead) necessarily caused by the period of such suspension, delay or interruption. No adjustment shall be made if the performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted by the department.
>
> No claims shall be allowed under this Subsection for the Department's failure to act as required by the Contract within the time specified in the Contract (or if no time is specified, within a reasonable time) for any cost incurred more than two weeks before the Contractor shall have notified the Department in writing of his claim due to the Department's failure to act.
>
> The contractor shall submit in writing not later 30 days after the termination of such suspension, delay or interruption the amount of the claim and breakdown of how the amount was computed in accordance with Subsection 9.03B except no allowance for overhead and profit shall be allowed.
>
> Any dispute concerning whether the delay or suspension is unreasonable or any other question of fact arising under this paragraph shall be determined by the Commission, and such determination and decision, in case any question shall arise, shall be a condition precedent to the right of the Contractor to receive any money hereunder.
>
> The Contractor further agrees that the sole allowance for any such delay or suspension, other than as provided above, is an extension of time as provided in Subsection 8.10.

In Massachusetts, a "no damages for delay" provision in a public contract is valid and enforceable. City of Worcester v. Granger Bros., Inc., 19 Mass. App. 379, 474 N.E. 2d 1151, 1157 (1985) citing Wes Julian Constr. Corp. v. Commonwealth, 351 Mass. 588, 595, 223 N.E. 2d 72 (1967), where the court stated:

> "These provisions of the contract exculpate the (Commonwealth) from any liability it would otherwise have for delays which it caused, even if its actions were "negligent, unreasonable or due to indecision," quoting Charles I. Hosmer, Inc. v. Commonwealth, 302 Mass, 495, 503, 19 N.E. 2nd 800, 805 (1939); citing in accord: Coleman Bros., Corp. v. Commonwealth, 307 Mass. 205, 261, 29 N.E. 2nd 832 (1949); Chas. T. Main, Inc. v. Massachusetts Turnpike Authority, 347 Mass. 154, 162, 163, 196 N.E. 2nd 821 (1964).

The Wes Julian court stated further that:

> (e)ven if we assume...that the conduct of the Commonwealth was "arbitrary and capricious", the (contractor) is not entitled to recover damages for delays caused by the (Commonwealth) in view of specific provisions of the contract regarding delay.
>
> Wes Julian, supra, at 72 (N.E. 2d).

So firm have been our courts in applying "no damages for delay" clauses that Massachusetts cases, particularly Wes Julian are cited in the legal literature to illustrate the strictest of the various positions taken by difference courts. (See, for example, 74 ALR 3rd 239: In one jurisdiction a "no damage" clause has been held to relieve the contractee from liability for delay even though the delay was caused by its conduct which was arbitrary, willful, and capricious.") (Emphasis added).

Only where "the Commonwealth in effect (had) used the delay provision to whipsaw the contractor, "Farina Bros. Co. V. Commonwealth, 257 N.E. 2d 450, 455 (1970) or where the Commonwealth had violated an express condition of site availability which was the "essence" of an extra work agreement, State Line Contractors, Inc. v. Commonwealth, 249 N.E. 2nd 619, 624 (1969) did the Contractor overcome a "no damages for delay" provision.[1] (Emphasis added.)

But where "the Commonwealth assented to extension in (the Contractor's) date of completion and agreed to its shutting down the job in the interest of better coordination" the exculpatory provision was applied even though (the Contractor) was doubtless discommoded and

[1] In Farina the Department refused to grant an extension of time promptly; thus the Court dealt with "damages caused the Contractor by the failure to grant seasonable extensions for performance made necessary by delay and failure of the Commonwealth to assist the contractor properly in rescheduling the work: rather than "damages caused by delay itself." Farina, supra, at 456 (N.E. 2d). In State Line, the Contractor was "induced" to enter into an extra work agreement by the Department's assurance that it could work simultaneously on adjacent sites. State Line, supra, at 624 (N.E. 2d).

caused significant expense by inadequate job coordination." Joseph E. Bennett Co., Inc. v. Commonwealth, 486 N.E. 2nd 1454, 1150 (1985).[2]

Thus, Subsection 5.05 (cooperation by Contractor) operates to exculpate the Department from any liability it might otherwise have for utility delays provided the Department has not "whipsawed" the Contractor by refusing a time extension or violated an essential express condition of the contract.[3]

Two recently decided SJC decisions have clarified the issue of no claim for delay. They are Reynolds Bros., Inc. et al v. Commonwealth of Massachusetts, 412 Mass. 1 and Sutton Corporation v. Commonwealth of Massachusetts, 412 Mass. 1003. Reynolds contended that he was delayed by the Department and was hindered and interfered with in the performance of its work by the Department. Sutton involved a bridge reconstruction in Danvers where the telephone company delayed relocating its lines over the bridge after numerous requests by the Department and the Contractor to move them.

The Court in the Reynolds case states:

> "General Laws c. 30, § 39O(a), (ante) is far from a model of clarity. However, it appears that the second clause, beginning with the words, 'provided however', was intended by the Legislature to modify or qualify the first clause, that is, the function of the second clause is to lessen the scope, impact, or severity of the first clause. That construction would be consistent with the meaning ordinarily given to the term 'provided'. See Black's Law Dictionary 1224 (6th ed. 1990). Thus, we read the second clause to mean that the contractor will be entitled to a price adjustment only when the awarding authority, here the department, exercises its statutory right to order the contractor in writing to delay its performance, and there is either (1) a delay of fifteen or more days resulting from that order or (2) following such a written order, the authority fails to take action within a specified time as

[2] In Bennett, certain amounts were paid to (the Contractor) to compensate it for expenses incident to delay and poor job coordination (between contractors), but apparently, the amounts paid did not cover the "significant expense" incurred as a result of the delay.

[3] All of the cases discussed above including Bennett dealt with contracts executed before the enactment of c. 30 §39(O).

> required by the contract which results in a delay of any length. Here, there was no written order as called for in the first clause of c. 30, § 390. The result is that the second clause, on which Reynolds relies, was not triggered."

The Reynolds case goes on to State:

> "Afforded no relief by G.L. c. 30, § 39O, Reynold's claims are precluded by the 'no damages for delay' provision of the contract. Section 8.05 specifically precludes damages for delays 'in commencement of the work or any delay or suspension of any portion thereof, except...that if the Commission in (its) judgment shall determine that the performance of all or any major portion of the work is suspended, delayed, or interrupted for an unreasonable time by an act of the Department in the administration of the Contract, or by the Department's failure to act as required by the Contract...an adjustment shall be made.' Here, since it is clear that the commission did not make the requisite determination, the exception does not apply, and the claims based on delay are precluded. We reject the argument that, because Reynolds does not assert 'delay' as much as it claims 'hindrances' and 'interferences' with the orderly performance of its work resulting in a loss of productivity, the no damages for delay provision is inapplicable. Hindrances and interferences, Reynolds contends, are not covered by § 8.05. We are satisfied that there is no significant distinction between the hindrances and interferences to which Reynolds points and the alleged delay in the start of the project and delays caused by the work of other contractors, which are precluded by the no damages for delay provision."

In the Sutton case, decided the same day as the Reynolds case, the Court held:

> "Sutton argues that the second clause of c. 30, § 390, should be read to provide an adjustment in the contract price for increased cost of performance any time there is a suspension, delay, or interruption for fifteen days or more, regardless of whether it was ordered or caused by the awarding authority or caused by a third party. As we have said in Reynolds Bros. v. Commonwealth, ante, (1992), the second clause only takes effect when the first clause is satisfied by the awarding authority ordering the contractor in writing to suspend, delay, or interrupt the work. The Department issued no written order in this case. Thus, c. 30, § 390, does not provide any relief to the plaintiff.
>
> Sutton's claim is precluded by the § 8.05 'no damages for delay' provision in the contract. As we said in Reynolds Bros. v. Commonwealth, supra, § 8.05 specifically precludes damages for delays in the commencement or performance of work, unless the Mass. Highway Commission

> (commission) in its discretion determines that an adjustment should be made for an unreasonable delay caused either by an action of the department in administering the contract or by the department's failure to act as required in the contract. Here, as in Reynolds Bros. v. Commonwealth, supra, it is clear that the commission did not make the requisite determination. Therefore, the exception does not apply, and the claim based on delay is precluded."

This dissertation is as complete a review of the SJC's decisions relative to delay damages as this writer is aware of. It presents a difficult case for any contractor to allege damages for delay unless there is a written stop work order.

However, Subsection 8.05 of the Standard Specifications was invoked by Board Vote dated 1/25/95, Item #52 (see Exhibit 3, a copy of which is included herein). At the hearing the Department agreed with damages of $1752.08 for trailer rental, $11,626.00 for Precast Structures and $1500.00 for Spector Metals. The only dispute was for the Contractor's portion of the claim totaling $43,577.60. The Department offered 25% of the total and the Contractor wanted 75% of its cost.

FINDINGS:

I find that the Commission has recognized a delay caused by the Department pursuant to 8.05 of the Standard Specifications.

I find that the $1752.00 for trailer rental, $11,626.00 for Precast Structures and $1500.00 for Spector Metal are reasonable.

I find that 50% of the Contractor's cost of $43,577.60 is reasonable. Thus, the Contractor is entitled to an additional $21,788.80.

RECOMMENDATION:

The Middlesex Corporation's claim for delay damages on Contract #94043 totaling $58,455.48 should be allowed in the reduced amount of $36,666.88.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: September 6, 1996

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **R. C. Griffin, Inc.**
CONTRACT #: **93076**
CITY/TOWN: **Lexington**
CLAIM: **Delay damages in the amount of $12,000.00.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, SEPTEMBER 11, 1996**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Dengenis

Chief Eng. Broderick
E.Botterman, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
S. Eidelman, DHD, District #4
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

R.C. Griffin, Inc.
49 Central Street
Peabody, MA 01960

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **R. C. GRIFFIN, INC.**, 49 Central Street, Peabody, MA 01960, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, SEPTEMBER 11, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

R. C. Griffin, Inc. (the Contractor) aggrieved by the Department's failure to pay a delay claim of $12,000.00 on Contract No. 93076, appealed to the Board of Contract Appeals.

Contract No. 93076 (the Contract) was for the Construction of a pre-engineered steel storage facility at the Massachusetts Highway Department's (MHD) maintenance depot in District #4 at Marrett Street in Lexington.

All relevant portions of the 1988 Standard Specifications for Highways and Bridges, including the August 1991 supplements, the latest edition of the State Building Code and the Special Provisions applied to the work performed under this Contract.

The Contract was awarded November 24, 1992, Item #2. The Contract was dated November 30, 1992. The original completion date was April 19, 1993. The Contract award price was $195,168.00.

Hearings were held on June 18, 1996 and August 16, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Dean Kalavritinos	Asst. Chief Counsel
Kristin Bourland	Legal Intern - MHD
Alan B. Ayers	R.C. Griffin

Entered as Exhibits were:

Exhibit #1.....	Contract #93076
Exhibit #2.....	Statement of Claim
Exhibit #3.....	Amended Statement of Claim
Exhibit #4.....	Stop Work Order from Anthony P. Salamanca to Alan B. Ayers dated February 23, 1993
Exhibit #5.....	Notice to begin work from Charles F. Mistretta to Alan B. Ayers dated December 7, 1993
Exhibit #6.....	District's Support of Amended Claim dated July 31, 1996 from Gerald T. Donnellan to Peter Milano

FACTS AND GENERAL DISCUSSION OF THE LAWS AND THE SPECIFICATIONS:

The Contractor commenced work on the project when a dispute arose between the Town of Lexington and the MHD. The Town was concerned that by MHD expanding this facility it would impact or potentially contaminate the abutting wetlands.

MHD determined that by the Contractor working the site with equipment and manpower may further alienate the Town of Lexington. Consequently the District Highway Director issued a written stop work order dated February 23, 1993. The Contractor demobilized at that time. Finally, he was notified to recommence the work on December 7, 1993 (see Exhibits 4 and 5 respectively).

The approximate length of the delay was just short of ten (10) months. The Contractor is requesting $12,000.00 in delay damages (see Exhibit #3).

All MHD construction contracts fully incorporate by reference the Standard Specifications for Highways and Bridges (Standard Specifications or Blue Book). Subsections 5.05 and 8.10 of the Blue Book contain express references to utility delay. Subsection 8.05 contains a general "no damages for delay" clause. These three provisions provide in relevant part:

Subsection 5.05 of the Standard Specifications:

> The Contractor shall so carry on his work under the direction of the Engineer that Public Service Corporation, or Municipal Departments may enter on the work to make changes in their structures or to place new structures and connections therewith without interference, and the Contractor shall have no claim for, or on account of any delay which may be due to or result from said work of Public Service Corporations or Municipal Department. No allowance of any kind will be made except as provided in Subsection 8.10. (emphasis added)

Subsections 8.10 D. and 8.10 E. of the Standard Specifications:

> D. When delay occurs due to reasonable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to "Acts of God," to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing, acts of the Government,

acts of the State or any political subdivision thereof, acts of other contracting parties over whose acts the Contractor has no control, fires, floods,epidemics, abnormal tides (not including Spring tides), severe coastal storms accompanied by high winds or abnormal tides, freezing of streams and harbors, abnormal time of Winter, freezing or Spring thawing, interference from recreational boat traffic, use of beaches and recreational facilities for recreational purposes during the summer season, abnormal ship docking and berthing, unanticipated use of wharves and storage sheds, strikes except those caused by improper acts or omissions of the Contractor, extraordinary delays in delivery of materials caused by strikes, lockouts, wrecks, freight embargoes, the time for completion of work shall be extended in whatever amount is determined by the Engineer to be equitable. (emphasis added)

E. In case the work is delayed by Public Service Corporations or Municipal Corporations see Subsection 5.05. (emphasis added)

Subsection 8.05 of the Standard Specifications:

The Contractor hereby agrees that he shall have no claim for damages of any kind on account of any delay in commencement of the work or any delay or suspension of any portion thereof, except as hereinafter provided. (emphasis added)

Provided, however, that if the Commission in their judgment shall determine that the performance of all or any major portion of the work is suspended, delayed, or interrupted for an unreasonable period of time by an act of the Department in the administration of the Contract, or by the Department's failure to act as required by the Contract within the time specified in the Contract (or if no time is specified, within a reasonable time), and without the fault or negligence of the Contractor, an adjustment shall be made by the Department for any increase in the actual cost of performance of the Contract (excluding profit and overhead) necessarily caused by the period of such suspension, delay, or interruption. No adjustment shall be made if the performance by the Contractor would have been prevented by the other causes even if the work had not been so suspended, delayed, of interrupted by the Department.

No claim shall be allowed under this Subsection for the Department's failure to act as required by the Contract within the time specified in the Contract (or if no time is specified, within a reasonable time) for any cost incurred more than two weeks before the Contractor shall have notified the Department in writing of his claim due to the Department's failure to act.

> The Contractor shall submit in writing not later than 30 days after the termination of such suspension delay or interruption the amount of the claim and breakdown of how the amount was computed in accordance with Subsection 9.03B except no allowance for overhead and profit shall be allowed.
>
> Any dispute concerning whether the delay or suspension is unreasonable or any other question of fact arising under this paragraph shall be determined by the Commission, and such determination and decision, in case any question shall arise, shall be a condition precedent to the right of the Contractor to receive any money hereunder.
>
> The Contractor further agrees that the sole allowance for any such delay or suspension, other than as provided above, is an extension of time as provided in Subsection 8.10. (emphasis added)

By statutory insertion, all MHD construction contracts also provide:

> Paragraphs (A) and (b) of M.G.L. c. 30 § (O) (required in every contract subject to the provisions of c. 30 § 39M or c. 149 § 44A):
>
> > (a) The awarding authority may order the general contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the awarding authority; provided however, that if there is suspension, delay, or interruption for fifteen days or more or due to a failure of the awarding authority to act within the time specified in this contract, the awarding authority shall make an adjustment in the contract price for any increase in the cost of performance of this contract but shall not include any profit to the general contractor on such increase; and provided further, that the awarding authority shall not make any adjustment in the contract price under this provision for any suspension, delay, or interruption or failure to act to the extent that such is due to any cause for which this contract provides for an equitable adjustment of the contract price under any other contract provisions. (emphasis added)
> >
> > (b) The general contractor must submit the amount of a claim under provision (a) to the awarding authority in writing as soon as practicable after the end of the suspension, delay, or interruption or failure to act and, in any event, not later than the date of final payment under this contract and, except for costs due to a suspension order, the awarding authority shall not approve any costs in the claim incurred more than twenty days before the general contractor notified the awarding authority in writing of the act or failure to act involved in the claim.

In Massachusetts, a "no damages for delay" provision in a public contract is valid and enforceable. City of Worcester v. Granger Bros., Inc., 19 Mass. App. 379, 474 N.E. 2d 1151, 1157 (1985) citing Wes Julian Constr. Corp. v. Commonwealth, 351 Mass. 588, 595, 223 N.E. 2d 72 (1967), where the court stated:

> "These provisions of the contract exculpate the (Commonwealth) from any liability it would otherwise have for delays which it caused, even if its actions were 'negligent, unreasonable or due to indecision,' quoting Charles I. Hosmer, Inc. v. Commonwealth, 302 Mass. 495, 503, 19 N.E. 2nd 800, 805 (1939); citing in accord: Coleman Bros. Corp. v. Commonwealth, 307 Mass. 205, 261, 29 N.E. 2nd 832 (1940); Chas. T. Main, Inc. v. Massachusetts Turnpike Authority, 347 Mass. 154, 162, 163, 196 N.E. 2nd 821 (1964)."

The Wes Julian court stated further that:

> "(e)ven if we assume...that the conduct of the Commonwealth was 'arbitrary and capricious,' the (contractor) is not entitled to recover damages for delays caused by the (Commonwealth) in view of specific provisions of the contract regarding delay.
>
> Wes Julian, supra, at 72 (N.E. 2d).

So firm have been our courts in applying "no damages for delay" clauses that Massachusetts cases, particularly Wes Julian are cited in the legal literature to illustrate the strictest of the various positions taken by different courts. (See, for example, 74 ALR 3rd 239: "In one jurisdiction a "no damage" clause has been held to relieve the contractee from liability for delay even though the delay was caused by its conduct which was arbitrary, willful, and capricious.") (Emphasis added).

Only where "the Commonwealth in effect (had) used the delay provisions to whipsaw the contractor, "Farina Bros. Co. v. Commonwealth, 257 N.E. 2d 450, 455 (1970) or where the Commonwealth

had violated an express condition of site availability which was the "essence" of an extra work agreement, State Line Contractors, Inc. v. Commonwealth, 249 N.E. 2nd 619, 624 (1969) did the Contractor overcome a "no damages for delay" provision.[1] (Emphasis added).

But where "the Commonwealth assented to extension in (the Contractor's) date of completion and agreed to its shutting down the job in the interest of better coordination" the exculpatory provision was applied even though (the Contractor) was doubtless discommoded and caused significant expense by inadequate job coordination." Joseph E. Bennett Co., Inc. v. Commonwealth, 486 N.E. 2nd 1454, 1150 (1985).[2]

Thus, Subsection 5.05 operates to exculpate the Department from any liability it might otherwise have for utility delays provided the MHD has not "whipsawed" the Contractor by refusing a time extension or violated an essential express condition of the contract.[3]

Two recently decided SJC decisions have clarified the issue of no claim for delay. They are Reynolds Bros., Inc. et al v. Commonwealth of Massachusetts, 412 Mass. 1 and Sutton Corporation v.

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[1]In Farina the Department refused to grant an extension of time promptly; thus the Court dealt with "damages caused the Contractor by the failure to grant seasonable extensions for performance made necessary by delay and failure of the Commonwealth to assist the contractor properly in rescheduling the work: rather than "damages caused by delay itself." Farina, supra, at 456 (N.E. 2d). In State Line, the Contractor was "induced" to enter into an extra work agreement by the Department's assurance that it could work simultaneously on adjacent sites. State Line, supra, at 624 (N.E. 2d).

[2]In Bennett, certain amounts were paid to (the Contractor) to compensate it for expenses incident to delay and poor job coordination (between Contractors), but apparently, the amounts paid did not cover the "significant expense" incurred as a result of the delay.

[3]All of the cases discussed above including Bennett dealt with contracts executed before the enactment of c. 30 §39(O).

Commonwealth of Massachusetts, 412 Mass. 1003. Reynolds Bros. dealt with a job at downtown crossings. Reynolds contended that he was delayed by the Department and was hindered and interfered with in the performance of its work by the Department. Sutton involved a bridge reconstruction in Danvers where the telephone company delayed relocating its lines over the bridge after numerous requests by the Department and the Contractor to move them.

The Court in the Reynolds case states:

> "General Laws c. 30, § 390 (a), (supra) is far from a model of clarity. However, it appears that the second clause, beginning with the words, 'provided however,' was intended by the Legislature to modify or qualify the first clause, that is, the function of the second clause is to lessen the scope, impact, or severity of the first clause. That construction would be consistent with the meaning ordinarily given to the term 'provided'. See Black's Law Dictionary 1224 (6th ed. 1990). Thus, we read the second clause to mean that the contractor will be entitled to a price adjustment only when the awarding authority, here the Department, exercises its statutory right to order the contractor in writing to delay its performance, and there is either (1) a delay of fifteen or more days resulting from that order or (2) following such a written order, the authority fails to take action within a specified time as required by the contract which results in a delay of any length. Here, there was no written order as called for in the first clause of c. 30, § 390. The result is that the second clause, on which Reynolds relies, was not triggered."

The Reynolds case goes on to state:

> "Afforded no relief by G.L. c. 30, § 390, Reynolds's claims are precluded by the 'no damages for delay' provision of the contract. Section 8.05 specifically precludes damages for delays 'in commencement of the work or any delay or suspension of any portion thereof, except...that if the Commission in (its) judgment shall determine that the performance of all or any major portion of the work is suspended, delayed, or interrupted for an unreasonable time by an act of the Department in the administration of the Contract, or by the Department's failure to act as required by the Contract...an adjustment shall be made.' Here, since it is clear that the commission did not make the requisite determination, the exception does not apply, and the claims based on delay are precluded. We reject the argument that, because Reynolds does not assert 'delay' as

> much as it claims 'hindrances' and 'interferences' with the orderly performance of its work resulting in a loss of productivity, the no damages for delay provision is inapplicable. Hindrances and interferences, Reynolds contends, are not covered by § 8.05. We are satisfied that there is no significant distinction between the hindrances and interferences to which Reynolds points and the alleged delay in the start of the project and delays caused by the work of other contractors, which are precluded by the no damages for delay provision."

In the Sutton case, decided the same day as the Reynolds case, the Court held:

> "Sutton argues that the second clause of c. 30, § 390, should be read to provide an adjustment in the contract price for increased cost of performance any time there is a suspension, delay, or interruption for fifteen days or more, regardless of whether it was ordered or caused by the awarding authority or caused by a third party. As we have said in Reynolds Bros. v. Commonwealth, ante, (1992), the second clause only takes effect when the first clause is satisfied by the awarding authority ordering the contractor in writing to suspend, delay, or interrupt the work. The Department issued no written order in this case. Thus, c. 30, § 390, does not provide any relief to the plaintiff.
>
> Sutton's claim is precluded by the § 8.05 "no damages for delay" provision in the contract. As we said in Reynolds Bros. v. Commonwealth, supra at, § 8.05 specifically precludes damages for delays in the commencement or performance of work, unless the Mass. Highway Commission (Commission) in its discretion determines that an adjustment should be made for an unreasonable delay caused either by an action of the department in administering the contract or by the department's failure to act as required in the contract. Here, as in Reynolds Bros. v. Commonwealth, supra, it is clear that the commission did not make the requisite determination. Therefore, the exception does not apply, and the claim based on delay is precluded."

FINDINGS:

In the present matter, the Contractor did receive a written stop work order which triggered the statute M.G.L. c. 30 § 39(O) and is entitled to his delay damages.

I find that the $12,000.00 is reasonable (the district agrees with this finding - Exhibit #6).

RECOMMENDATION:

R. C. Griffin, Inc.'s claim on Contract #93076 for delay damages in the amount of $12,000.00 should be approved.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: October 16, 1996

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR:	**Kodiak Corporation**
CONTRACT:	**#94241**
CITY/TOWN:	**Lawrence**
CLAIM:	**Appeal of delay damages totaling $73,865.00**

Please place this report and recommendation on the Docket Agenda WEDNESDAY, OCTOBER 23, 1996, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/is
Attachment
cc: Commissioner Sullivan
Dep. Comm. Kostros
Assoc. Comm. Eidelman
Chief Engineer Broderick
Constr. Engr. McCabe
Area Constr. Engr. Eddlem
Secretary's Office

Frank Garvey, Fiscal Mgmt.
Cosmo Fedele, Finals
Chief Counsel's Office

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this report and recommendation was sent by ordinary mail to Kodiak Corporation, 200 Main Street, P.O. Box 1125, Salem, N.H. 03079, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of WEDNESDAY, OCTOBER 23, 1996, at 9:30 A.M., 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The Kodiak Corporation (the Contractor), aggrieved by the Massachusetts Highway Department's (the Department) failure to pay a delay claim on Contract #94241, Lawrence, in the amount of $73,865.00, appealed to the Board of Contract Appeals.

Contract #94241 (the Contract) consisted of a bridge reconstruction and related work for the South Union Street Bridge over the MBTA, Bridge No. L-4-22.

The work done under this Contract consisted of reconstructing the existing bridge structure carrying South Union Street over the Boston and Maine Railroad (Guilford Transportation Industries) right of way, along with the reconstruction of the roadway approaches in the City of Lawrence.

The bridge work included removing the superstructure, the concrete pier, and a portion of the abutments of the existing bridge; constructing new abutments, wingwalls and a new superstructure; providing and installing bridge protective screening; and other related bridge work.

Also included in the work was excavation, grading, and borrow, reconstructing approaches and repaving with bituminous concrete; furnishing and installing guardrail, granite curbing and edging; constructing concrete sidewalks and bituminous concrete sidewalks and driveways; constructing metal-bin type and fieldstone masonry walls; applying traffic lines and markings; and other appurtenances and incidental items as set forth in the proposal and required to complete the work.

All work done under this contract had to conform with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM

TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the PLANS and these SPECIAL PROVISIONS.

The Contract date of award was April 26, 1994, Item #2. The Contract was dated May 5, 1994. The original completion date was July 29, 1995. The Contractor's bid price was $2,449,075.80.

A hearing was held on October 3, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Deputy Chief Counsel
Eric Botterman	Deputy Chief Engineer, Construction
William Barr	Kodiak Corp.
James Martin	Kodiak corp.

Entered as Exhibits were:

Exhibit #1 . . . Contract No. 94241
Exhibit #2 . . . Statement of Claim

Facts and Issues of Law Presented:

The testimony of William Barr states the factual issues of this hearing. Mr. Barr states under oath:

> "We bid the job on October 1993 and the job was delayed in being awarded until the summer of 1994 and we were about to start the project. In October 1994 we received direction from Commissioner Kevin Sullivan to not close the road, leave it open to traffic due to the fact that the job was most likely going to take two (2) years to complete and he wanted to complete it in a less period of time. In October of 1994 we stopped work, left the job opened to traffic, devised an accelerated plan to complete the project with the bridge actually closed for eight (8) months."

Mr. Barr further testified:

> "The bridge was closed to traffic for eight months between the demolition and the completion of the new job and then reopened. It was closed from March 15 through November 15, 1995. Part of that project we had when we were shut down in October and we didn't start work again until March 15th and we had no other work due to bonding capacity. This job had been on our books from October 1993. We were ready to

start as soon as the Mass Highway was awarded to us. So we were unable to bid any other work. We anticipated starting this job in late summer of 1994 when we were shutdown. Therefore, October, November, December, January, February and part of March, we had no work that we could either bid and successfully complete knowing we had to do this job we had to gear up for. So those months there, our overhead costs we feel as though we should be reimbursed by MHD."

Both Mr. Barr and Accountant James Martin testified that the cost to carry this job during the months of October, November and December of 1994 and January, February and part of March 1995 was $73,865.00.

Mr. Barr Testified:

"Yes we have a total cost of $73,865.00 which runs from part of October 1994 and through part of March of 1995. I can read off the total cost for the different items:

Burden	$ 9,863.65
Depreciation	1,477.98
Dues and subscriptions	625.00
Legal and audit fees	13,218.55
License and fees	230.84
Group Insurance	5,161.88
Office expenses and supplies	4,579.92
Office and garage rent	9,747.23
Office salaries	7,870.97
Officer salary	14,192.34
Repairs and maintenance	2,887.85
Telephone	4,489.34
Annual reports	100.00
Utilities	239.45

We have a reduction for estimated weather delay of $820.00. Giving us a total cost of $73,865.00."

Deputy Chief Engineer Eric Botterman testified on behalf of the Department.

Mr. Botterman stated:

"There's no doubt that what Mr. Barr said is accurate. When I was in the District, and I want to say it was September of 1994 or maybe early October. We met with Mr. Barr and the City of Lawrence and some of the abutters and what not and they expressed their concerns that the bridge was going to be shut down for two (2) years at which time at the end of that meeting we requested that Kodiak

> Corporation submit a price to accelerate the job. I think we asked them to look at a couple of windows, 6 months, 9 months or 12 months, on shutting down the bridge, something on that order. So there's no doubt that what Mr. Barr says is accurate that we asked him to stop work and only to close the bridge down for a period of time. I wasn't present at the last few days in October 1994, I can't speak to whether the Commissioner actually instructed them to stop work, but there's no doubt that that was the intention of the Highway Department because they had them stop work."

I have discussed with the Board of Contract Appeals the intricacies of a delay claim and the laws and cases governing delay in this state. However, I feel it necessary to rehash these matters at this time.

All MHD construction contracts fully incorporate by reference the Standard Specifications for Highways and Bridges (Standard Specifications or Blue Book). Subsections 5.05 and 8.10 of the Blue Book contain express references to utility delay. Subsection 8.05 contains a general "no damages for delay" clause. These three provisions provide in relevant part:

Subsection 5.05 of the Standard Specifications:

> The Contractor shall so carry on his work under the direction of the Engineer that Public Service Corporation, or Municipal Departments may enter on the work to make changes in their structures or to place new structures and connections therewith without interference, and the Contractor shall have no claim for, or on account of any delay which may be due to or result from said work of Public Service Corporations or Municipal Department. No allowance of any kind will be made except as provided in Subsection 8.10. (emphasis added)

Subsections 8.10 D. and 8.10 E. of the Standard Specifications:

> D. When delay occurs due to reasonable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to "Acts of God," to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing, acts of the Government,acts of the State or any political subdivision thereof, acts of other contracting parties over whose acts the Contractor has no control, fires, floods,epidemics, abnormal tides (not including Spring tides), severe

coastal storms accompanied by high winds or abnormal tides, freezing of streams and harbors, abnormal time of Winter, freezing or Spring thawing, interference from recreational boat traffic, use of beaches and recreational facilities for recreational purposes during the summer season, abnormal ship docking and berthing, unanticipated use of wharves and storage sheds, strikes except those caused by improper acts or omissions of the Contractor, extraordinary delays in delivery of materials caused by strikes, lockouts, wrecks, freight embargoes, the time for completion of work shall be extended in whatever amount is determined by the Engineer to be equitable. (emphasis added)

E. In case the work is delayed by Public Service Corporations or Municipal Corporations see Subsection 5.05. (emphasis added)

Subsection 8.05 of the Standard Specifications:

The Contractor hereby agrees that he shall have no claim for damages of any kind on account of any delay in commencement of the work or any delay or suspension of any portion thereof, except as hereinafter provided. (emphasis added)

Provided, however, that if the Commission in their judgment shall determine that the performance of all or any major portion of the work is suspended, delayed, or interrupted for an unreasonable period of time by an act of the Department in the administration of the Contract, or by the Department's failure to act as required by the Contract within the time specified in the Contract (or if no time is specified, within a reasonable time), and without the fault or negligence of the Contractor, an adjustment shall be made by the Department for any increase in the actual cost of performance of the Contract (excluding profit and overhead) necessarily caused by the period of such suspension, delay, or interruption. No adjustment shall be made if the performance by the Contractor would have been prevented by the other causes even if the work had not been so suspended, delayed, of interrupted by the Department.

No claim shall be allowed under this Subsection for the Department's failure to act as required by the Contract within the time specified in the Contract (or if no time is specified, within a reasonable time) for any cost incurred more than two weeks before the Contractor shall have notified the Department in writing of his claim due to the Department's failure to act. The Contractor shall submit in writing not later than 30 days after the termination of such suspension delay or interruption the amount of the claim and breakdown of how the amount was

> computed in accordance with Subsection 9.03B except no allowance for overhead and profit shall be allowed.
>
> Any dispute concerning whether the delay or suspension is unreasonable or any other question of fact arising under this paragraph shall be determined by the Commission, and such determination and decision, in case any question shall arise, shall be a condition precedent to the right of the Contractor to receive any money hereunder.
>
> The Contractor further agrees that the sole allowance for any such delay or suspension, other than as provided above, is an extension of time as provided in Subsection 8.10. (emphasis added)

By statutory insertion, all MHD construction contracts also provide:

> Paragraphs (A) and (b) of M.G.L. c. 30 § (O) (required in every contract subject to the provisions of c. 30 § 39M or c. 149 § 44A):
>
> (a) The awarding authority may order the general contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the awarding authority; provided however, that if there is suspension, delay, or interruption for fifteen days or more or due to a failure of the awarding authority to act within the time specified in this contract, the awarding authority shall make an adjustment in the contract price for any increase in the cost of performance of this contract but shall not include any profit to the general contractor on such increase; and provided further, that the awarding authority shall not make any adjustment in the contract price under this provision for any suspension, delay, or interruption or failure to act to the extent that such is due to any cause for which this contract provides for an equitable adjustment of the contract price under any other contract provisions. (emphasis added)
>
> (b) The general contractor must submit the amount of a claim under provision (a) to the awarding authority in writing as soon as practicable after the end of the suspension, delay, or interruption or failure to act and, in any event, not later than the date of final payment under this contract and, except for costs due to a suspension order, the awarding authority shall not approve any costs in the claim incurred more than twenty days before the general contractor notified the awarding authority in writing of the act or failure to act involved in the claim.

In Massachusetts, a "no damages for delay" provision in a public contract is valid and enforceable. City of Worcester v. Granger Bros., Inc., 19 Mass. App. 379, 474 N.E. 2d 1151, 1157 (1985) citing Wes Julian Constr. Corp. v. Commonwealth, 351 Mass. 588, 595, 223 N.E. 2d 72 (1967), where the court stated:

> "These provisions of the contract exculpate the (Commonwealth) from any liability it would otherwise have for delays which it caused, even if its actions were 'negligent, unreasonable or due to indecision,' quoting Charles I. Hosmer, Inc. v. Commonwealth, 302 Mass. 495, 503, 19 N.E. 2nd 800, 805 (1939); citing in accord: Coleman Bros. Corp. v. Commonwealth, 307 Mass. 205, 261, 29 N.E. 2nd 832 (1940); Chas. T. Main, Inc. v. Massachusetts Turnpike Authority, 347 Mass. 154, 162, 163, 196 N.E. 2nd 821 (1964)."

The Wes Julian court stated further that:

> "(e)ven if we assume...that the conduct of the Commonwealth was 'arbitrary and capricious,' the (contractor) is not entitled to recover damages for delays caused by the (Commonwealth) in view of specific provisions of the contract regarding delay.
>
> Wes Julian, supra, at 72 (N.E. 2d).

So firm have been our courts in applying "no damages for delay" clauses that Massachusetts cases, particularly Wes Julian are cited in the legal literature to illustrate the strictest of the various positions taken by different courts. (See, for example, 74 ALR 3rd 239: "In one jurisdiction a "no damage" clause has been held to relieve the contractee from liability for delay even though the delay was caused by its conduct which was arbitrary, willful, and capricious.") (Emphasis added).

Only where "the Commonwealth in effect (had) used the delay provisions to whipsaw the contractor, "Farina Bros. Co. v.

Commonwealth, 257 N.E. 2d 450, 455 (1970) or where the Commonwealth had violated an express condition of site availability which was the "essence" of an extra work agreement, State Line Contractors, Inc. v. Commonwealth, 249 N.E. 2nd 619, 624 (1969) did the Contractor overcome a "no damages for delay" provision.[1](Emphasis added).

But where "the Commonwealth assented to extension in (the Contractor's) date of completion and agreed to its shutting down the job in the interest of better coordination" the exculpatory provision was applied even though (the Contractor) was doubtless discommoded and caused significant expense by inadequate job coordination." Joseph E. Bennett Co., Inc. v. Commonwealth, 486 N.E. 2nd 1454, 1150 (1985).[22]

Thus, Subsection 5.05 operates to exculpate the Department from any liability it might otherwise have for utility delays provided the MHD has not "whipsawed" the Contractor by refusing a time extension or violated an essential express condition of the contract.[3]

Two recently decided SJC decisions have clarified the issue of no claim for delay. They are Reynolds Bros., Inc. et al v.

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[1] In Farina the Department refused to grant an extension of time promptly; thus the Court dealt with "damages caused the Contractor by the failure to grant seasonable extensions for performance made necessary by delay and failure of the Commonwealth to assist the contractor properly in rescheduling the work: rather than "damages caused by delay itself." Farina, supra, at 456 (N.E. 2d). In State Line, the Contractor was "induced" to enter into an extra work agreement by the Department's assurance that it could work simultaneously on adjacent sites. State Line, supra, at 624 (N.E. 2d).

[2] In Bennett, certain amounts were paid to (the Contractor) to compensate it for expenses incident to delay and poor job coordination (between Contractors), but apparently, the amounts paid did not cover the "significant expense" incurred as a result of the delay.

[3] All of the cases discussed above including Bennett dealt with contracts executed before the enactment of c. 30 §39(O).

Commonwealth of Massachusetts, 412 Mass. 1 and Sutton Corporation v. Commonwealth of Massachusetts, 412 Mass. 1003. Reynolds Bros. dealt with a job at downtown crossings. Reynolds contended that he was delayed by the Department and was hindered and interfered with in the performance of its work by the Department. Sutton involved a bridge reconstruction in Danvers where the telephone company delayed relocating its lines over the bridge after numerous requests by the Department and the Contractor to move them.

The Court in the Reynolds case states:

> "General Laws c. 30, § 390 (a), (supra) is far from a model of clarity. However, it appears that the second clause, beginning with the words, 'provided however,' was intended by the Legislature to modify or qualify the first clause, that is, the function of the second clause is to lessen the scope, impact, or severity of the first clause. That construction would be consistent with the meaning ordinarily given to the term 'provided'. See Black's Law Dictionary 1224 (6th ed. 1990). Thus, we read the second clause to mean that the contractor will be entitled to a price adjustment only when the awarding authority, here the Department, exercises its statutory right to order the contractor in writing to delay its performance, and there is either (1) a delay of fifteen or more days resulting from that order or (2) following such a written order, the authority fails to take action within a specified time as required by the contract which results in a delay of any length. Here, there was no written order as called for in the first clause of c. 30, § 390. The result is that the second clause, on which Reynolds relies, was not triggered."

The Reynolds case goes on to state:

> "Afforded no relief by G.L. c. 30, § 390, Reynolds's claims are precluded by the 'no damages for delay' provision of the contract. Section 8.05 specifically precludes damages for delays 'in commencement of the work or any delay or suspension of any portion thereof, except...that if the Commission in (its) judgment shall determine that the performance of all or any major portion of the work is suspended, delayed, or interrupted for an unreasonable time by an act of the Department in the administration of the Contract, or by the Department's failure to act as

> required by the Contract...an adjustment shall be made.' Here, since it is clear that the commission did not make the requisite determination, the exception does not apply, and the claims based on delay are precluded. We reject the argument that, because Reynolds does not assert 'delay' as much as it claims 'hindrances' and 'interferences' with the orderly performance of its work resulting in a loss of productivity, the no damages for delay provision is inapplicable. Hindrances and interferences, Reynolds contends, are not covered by § 8.05. We are satisfied that there is no significant distinction between the hindrances and interferences to which Reynolds points and the alleged delay in the start of the project and delays caused by the work of other contractors, which are precluded by the no damages for delay provision."

In the Sutton case, decided the same day as the Reynolds case, the Court held:

> "Sutton argues that the second clause of c. 30, § 390, should be read to provide an adjustment in the contract price for increased cost of performance any time there is a suspension, delay, or interruption for fifteen days or more, regardless of whether it was ordered or caused by the awarding authority or caused by a third party. As we have said in Reynolds Bros. v. Commonwealth, ante, (1992), the second clause only takes effect when the first clause is satisfied by the awarding authority ordering the contractor in writing to suspend, delay, or interrupt the work. The Department issued no written order in this case. Thus, c. 30, § 390, does not provide any relief to the plaintiff.
>
> Sutton's claim is precluded by the § 8.05 "no damages for delay" provision in the contract. As we said in Reynolds Bros. v. Commonwealth, supra at, § 8.05 specifically precludes damages for delays in the commencement or performance of work, unless the Mass. Highway Commission (Commission) in its discretion determines that an adjustment should be made for an unreasonable delay caused either by an action of the department in administering the contract or by the department's failure to act as required in the contract. Here, as in Reynolds Bros. v. Commonwealth, supra, it is clear that the commission did not make the requisite determination. Therefore, the exception does not apply, and the claim based on delay is precluded."

In the present matter there was no written stop work order. Consequently, it invokes the "no damages for delay clauses" of our contracts. In order for the Board of Contract Appeals to honor the

verbal actions of the district in this matter they have to invoke the provisions of subsection 8.05 of the Standard Specifications.

Consequently, I will make no findings at this time but rather submit my recommendation.

RECOMMENDATION

It is respectfully recommended that the Board of Contract Appeals invoke the provisions of subsection 9.05 of the Standard Specification as it relates to the Kodiak Corp's delay claim on Contract No. 94241 and award it delay damages in the amount of $73,865.00.

Respectfully submitted

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: April 2, 1997

RE: Board of Contract Appeals
(PFN-141061)

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **SPS New England, Inc.**
CONTRACT #: **94430**
CITY/TOWN: **Wilmington**
CLAIM: **Delay damages in the amount of $71,797.78.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, APRIL 9, 1997**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro

Assoc. Comm. Botterman
Assoc. Comm. Broz
Assoc. Comm. Blundo
Chief Eng. Broderick
D.Anderson, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
E.Botterman, DHD, District #4
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

SPS New England, Inc.
98 Elm Street
Salisbury, MA 01952

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **SPS NEW ENGLAND, INC.**, 98 Elm Street, Salisbury, MA 01952, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, APRIL 9, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

SPS New England, Inc. (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) failure to pay a delay claim of $71,797.78 on Contract No. 94430, appealed to the Board of Contract Appeals.

Contract #94430 (the Contract) was for the rehabilitation of Bridge No. W-38-50 West Street over Route I-93 in Wilmington.

The work done under this contract included full depth reconstruction 150 feet on each side of the bridge; coldplaning and resurfacing to the project limits; installing type - SS guardrail; and modified eccentric loader breakaway cable terminals; constructing temporary bituminous concrete pavement; erecting signs; laying pavement markings; placing precast concrete barrier; installing a temporary signal system and other traffic control devices during phase construction.

The bridge work included:

1. Replacing poured joint sealer with armored joints and neoprene strip seals.
2. Repairing pier caps and columns.
3. Replacing deck of structure.
4. Removing existing bridge curbing and replacing with new curbing.
5. Installing protective shielding under work areas and attaching utilities from structure to it. Also included were reattaching utilities to epaired structure.
6. Removing steel beams from all spans and replacing with new continuous beams of weathering steel.

All work done under this contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, THE PLANS and the SPECIAL PROVISIONS.

The Contract was awarded June 10, 1994, Item #82. The Contract was dated August 24, 1994. The original completion date was September

20, 1995. The Contract award price was $1,976,300.50.

A hearing was held on March 27, 1997. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Deputy Chief Counsel
Dale Lutz	Audit Operations
Ralph La Cambria	Resident Engineer
Ken Ravioli	Asst. District Construction Eng.
Tim McLaughlin	SPS New England
Robert Rymsha	SPS New England
Wayne Capolupo	SPS New England

Entered as Exhibits were:

Exhibit #1.....	Contract #94430
Exhibit #2.....	Statement of Claim
Exhibit #3.....	Speed Memo dated 4/3/95 from Ken Ravioli to Contractor
Exhibit #4.....	Speed Memo dated 4/26/95

FACTS AND GENERAL DISCUSSIONS OF LAW:

After excavating the concrete deck on Bridge No. W-38-50 under Phase I, it was determined that the armored joints would be three inches too narrow, so a speed memo (Exhibit #3) was sent to the Contractor to refabricate half of the armor joints to make up for the deficiency in width which was discovered when the Contractor opened the bridge deck. The Contractor alleges that this speed memo constituted a written stop work order. On April 26, 1995 a second speed memo (Exhibit #4) was sent to the Contractor leaving the fabrication of the armor joints as they were originally proposed - creating a possible delay of approximately 21 days.

M.G.L. c. 30 § 39(O) states:

> **Contracts for construction and materials, suspension, delay or interruption due to order of awarding authority; adjustment in contract price: written claim**
>
> Every contract subject to the provisions of section thirty-nine M of this chapter or subject to section forty-four A of chapter one hundred forty-nine shall contain the following provisions (a) and (b) in their entirety and, in the event a suspension, delay, interruption or failure to act of the awarding authority increases the cost of performance to any subcontractor,

> that subcontractor shall have the same rights against the general contractor for payment for an increase in the cost of his performance as provisions (a) and (b) give the general contractor against the awarding authority, but nothing in provisions (a) and (b) shall in any way change, modify or alter any other rights which the general contractor or the subcontractor may have against each other.
>
> (a) The awarding authority may order the general contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the awarding authority; provided however, that if there is a suspension, delay or interruption for fifteen days or more or due to a failure of the awarding authority to act within the time specified in this contract, the awarding authority shall make an adjustment in the contract price for any increase in
> the cost of performance of this contract but shall not include any profit to the general contractor on such increase; and provided further, that the awarding authority shall not make any adjustment in the contract price under this provision for any suspension, delay, interruption or failure to act to the extent that such is due to any cause for which this contract provides for an equitable adjustment of the contract price under any other contract provisions (emphasis added).
>
> (b) The general contractor must submit the amount of a claim under provision (a) to the awarding authority in writing as soon as practicable after the end of the suspension, delay, interruption or failure to act and, in any event, not later than the date of final payment under this contract and, except for costs due to a suspension order, the awarding authority shall not approve any costs in the claim incurred more than twenty days before the general contractor notified the awarding authority in writing of the act or failure to act involved in the claim.

FINDINGS:

In the present matter, I find that the Contractor did receive a written stop work order which triggered the statute M.G.L. c. 30 § 39 (O) and is entitled to his delay damages.

I find that the length of the delay was 21 days.

I find that the amount of damages which was agreed to by the MassHighway's Deputy Chief Counsel and the Contractor at the hearing was $39,000.00 and that this amount is fair and reasonable.

RECOMMENDATION:

SPS New England's claim on Contract #94430 for delay damages in the amount of $71,797.78 should be approved in the lesser amount of $39,000.00.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTRODUCTION:

Bardon Trimount, Inc. (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) denial of a claim filed on behalf of its approved subcontractor, Garrity Asphalt Reclaiming, Inc. (the Subcontractor) for delay in its cold planing operation between May 17, 1998 through May 21, 1998, a period of five days, in the amount of $21,842.92, appealed to the Board of Contract Appeals.

The work done on this Contract was for the resurfacing and related work on a section of Route 3 in Braintree, Quincy and Weymouth.

Contract #98035 was awarded July 2, 1997, Item #12. It was dated July 9, 1997. The original completion date was September 10, 1998. The Contract bid price was $5,571,246.35.

A hearing was held on February 23, 1999. Present representing the parties at the hearing were:

Peter Milano	Chief Administrative Law Judge
Isaac Machado	Counsel - MHD
Tom Manning	MHD - District #4
Greg MacKenzie	Bardon Trimount
Rick Barbour	Garrity Asphalt

Entered as Exhibits were:

Exhibit #1 …….. Contract #98053
Exhibit #2 …….. Statement of Claim

The Contractor was given thirty (30) days to submit a brief supporting its position. As of this writing no brief has been submitted.

FACTS AND ISSUES PRESENTED:

The Contractor was notified by MassHighway on Wednesday, May 13, 1998 that its cold planing operation would not be allowed for one (1) week starting Sunday, May 17, 1998 through May 21, 1998. The Contract specified that work on the project could only be conducted Sunday through Thursday night.

The milled surface conducted by the subcontractor had gotten two (2) miles ahead of the paving operation. What the cold planer could do in one (1) night would take tow (2) nights of paving.

MassHighway was receiving numerous complaints from the public that windshields were being broken through pebbles being kicked up on the milled surface.

The district cited Section 7.09 of the Standard Specifications as justification for the shut down. Section 7.09 Public Safety and Convenience states in part:

> The Contractor shall at all times, until written acceptance of the physical work by the Chief Engineer, be responsible for the protection of the work and shall take all precautions for preventing injuries to persons or damage to property on or about the project.

The subcontractor claims this constituted a changed condition pursuant to Section 4.04. No evidence of a changed condition was offered at the hearing and no post hearing submission was submitted.

The shutdown was for five (5) days so that M.G.L. c. 30 § 39 (o), which deals with suspension of work by the awarding authority does not apply. M.G.L. c. 30 § 39 (o) does not apply because the delay has to be more than fifteen (15) days. Thus, we look to the Contract for any interpretation of the awarding authority's rights to suspend or delay the project.

The Standard Specifications at Section 8.09 Delay and Suspension of Work states:

> The Engineer shall have the authority to delay the commencement of the work and delay or suspend any portions thereof; for such period or periods as he may deem necessary because of conditions beyond the control of the Commonwealth, or the Contractor; or beyond the control of the Commonwealth and the Contractor; for the failure of the Contractor to correct conditions unsafe for the general public; for failure to carry out provisions of the Contract; for failure to carry out orders; for causes and conditions considered unsuitable for the prosecution of the work; for acts of third persons not a party to the Contract; or for any other cause, condition, or reason deemed to be in the public interest (emphasis added).
>
> Upon receipt of written order of the Engineer, the Contractor shall immediately delay the commencement of the work or delay or suspend any portion thereof in accordance with said order. No work shall be suspended or delayed without the prior written approval or order of the Engineer. The work shall be resumed when conditions so warrant or deficiencies have been corrected and the conditions of the Contract satisfied as ordered or approved in writing by the Engineer. The Contractor's attention is also directed to the requirements of Sub-sections 7.09 and 7.18 which shall govern during any period of temporary or partial suspension of work.

Furthermore, Section 8.05 of Standard Specifications, Claim for Delay or Suspension of the Work, states in part:

> The Contractor hereby agrees that he shall have no claim for damages of any kind on account of any delay in commencement of the work or any delay or suspension of any portion thereof, except as hereinafter provided.
>
> Provided, however, that if the Commission in their judgment shall determine that the performance of all or any major portion of the work is suspended, delayed, or interrupted for an unreasonable period of time by an act of the Department in the administration of the Contract, or by the Department's failure to act as required by the Contract within the time specified in the Contract (or if no time is specified, within a reasonable time) and without the fault or negligence of the Contractor, an adjustment shall be made by the Department for any increase in the actual cost of performance of the Contract (excluding profit and overhead) necessarily caused by the period of such suspension, delay or interruption. No adjustment shall be made if the performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted by the department (emphasis added).

The Supreme Judicial Court states in Cardin v. Royal Insurance Co. of America 394 Mass. 450 (1985) that courts will construe the terms … (of a contract) according to their ordinary meanings. Under the Cardin case and other cases cited therein, my Findings are as follows:

1) I find there was no changed condition.
2) I find that MassHighway has the authority to suspend or delay a project.
3) I find that in the present matter that suspension of the cold planing operation for a period of five (5) days is not unreasonable.

RECOMMENDATION:

The claim of Bardon Trimount, Inc. on behalf of its approved subcontractor, Garrity Asphalt Reclaiming, Inc., for cost associated with MassHighway suspension of the cold planing operation between May 17 and May 21, 1998 in the amount of $21,842.92 should be denied.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

APPENDIX C-1

DECISIONS/RULINGS

Claims re: Differing Site Conditions

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: August 11, 1994

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **Hartford Roofing Co., Inc.**
CONTRACT #: **93214**
CITY/TOWN: **Northborough/Sturbridge**
CLAIM: **Department's failure to pay a claim for a changed condition in the amount of $32,290.00.**

- -

Please place this report and recommendation on the Docket Agenda WEDNESDAY, AUGUST 17, 1994, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Bedingfield
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Church
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis
Chief Engineer Dindio
Ned Corcoran, Ch. Counsel
J.Superneau,Dep.Ch.Eng.,Hwy.Oper.
Secretary's Office
P. Donohue,DHD, Dist.3
Cosmo Fedele,Fin.Rev.Eng.
Frank Garvey,Fisc.Mgmt.
Warren G. Miller, Esq.
15 Court Square
Boston, MA 02108

Hartford Roofing Co., Inc.
12 Mill Street
Bellingham, MA 02019

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **WARREN G. MILLER, ESQ.**, 15 Court Square, Boston, MA 02108, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, AUGUST 17, 1994** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

Hartford Roofing Co., Inc. (the Contractor) aggrieved by the Department's failure to pay a claim for an alleged changed condition in the amount of $32,290.00 on Contract #93214, appealed to the Board of Contract Appeals.

Contract #93214 (the Contract) was awarded on November 10, 1992, Item #9. The Contract was dated November 20, 1992. The original completion date was March 2, 1993. The contract award price was $102,630.00.

Contract #93214 was for the removal and replacement systems at M.H.D. Maintenance Depots in Northborough and Sturbridge.

The work to be performed under this contract consisted of furnishing all labor, materials and equipment necessary to construct a roofing system as specified in the Contract. The Contractor was to remove the existing 4 ply T & G roof down to the light weight concrete deck. Inspect and repair or replace the light weight concrete areas needed. Install a new waterproof roof over a ½" rigid insolation and vapor barrier; remove and replace all flashing, remove and replace deteriorated corrugated steel decking as needed and repair any existing visual deformations.

All work done under this contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, THE PLANS and SPECIAL PROVISIONS.

The work described in the Contract was to be done at the existing Sturbridge Maintenance Depot, at the junction of Route 20 and Route 131 and the Northborough Maintenance Depot, at the junction of Route 20 and Route 9.

A hearing was held on June 16, 1994. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Assistant Chief Counsel
James Murray	MHD - District #3
Thomas Fuller	MHD - District #3
Warren Miller	Attorney for Hartford Roofing
William Lutz	Hartford Roofing
Ronald Simon	Hartford Roofing
Robert J. Feeley	Hartford Roofing

Entered as exhibits were:

Exhibit #1.....	Contract #93214
Exhibit #2.....	Statement of Claim
Exhibit #3.....	Letter dated March 9, 1994 to Commissioner Bedingfield from Hartford Roofing

Proposed findings of facts and rulings of law were submitted after the hearing by the attorney for the Contractor. Also submitted by the Contractor, was an Affidavit of Edward Boisselle, a Senior Field Advisor employed by Tremco (see Attachment I).

FACTS, ISSUES AND GENERAL DISCUSSIONS OF LAW:

The existing roofing system at the Sturbridge depot consisted of a lightweight concrete roof deck over a corrugated metal deck. There was a gravel surfaced built-up roofing system above the lightweight concrete deck. The existing roofing system at Northborough consisted of a structural concrete roof deck covered by a lightweight concrete fill and a built-up, gravel-surfaced roofing system.

The Specifications generally described the Scope of Work to include removal of the tar and gravel roof "down to the lightweight concrete deck" and required the contractor to "inspect and repair or replace the lightweight concrete areas needed" and then install a new built-up roof using materials manufactured by Tremco. The Department denied this claim based on the phrase repair or replace...as needed. The detailed Roof Replacement section of the

specifications provided under Scope of Work (§1.02) for localized deck reattachment/repair/replacement. The specification (§2.03) called for the use of Set - 45 for concrete deck repairs. This product "sets-up" in 45 minutes and is suitable only for small area repair.

Tremco, a division of B.F. Goodrich Co., acted as a consultant to the Department in promulgating the specifications for the Project. Prior to the invitation for bids, Tremco representatives made test-cores at each roof. They disclosed that the lightweight concrete deck at each location was sound in the area of the cores. Because there was a small area of rust on the underside of the metal roof deck at Sturbridge, Tremco advised the Department to include a unit price for any areas of lightweight concrete deck which may require repair. The Department rejected this suggestion and instead included those provisions previously mentioned. Tremco anticipated that only small areas of each roof deck would require replacement (see Affidavit of Edward Boisselle).

The Contractor visited both sites prior to its bid and made a cut through the built-up roofing to the lightweight concrete deck at each location. The deck appeared to be sound in each of the areas the Contractor tested. The Department postponed the originally scheduled commencement date of December 1992 to the spring of 1993. As a result, the roofs were subjected to the winter weather of 1992-1993.

In the spring of 1993 the Contractor commenced work at Sturbridge. When the Contractor removed the first area of built-up roofing material in preparation for replacement, its foreman observed that extensive areas of the lightweight concrete deck were seriously deteriorated and unsuitable as a subsurface for the specified new roofing system. Although the Contractor had included a contingency in its bid for repairing/replacing an estimated 5% of the roof area, it was apparent that the areas of deck requiring repair or replacement were far more extensive than that. The Contractor

immediately stopped work and notified Tremco who was acting as the Department's consultant and inspector for the Project.

Tremco representatives promptly visited the sites and made a large number of test cuts at both locations. They concluded that the Sturbridge deck could not be repaired but had to be entirely removed. Tremco recommended an alternative roofing system which required removal of the entire lightweight concrete deck down to the structural metal deck, the installation of two layers of rigid roof insulation and the installation of the originally specified built-up roofing system above the insulation. The Contractor performed this remedial work at Sturbridge under the supervision of Tremco. The Contractor did so after clearly advising the Department in writing of its intention to seek extra compensation for this work.

Similar deterioration of the lightweight concrete deck was discovered at Northborough. That deck, however, was susceptible of repair. Tremco advised the Contractor to remove the deteriorated sections of the lightweight concrete deck at Northborough and replace them with a lightweight gypsum concrete, not the Set - 45, which had been specified for the anticipated areas of minor repair. Approximately 50% of the Northborough roof deck was removed and replaced by the Contractor.

The specifications for the Project did not require the Contractor to remove and replace the entire lightweight concrete roof deck at Sturbridge or one-half of the area of the deck at Northborough. A proper interpretation of the specifications is that the contractor should include in his bid a contingency for a minor amount of possible deck repair as might be required based on a pre-bid visual inspection of the sites. The additional work required on these projects far exceeded any scope of work which a prudent contractor could possibly have anticipated without removing large areas of existing roofing. It was entirely impracticable for the Contractor, or any other bidder, to do that prior to bid.

The reference in the specifications to "localized" repair and

replacement and the specification of Set - 45 as the repair material fortifies the above interpretation as well as the affidavit of Edward Boisselle.

M.G.L. Chapter 30 § 39N is applicable to all projects bid pursuant to M.G.L. Chapter 149 § 44A-J. § 39N provides that where actual site conditions differ substantially or materially from those shown on the plans or indicated in the contract documents, the contractor may request an equitable adjustment in the contract price. The awarding authority is required to consider such a request in good faith and to make a fair adjustment if the conditions so warrant. See for example, Glynn v. City of Gloucester, 21 Mass. App. Ct. 390 (1986).

Furthermore, subsection 4.04 Changed Conditions provides in part:

> **4.04 Changed Conditions**
>
> In accordance with Chapter 30, Section 39N of the General Laws, as amended, the following paragraph is included in its entirety:
>
> If, during the progress of the work, the Contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the Contractor or the contracting authority may request an equitable adjustment in the contract price of the Contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a Contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions, and (I) if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or (II) a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the Contract shall be modified in writing accordingly (emphasis added).

This section commonly classifies changed conditions as either Type I (latent subsurface conditions) or Type II (a change in the construction methods).

FINDINGS:

I find that the condition of the lightweight concrete roof decks at each location was a Type I changed subsurface or latent physical condition which differed materially from the conditions shown on the plans or indicated in the contract documents. It was as impossible for a bidder to ascertain these conditions prior to bid as it would have been for an excavating contractor to ascertain the existence of subsurface conditions not indicated by borings or other evidence. Even Tremco did not contemplate the extent of deck deterioration which actually existed.

Further, I find the fair and reasonable value of the extra work provided by the Contractor as a result of a Type I changed condition was $29,307.86 (See Attachement II).

RECOMMENDATION:

The Hartford Roofing Company's claim on Contract #93214 for additional cost due to a changed condition should be approved in the lesser amount of $29,307.86.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: May 25, 1995

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **The Middlesex Corp./Hiway Paving, Inc./ Mass. Bituminous Products**
CONTRACT #: **93309**
CITY/TOWN: **Mill Creek - Chelsea/Revere**
CLAIM: **$45,367.79**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, MAY 31, 1995**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Bedingfield
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Church
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis

Chief Eng. Dindio
J. Crescio, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
S. Eidelman, DHD, Distric #4
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

The Middlesex Corp./
Hiway Paving, Inc./
Mass. Bituminous Products
17 Progress Avenue
Chelmsford, MA 01824

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **MIDDLESEX CORP./HIWAY PAVING, INC./MASS. BITUMINOUS PRODUCTS**, 17 Progress Avenue, Chelmsford, MA. 01824, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, MAY 31, 1995** at 10:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The Middlesex Corp./Hiway Paving,Inc./Mass. Bituminous Products (the Contractor) aggrieved by the Department's failure to pay a claim for an alleged changed condition in the amount of $45,367.79 on Contract #93309, appealed to the Board of Contract Appeals.

Contract #93309 (the Contract) was awarded January 6, 1992, Item #2. The Contract was dated January 12, 1993. The original completion date was November 25, 1994. The Contract award price was $5,417,565.00.

Contract #93309 was for the improvement of the drainage of Mill Creek in the Cities of Chelsea and Revere.

The work under this contract consisted of widening Broadway, reconstructing Broadway and the Access Road to Parkway Plaza Shopping Center, widening Mill Creek, and creating a salt marsh.

The work was comprised of excavation, borrow, grading, installation of drainage pipes and structures, bituminous pavements, curbing, fencing, bounds, sidewalks, guardrail, lighting, landscaping, pavment markings, relocation and/or adjustment of existing utilities and sewer systems, and other incidental items of work as listed in the Contract.

This contract also consisted of constructing Bridge No. C-9-16 carrying Ramps "J" and "K" over Mill Creek; Bridge No. C-9-17 carrying Route 16, Northeast Expressway I-95 and Ramp "H" over Mill Creek; Bridge No. C-9-18 carrying Ramps "H" and "G" over Mill Creek; Bridge No. C-9-19 carrying the Access Road to Parkway Plaza Shopping Center over Mill Creek; and Bridge No. C-9-20 carrying Broadway over Mill Creek.

All work done under this contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND

HIGHWAY LIGHTING, THE PLANS and these SPECIAL PROVISIONS.

A hearing was held on February 9, 1995. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Thomas Eddlem	MHD - Construction
John McDonnell	Chief Counsel's Office
David Mullen	Deputy Chief Counsel
David Skerrett	Middlesex Corporation
Tom Mulhall	Middlesex Corporation

Entered as exhibits were:

Exhibit #1.....Contract #93309
Exhibit #2.....Statement of Claim

FACTS, ISSUES AND GENERAL DISCUSSIONS OF LAW:

The claim was originally filed for $48,667.79. The Claims Committee approved $3300.00 which represented only that portion of the work to dispose of the creosote - treated piling, in accordance with environmental regulations.

The claim arose when the Contractor encountered unanticipated obstructions during installation of the excavation support system at the Broadway Bridge site.

In order to excavate for the construction of the footings for the bridge abutments, cofferdams were necessary to provide support and to control water. As steel sheets were driven to form the cofferdams, buried timber wall obstructions were encountered in their path (see attached location plan and copies of pictures). The timbers had to be cut, excavated, removed and disposed of in order to complete each cofferdam. A considerable amount of unanticipated time and extra effort was required to accomplish this. This had a great impact on the rate of production which resulted in additional labor and equipment costs above what would have normally been expected for this work.

There was no way that the timber wall obstructions as found could have been anticipated before this work was started. Timbers were not indicated on the plans or the specifications in the locations where

they were discovered. A pre-bid site inspection at low tide did reveal some piles and cribbing underneath the stone culvert, however this is not near the area where the buried timber walls were encountered. In addition, there were no plans available of the existing culvert or of any prior structures at this location from the MHD or the cities of Chelsea and Revere.

M.G.L. Chapter 30 § 39N is applicable to all projects bid pursuant to M.G.L. Chapter 30 § 39(M). § 39N provides that where actual site conditions differ substantially or materially from those shown on the plans or indicated in the contract documents, the contractor may request an equitable adjustment in the contract price. The awarding authority is required to consider such a request in good faith and to make a fair adjustment if the conditions so warrant. See for example, Glynn v. City of Gloucester, 21 Mass. App. Ct. 390

M.G.L. c. 30 § 39N states:

> **§ 39N. Construction contracts; equitable adjustment in contract price for differing subsurface or latent physical conditions.**
>
> Every contract subject to section forty-four A of chapter one hundred and forty-nine or subject to section thirty-nine M of chapter thirty shall contain the following paragraph in its entirety and an awarding authority may adopt reasonable rules or regulations in conformity with that paragraph concerning the filing, investigation and settlement of such claims:
>
> If during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the contractor or the contracting authority may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a contractor, or upon its own initiative, the

contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the contract shall be modified in writing accordingly.

Furthermore, subsection 4.04 Changed Conditions provides in part:

4.04 Changed Conditions

In accordance with Chapter 30, Section 39N of the General Laws, as amended, the following paragraph is included in its entirety:

If, during the progress of the work, the Contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the Contractor or the contracting authority may request an equitable adjustment in the contract price of the Contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a Contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions. And (I) if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or (II) a change in the construction methods required for the performance of the work which results in

> an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the Contract shall be modified in writing accordingly.

This section and M.G.L. c. 30 § 39(F) commonly classified changed conditions as either Type I (latent subsurface conditions) or Type II (a change in the construction methods).

The Department rejected this claim based on the borings and page 4 of the special provisions which stated:

> **BORINGS (Supplementing Subsection 2.03)**
> The borings as indicated on the plans were taken for the purpose of design of the foundations. They do not necessarily show the actual nature of the material that may be encountered in the excavation. Material encountered in the excavation may include water pipe, gas pipe, electrical conduit and other utility services, and may also include cribbing, piling, masonry and other materials from previous constructions. The Contractor shall make his own investigations to ascertain the presence of the utilities and former constructions. The bid by the Contractor and its acceptance by the Department will be considered as a mutual agreement that the removal and disposal of all materials encountered in excavation, regardless of their nature or size will be considered as included under the general items for excavation; and that there shall be no addition to the Contract unit price for the item if the operation more difficult or more costly than is implied by the preliminary information, and that there shall be no deduction from the contract unit price if the operation is less difficult or less costly than is implied by the preliminary information.

The inclusion of this provision in the Contract would seem to preclude a changed condition (4.04) for any excavation items. However, the Contract can not abrogate the statute M.G.L. c. 30 § 39(N).

During the course of the excavation, the Contractor was pulling the timber piles out by means of a backhoe. These were anticipated by the Contractor and visible prior to bid with a site inspection.

However, obstructions were encountered while installing the earth support system that were not visible even at low tide. These obstructions were found along the common wall of the phase 1/phase 2

interface of the bridge structure. The limit of the obstructions was approximately ten feet east and west of the interface line.

The obstructions were not randomly buried timbers and were identified as an underground timber structure made with heavy timber strongbacks and walls. Removal of the timber required the construction of a temporary support system made with "H" piles and steel plates beyond the phase limits of the cofferdam structure. Excavation of the overburden then took place to expose the timber. The timber was then cut, removed and disposed of. This scenario happened several times in both phases and needed to be scheduled at low tides. The temporary system and subsequent excavation and removal beyond the phase limits required continuous maintenance of the adjacent roadway. This additional work necessitated the need for additional equipment and manpower.

FINDINGS:

I find that the obstructions encountered on this job, although made up of timber piles, necessitated "a change in the construction methods required for the performance of the work" which resulted in an increase in the cost of the work.

I further find that $45,367.79 appears to be reasonable for the additional work required.

RECOMMENDATION:

The claim filed by Middlesex Corp./Hiway Paving, Inc./Mass. Bituminous Products on Contract #93309 for a changed condition in the amount of $45,367.79 was a Type II changed condition and should be approved.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: November 16, 1995

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **Todesca Forte, Inc.**
CONTRACT #: **92476**
CITY/TOWN: **Hanson (Rte. 58)**
CLAIM: **Sweeping roadway prior to paving operations and pavement markings operations.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, NOVEMBER 22, 1995**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Bedingfield
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis

Chief Eng. Dindio
J. Crescio, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
B. McCourt, DHD, District #5
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

Charles Schaub, Esq.
Hinckley, Allen and Snyder
One Financial Center
Boston, MA 02111

Todesca Forte, Inc.
9 Whipple Street
Berkeley, RI 02864

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **TODESCA FORTE, INC.**, 9 Whipple Street, Berkeley, RI 02864, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, NOVEMBER 22, 1995** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

Todesca Forte, Inc. (the Contractor) aggrieved by the Department's failure to pay $10,992.28 for extensive sweeping of the pavement before paving the final course of bituminous concrete on the sidewalks, and applying the fog lines and remaining center lines on the roadway on Contract #92476 (the Contract), appealed to the Board of Contract Appeals.

Contract #92476 was for the reconstruction of a Section of Route 58 in the Town of Hanson.

The work to be done under this contract consisted of the reconstruction of a section of Route 58 in the Town of Hanson. The surface was to be Class I Bituminous Concrete Pavement Type I-1, constructed over a reclaimed base course, composed of in-place pulverizing of the existing bituminous concrete pavement. The proposed roadway was to be 32 feet wide with bituminous concrete berm Type A granite edging or curbing at all major intersections.

Also included in the Contract was the removal of the existing cable guard rail and installation of new steel beam guard rail with wooden posts, removal and installation of signs and the installation of new pavement markings. Traffic control signal installation and/or reconstruction was proposed at the following locations:

- Location 1 was the intersection of Monponsett Street, Indian Head Street (Route 58), and Main Street (Route 27).
- Location 2 was the intersection of Liberty Street (Route 58) and Winter Street.
- Location 3 was the intersection of Liberty Street (Route 58) and County Road (Route 14).

The work under the Contract was paid at the contract unit price bid for each item, which price included the furnishing of all material, labor, and equipment required for the satisfactory completion and acceptance of the work in accordance with the plans, specifications, and special provisions.

All work done under the Contract had to be in conformance with

the Department of Public Works STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, THE PLANS and these SPECIAL PROVISIONS.

The Contract was awarded March 20, 1992, Item #7. The Contract was dated March 30, 1992. The extended completion date was August 12, 1994. The Contract award price totaled $4,193,707.00.

A hearing was held October 17, 1995. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Dean Kalavritinos	Assistant Chief Counsel
Robert Patneaude	Area Construction Engineer, District #5
Bin Lee	Area Construction Engineer - Boston
Angelo Todesca, Jr.	Todesca Forte
Vincent J. DeQuattro	Todesca Forte
Charles Schaub	Attorney - Todesca Forte

Entered as exhibits were:

Exhibit #1.....	Contract #92476
Exhibit #2.....	Statement of Claim
Exhibit #3.....	Letter dated 2/7/95 from Bernard McCourt, DHD to Chief Engineer Attn: Peter Milano
Exhibit #4A,B,C,D & E..	Pictures reflecting the deposits of sand

FACTS AND ISSUES PRESENTED:

This claim is a sweeping claim which the Contractor performed after the winter, but prior to putting the final coat down on the sidewalks. The Contractor had paved the roadway prior to the cessation of operations in the latter part of 1992. However, pavement markings had not been laid down.

Route 58 in the Town of Hanson is a numbered route under Town jurisdiction. Due to heavy deposits of sand resulting from winter snow removal operations (see Exhibit #4) and the anticipated spring

paving and lane striping operations, the Resident Engineer requested the Town Highway Department to sweep the roadway. (Note: Hanson is a salt free town which increased the accumulation of sand after a severe winter). The Town refused. The Contractor was then advised that he would be required to clean the pavement of excessive sand before he would be allowed to continue paving and striping. The District recommended this claim be honored.

As part of the scope of the work to be performed, the Contractor was to sweep/clean the roadway before applying the tack coat.

Standard Specifications Section 460.62 states that,

> **"The existing surface shall be cleaned of all foreign matter and loose material and shall be dry before the tack coat is placed."**

Also, as part of the scope of work, the Contract contained pay items for Reflectorized Pavement Markings, Section 860. Section 860.62 Applications of Markings states in part:

> **"No paint or pavement marking material shall be heated above the temperature marked on the container. Markings shall be applied only in seasonable weather and in accordance with good painting practices. The surface shall be dry and free of sand, grease, oil or other foreign substances prior to the application. The Contractor shall prepare the surface to accept the application as part of this item, with no additional compensation. The Engineer will make the final determination for all of the foregoing (emphasis added)".**

It is clear from the evidence and testimony presented at the hearing that the Contractor knew or should have known that he would have to sweep at least the sidewalk portion of this claim. The sidewalk had to be swept prior to the tack coat consequently $2193.60 was removed from this claim by agreement of counsels at the hearing.

Thus, the only remaining issue is whether or not the Contractor was required to sweep prior to placing the pavement markers.

Subsection 7.17 of the Standard Specifications provides in part:

> **7.17 Traffic Accommodation**
>
> **Any portion of the work which is in an acceptable condition for travel may be opened for traffic as directed in writing by the Engineer, but such opening for traffic shall not be construed as an acceptance of the work or part thereof, nor shall it act as a waiver of any of the provisions of these specifications or of the Contract; provided, however, that 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 as 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 under the provisions of Subsection 4.03 if there are no applicable items in the Contract. Any damage to the highway not attributable to traffic which might occur on such section, shall be repaired by the Contractor at his expense.**

In the present matter, the Contractor finished paving the roadway in the fall and for whatever reasons did not put down the pavement markings. Normally pavement markings would be placed right after the bituminous is laid. Consequently, the roadway surface would be "dry and free of sand". The need of sweeping the surface would not have been present.

Thus, the Contractor actually performed the work, which is not normally encountered in work of this character.

Subsection 4.04 of the Standard Specifications provides in part:

> **4.04 Changed Conditions.**
>
> **In accordance with Chapter 30, Section 39N of the General Laws, as amended, the following paragraph is included in its entirety:**
>
> **If, during the progress of the work, the Contractor or the awarding authority discovers that the actual**

> **subsurface or latent physical conditions encountered at site differ substantially or materially from those shown on the plans or indicated in the contract documents either the Contractor or the contracting authority may request an equitable adjustment in the contract price of the Contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a Contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the Contract shall be modified in writing accordingly (emphasis added).**

A Type II changed condition occurs when there is a "change in the construction methods required...". In the case at hand the Contractor never envisioned the need to sweep the pavement to place his roadway marking. Since the district does support this claim, I can only assume that the reason for not placing the pavement markings was beyond the control of the Contractor.

FINDINGS:

I find that the enormous accumulation of roadway dirt over the winter in the present matter created a Type II changed condition.

I find that Subsection 7.17, in the present matter, placed the responsibility for maintaining roadway on the Party of the First Part (the Department).

RECOMMENDATION:

The claim of Todesca Forte, Inc. on Contract #92476 for sweeping the roadway and sidewalk prior to placing pavement markings and bituminous respectively in the amount of $10,992.28 should be approved in the lesser amount of $8798.58.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: April 19, 1996

RE: Board of Contract Appeals
(PFN-060494)

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **The Middlesex Corporation & Affiliates**
CONTRACT #: **94124**
CITY/TOWN: **Lawrence/Andover**
CLAIM: **Changed condition in the amount of $34,779.42**

- -

Please place this report and recommendation on the Docket Agenda **TUESDAY, APRIL 23, 1996**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Bedingfield
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis

Chief Eng. Broderick
J. Allegro, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
S. Eidelman, DHD, District #4
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

The Middlesex Corp. &
Affiliates
17 Progress Avenue
Chelmsford, MA 01824

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **THE MIDDLESEX CORP. & AFFILIATES**, 17 Progress Avenue, Chelmsford, MA 01824, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **TUESDAY, APRIL 23, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The Middlesex Corporation & Affiliates (the Contractor) aggrieved by the Department's failure to pay a claim for an alleged changed condition in the amount of $34,779.42 on Contract #94124, appealed to the Board of Contract Appeals.

Contract #94124 (the Contract) was for the reconstruction of a section of River Road and Andover Street in the City of Lawrence and the Town of Andover.

The work under this Contract consisted of the widening and reconstruction of River Road and Andover Street in Andover and Lawrence between I-93 in Andover and Winthrop Avenue in Lawrence.

The work included unclassified excavation, cold planing, full depth bituminous concrete pavement, bituminous concrete overlay, drainage, granite curb and edging, bituminous and cement concrete sidewalk, highway guard, pavement markings, signs, traffic signal systems, reconstruction of existing traffic signal systems, wetland replication, landscaping, and other incidental work.

All work done under this contract shall be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATION FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATION dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, THE PLANS and these SPECIAL PROVISIONS.

Contract #94124 was awarded September 1, 1993, Item #41. The Contract was dated September 7, 1993. The original completion date was August 26, 1995. The Contract award price was $4,128,965.00.

A hearing was held on January 11, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Deputy Chief Counsel
Ralph Romano	Construction Eng.-District #4
Frank Suszynski	Resident Engineer
David Skerrett	The Middlesex Corp.
John Ready	The Middlesex Corp.

Entered as Exhibits were:

Exhibit #1.....Contract #94124
Exhibit #2.....Statement of Claim

A post hearing submission was requested of the Contractor and is now a part of the file.

FACTS, ISSUES AND GENERAL DISCUSSIONS OF LAW:

This claim is for an alleged changed condition for payment of the cost to excavate, remove and dispose of unanticipated concrete road slabs encountered beneath the surface during excavation of the existing roadway. The district directed the resident engineer to pay for the removal of these concrete slabs under Item 120.1 Unclassified Excavation which states in part.

> "The work under this item shall conform to the relevant provisions of Section 120 of the Standard Specifications and the following:
>
> The work shall include the excavation of material of every description regardless of the type encountered, from within the project limits as shown on the drawings and as directed by the Engineer, except materials for which payment is made under the items of Bituminous Concrete Excavation by Cold Planer, Class A Rock Excavation, Class A Trench Excavation, Class B Trench Excavation and Class B Rock Excavation of this Contract and except those materials for which excavation is included with the work specified to be performed under other items of this Contract."

The specifications for Item 120.1 Unclassified Excavation are explicit in their description of the type of material expected to be encountered beneath the existing pavement surface Item 120.1 states in part:

> "The existing pavement in Andover and between Sta 0+00 to about Sta 30+00 in Lawrence is bituminous concrete. The Andover Street pavement from about Sta 30+00 to the project limit is granite cobblestone overlaid with bituminous concrete."

No mention is made of underlying cement concrete pavement because it was not anticipated.

Reinforced concrete strung out twenty (20%) per centum of the project limits.

Reinforced concrete was encountered at the following stations:

Stations	23.00	-	27.00
	27.00	-	31.50
	31.50	-	33.50
	33.50	-	37.00
	37.00	-	39.00
	49.00	-	53.00
	53.00	-	57.00
	57.00	-	60+75

The Contractor testified that normal excavation under Item 120.1 would consist of bituminous, gravel, fill and peat but not reinforced concrete. Ralph Romano, District #4, Construction Engineer testified that in his forty (40) years of experience whenever you see cobbles you never find reinforced concrete.

M.G.L. c. 30 § 39N is the so-called changed condition statute. It states:

> **§ 39N. Construction contracts; equitable adjustment in contract price for differing subsurface or latent physical conditions**
>
> Every contract subject to section forty-four A of chapter one hundred and forty-nine or subject to section thirty-nine M of chapter thirty shall contain the following paragraph in its entirety and an awarding authority may adopt reasonable rules or regulations in conformity with that

> paragraph concerning the filing, investigation and settlement of such claims:
>
> If, during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the contractor or the contracting authority may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the contract shall be modified in writing accordingly (emphasis added).

Every contract awarded pursuant to M.G.L. c. 30 must incorporate this provision and cannot circumvent it by other contract language.

FINDINGS:

I find that the reinforced concrete slab under the roadway surface constituted a changed condition.

Also, I find the damages compiled by the Contractor of $34,779.42 were reasonable. However, the district did pay the Contractor $3204.00, 801 c.y. at $4.00 per c.y. for unclassified excavation in the stations outlined above. The revised claim should be $31,575.42.

RECOMMENDATION:

The claim filed by the Middlesex Corporation & Affiliates on Contract #94124 for a changed condition should be approved in the lesser amount of $31,575.42.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: May 2, 1996

RE: Board of Contract Appeals
(PFN-122705)

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **Petricca Construction Company (Traffic Systems Co., Inc.-Sub)**
CONTRACT #: **95352**
CITY/TOWN: **Pittsfield (Rtes. 8 & 9)**
CLAIM: **Additional compensation in the amount of $14,229.90.**

- -

Please place this report and recommendation on the Docket Agenda **MONDAY, MAY 6, 1996**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Bedingfield
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis

Chief Eng. Broderick
E. Botterman, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
Ross Dindio, DHD, District #1
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

Petricca Construction Co.
P.O. Box 1145
550 Cheshire Road
Pittsfield, MA 01202

Traffic Systems Co., Inc.
24 Rockdale Street
Worcester, MA. 01606

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **PETRICCA CONSTRUCTION CO.,**, P.O. Box 1145, 550 Cheshire Road, Pittsfield, MA 01202, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **MONDAY, MAY 6, 1996** at 11:00 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The Petricca Construction Company (the Contractor) aggrieved by the Department's failure to pay a claim for an alleged changed condition in the amount of $14,229.90 on Contract #95352 appealed to the Board of Contract Appeals.

Contract #95352 (the Contract) was for traffic signal additions and road improvements at the Coltsville Intersection on Routes 8 and 9 in the City of Pittsfield.

The work done under this contract consisted of the installation of new traffic signals at the intersection of Cheshire Road and the Allendale Shopping Center entrance and at the Dalton Avenue intersection with Meadowview Drive and K-Mart driveway. In addition to these two new locations, three existing signalized intersections were coordinated in sub-system 1 of a closed loop control system, for a total of five intersections in sub-system 1. These existing intersections in sub-system 1 were the following:

- Intersection of Merrill Road/Crane Connector
- Intersection of Dalton Avenue (Route 9)/Crane Connector, and
- Intersection of Dalton Avenue (Route 9)/Cheshire Road (Route 8)/Merrill Road

Sub-System 2 of the closed loop control system included three intersections:

- Intersection of Dalton Avenue and Hubbard Avenue (the master controller was located here)
- Intersection of Hubbard Avenue/Berkshire Crossing main entrance, and
- Intersection of Hubbard Avenue/Berkshire Crossing secondary drive

Roadway widening occurred in varying widths at many locations within the project limits to allow for the addition of lanes. Cold planing and overlaying the existing surface was required throughout the project limits. Sidewalks which were to be rebuilt were done so to conform with current standards.

All work done under this contract had to conform with the

Massachusetts Highway Department's STANDARD SPECIFICATIONS FOR HIGHWAY AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the AMERICAN STANDARD NURSERY STOCK (ANSI Z 60.1 - 1986), THE PLANS AND THESE SPECIAL PROVISIONS.

Contract #95352 was awarded March 1, 1995, Item #46. The Contract was dated March 9, 1995. The original completion date was July 27, 1996. The Contract award price was $2,550,288.00.

A hearing was held on April 25, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Mark Ringie	Resident Engineer
Al Stegemann	Asst. Construction Eng. - Dist #1
James Hayes	Area Construction Eng. - MHD
Robert H. Morse	Traffic Systems Co., Inc.

The Contractor filed this claim on behalf of its approved subcontractor, Traffic Systems Co., Inc. At the hearing the Contractor authorized Traffic Systems to present its claim. A post hearing submission was requested of Traffic Systems and it is now part of the file.

FACTS, ISSUES AND GENERAL DISCUSSIONS OF LAW:

This claim concerns additional time and materials involved with the installation of a strain pole foundation located at Sta. 81+12 - 43' RT on Merrill Road. Borings were taken and shown on the plans for twelve of the thirteen traffic signal foundations on the project. On April 12, 1995, HTSD, the Consultant for the project, submitted the foundation sizes based on the approved span pole and mast arm calculations. The depth of the foundations varied widely from 13'-6" to 25'- 0". All foundation determinations were based on the indicated borings with the exception of the foundation at Sta. 82+12

- 43' RT Merrill Road. The foundation design at this location called for a depth of 25"-0". This was the only location for a Traffic Signal foundation lacking a boring (emphasis added).

On April 26, 1995, Traffic Systems commenced work on the proposed strain pole foundation at Sta. 82+12 - 42' RT Merrill Road. The Contractor encountered severe water conditions at the ten foot level on April 27, started water control measures and continued to advance the hole until Monday, May 2, 1995, where at a depth of 19' it was unable to advance the hole further due to extremely unstable conditions.

At this point, HTSD was notified of the situation and a determination was made by the consultant on May 3, 1995, to install the foundation 21'- 0" deep. The contractor once again tried to advance the hole further to the new design depth, but was unable to make any headway due to infiltration of soil particles caused by a high static head of water. Once again auguring operations were stopped and the consultant notified. After reviewing information concerning the existing soils, the consultant revised the foundation depth on May 5, 1995 to 12'- 0", consistent with the design for Wet Sandy soils as shown on Design Chart III contained in the contract drawings (see Attachment I). The entire depth of the open boring was to be filled with concrete. Based on what the contractor perceived as having been improper design depth for the foundation given the actual soil conditions, he is claiming for additional costs incurred while trying to reach the initial design depth.

The size of a strain pole foundation is determined by relating the Base Bending Moment calculated by the pole manufacturer for the particular span wire assembly to the soil type at the specific foundation site. There are four (4) soils types used by the Department during this process. A copy of the Massachusetts Highway Department's "Foundation Design Charts" is attached as Attachment I.

The Plan for the site in question stated that the Moment = 176 Ft. Kip. The submitted data from the pole manufacturer calculated a

Moment = 174.32 Ft. Kip. There was no soils boring for this site in question, and there was no soils boring for this site in question, and there was no specified foundation size on the Plan.

M.G.L. c. 30 § 39N is the so-called changed condition statute. It states:

> **§ 39N. Construction contracts; equitable adjustment in contract price for differing subsurface or latent physical conditions.**
>
> Every contract subject to section forty-four A of chapter one hundred and forty-nine or subject to section thirty-nine M of chapter thirty shall contain the following paragraph in its entirety and an awarding authority may adopt reasonable rules or regulations in conformity with that paragraph concerning the filing, investigation and settlement of such claims:
>
> If, during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the contractor or the contracting authority may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the contract shall be modified in writing accordingly (emphasis added).

Every contract awarded pursuant to M.G.L. c. 30 must incorporate this provision and cannot circumvent it by other contract language.

Since this site, Sta. 81+12-43' RT on Merrill Road, was the only location no borings were taken, our consultant, Highway Traffic Signal

Design (HTSD) used the nearest boring to calculate the size of the foundation. However, this foundation encountered water problems at the ten foot level.

The district agrees with the Contractor that a changed subsurface condition existed at the above captioned foundation. The resident engineer kept records of the additional cost encountered at this foundation and agreed that $14,229.90 was an accurate measure of damages.

FINDINGS:

I find that a type I change condition, to wit: changed subsurface condition, occurred at the foundation located at Sta. 81+12-43' RT on Merrill Road.

I further find that the damages compiled by the Contractor of $14,229.90 were reasonable.

RECOMMENDATION:

The claim filed by the Petricca Construction Company on Contract #95352 for a changed subsurface condition at the strain pole foundation at Sta. 81+12-43' RT on Merrill Road should be approved in the amount of $14,229.90.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: June 27, 1996

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **The Garweth Corporation**
CONTRACT #: **95088**
CITY/TOWN: **Taunton**
CLAIM: **Additonal costs in the amount of $7285.28**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, JULY 3, 1996**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge
PM/jd
Attachment
cc:
Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Dengenis

Chief Eng. Broderick
E. Botterman, Dep.Ch.Eng.Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
Steve O'Donnell, Contr. Adm.
B. McCourt, DHD, District #5
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

Garweth Corp.
Louisburg Square South
144 Quincy Shore Drive
Suite 125
P.O. Box 7123
Quincy, MA 02269-7123

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **GARWETH CORP.**, 144 Quincy Shore Drive, Suite 125, P.O. Box 7123, Quincy, MA 02269-7123, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, JULY 3, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The Garweth Corporation (the Contractor) aggrieved by the Department's failure to pay $7285.28 for additional cost incurred due to the Department's failure to relocate high voltage lines, appealed to the Board of Contract Appeals.

Contract #95088 (the Contract) was a bridge replacement job in Taunton, Stevens Street over Conrail.

The work done under this contract consisted of replacing the existing bridge structure carrying Stevens Street over Conrail at the same location and the reconstruction of Stevens Street beginning at Station 4+50 along the construction centerline and continuing northerly on Stevens Street to Station 20+0 ± along the construction centerline for a total of 1560 feet.

Bridge T-1-1 is a three span prestressed concrete (deck beam) bridge.

The work included removing the superstructure and abutments of the existing bridge, constructing new abutments, wingwalls and superstructure, placing bridge railing and protective screening and other bridge related work.

The work also included excavation, grading and borrow, reconstructing roadways with Bituminous Concrete, finishing and installing curbing, guardrail, and traffic signs.

All work done under this contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988 and the SUPPLEMENTAL SPECIAL PROVISIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the PLANS and these SPECIAL PROVISIONS.

The Contract was awarded July 27, 1994, Item #41. The Contract was dated September 12, 1994. The original completion date was November 30, 1995. The Contract award price was $922,470.50.

A hearing was held on May 21, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Deputy Chief Counsel
Gilbert Alegi	Construction Eng.- District 5
Kevin Cassidy	Area Construction Eng.- District 5
Ara Balikian	McNamara & Flynn - Atty. for Garweth
Robert Weatherbee	Garweth Corp.
Stephen Descoteaux	MAI Engineering

Entered as exhibits were:

Exhibit #1.....Contract #95088
Exhibit #2.....Statement of Claim

A post-hearing submission was requested of the Contractor and is now a part of the file. The parties stipulated that the damages were $7285.28.

FACTS AND ISSUES PRESENTED:

This claim involved the relocation of high tension wires belonging to Taunton Municipal Lighting Plant (TMLP). These lines carried over the south abutment which the plans showed would be relocated by the TMLP.

The Contractor was notified by the District on or about May 18, 1995 that the high voltage lines would not be relocated per contract due to excessive costs of approximately $208,000.00 and that the Contractor should request a change order to cover the additional costs associated with its changed method of construction. The above was accomplished in the Contractor's letter of May 19, 1995 at a cost of approximately $26,000.00. An alternative method of installation of beams was submitted and subsequently approved by the District on June 9, 1995, but the change order to cover the additional costs was not processed.

The Contractor withdrew its alternate proposal for setting the beams in light of the delay in processing the change order by letter of July 5, 1995 and submitted the original method of settling the beams for approval. The original method was approved by the Department on

July 28, 1995. It should be noted that the approved drawing specifically states in bold letters "High Voltage lines to be removed per specifications" (see file).

After negotiations with Conrail/Amtrak, a final method of beam installation was submitted on October 3, 1995 and sequentially approved by the Department on November 7, 1995.

Beams were set in accordance with the final alternate and the additional costs submitted to District #5 on November 21, 1995. The Contractor again requested that the additional costs be processed as a change order in the amount of $7285.28. This change order was again rejected by the Department's letter of March 4, 1996.

In a conversation with, Gilbert Alegi, Construction Engineer for District #5, Mr. Alegi stated that he supports payment of this claim. The original construction method which the Contractor wanted to use involved a huge 250 ton crane sitting on the south abutment to install the beams. Because TMLP did not relocate the high power lines, the Contractor sought approval from Conrail to use an all-terrain crane on the railroad tracks, which was approved.

M.G.L. c. 30 § 39N and Section 4.04 of the Standard Specification deals with Changed Conditions Section 4.04 of Standard Specification states in part:

> **4.04 Changed Conditions.**
>
> In accordance with Chapter 30, Section 39N of the General Laws, as amended, the following paragraph is included in its entirety:
>
> If, during the progress of the work, the Contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the Contractor or the contracting authority may request an equitable adjustment in the contract price of the Contract applying to work affected by the differing site conditions. A request such an adjustment shall be in writing and shall be delivered by the party making claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a Contractor, or upon its

> own initiative, the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the Contract shall be modified in writing accordingly. (emphasis added)

FINDINGS:

I find a type II changed condition occurred on this Contract to wit: "a change in the construction method". Having to use two all-terrain cranes instead of one huge crane on the abutment constituted a changed condition.

I find the additional cost of $7285.28 which was stipulated to by the Department to be reasonable.

RECOMMENDATION:

The Garweth Corporation's claim on Contract #95088 from a Type II Changed Condition should be approved in the amount of $7285.28.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: September 18, 1996

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **P. Gioioso & Sons, Inc.**
CONTRACT #: **93301**
CITY/TOWN: **Greenfield (I-91 & Rte. 2)**
CLAIM: **Changed condition in the amount of $15,926.27.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, SEPTEMBER 25, 1996**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro
Assoc. Comm. Eidelman
Assoc. Comm. Dengenis

Chief Eng. Broderick
E.Botterman, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
J. Hoey, DHD, District #2
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

P. Gioioso & Sons, Inc.
58 Sprague Street
Hyde Park, MA 02136

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **P. GIOIOSO & SONS, INC.**, 58 Sprague Street, Hyde Park, MA 02136, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, SEPTEMBER 25, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

P. Gioioso & Sons, Inc. (the Contractor) aggrieved by the Department's failure to pay $15,926.27 on a changed condition claim on Contract #93301, appealed to the Board of Contract Appeals.

Contract #93301 (the Contract) was for the rehabilitation of three (3) bridges on Interstate 91 ramps at Route 2 in Greenfield.

The work done under this Contract involved the rehabilitation of the superstructures and portions of the substructures on Bridge Nos. G-12-44, G-12-45 and G-12-46.

The work included, but was not limited to, the removal of all existing materials above the top flange of existing beams to the limits shown on the drawings. All existing structural steel was to be cleaned and painted. New reinforced concrete deck slab replaced the existing deck. The existing copings and railings were replaced with New Jersey copings. New stud shear connectors had to be provided for each beam. All existing roadway joints were replaced with new armored joint assemblies.

Also included were repairs and modifications to the abutments, piers and wingwalls, reconstruction of approximately 1400 feet of Ramp 5S-2E and approximately 600 feet of Ramp 5S-2W including roadway widening; pavement excavation by cold planer; bituminous concrete resurfacing; roadway drainage modifications; removed and reset edging; furnished and installed guard rail; applied pavement markings and other appurtenances, and incidental items required to complete the work as shown in the drawings or as listed in the Contract.

All work done under this Contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS; the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, THE PLANS and these SPECIAL PROVISIONS.

The Contract was awarded December 23, 1992, Item #8. The Contract was dated December 29, 1992. The original completion date was July 8, 1994. The Contract award price was $1,477,957.00.

A hearing was held on August 20, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Deputy Chief Counsel
James Hayes	Boston Construction Office
Joseph Gioioso	P. Gioioso & Sons
Mario Romania	P. Gioioso & Sons

Entered as Exhibits were:

Exhibit #1.....Contract #93301
Exhibit #2.....Statement of Claim

FACTS AND ISSUES OF LAW:

The Special Provisions indicated that removal of concrete encasement was included in Items 114.1, 114.2 and 114.3, without an indication as to the extent of the work. The heavy traffic flows in this location and the winter conditions at bid time made a detailed inspection of the structures virtually impossible according to the Contractor.

The "Typical Cross Sections - Existing" for each bridge did not indicate concrete encasement, although they did provide detailed information and dimensions as to the other demolition items. The only detail which did indicate concrete encasement to be removed was "Existing Deck Detail at Abutments" on Sheet 5 of 12 of the bridge plans for Bridge G-12-45 only. There were six encasements total covered by this detail. The detail did not indicate that this encasement was typical of other locations on this bridge or of similar locations on other bridges.

In post hearing submissions requested of both parties, diametrically opposed positions were taken by both Contractor and the Department.

Mr. Mullen's submission on behalf of the Department stated:

> "The contractor is correct in that the Special Provisions indicated that removal of concrete encasement was included in the contract. However, they are mistaken when they rely on the cross-sections that were provided in the bid proposal. Clearly, the diagrams provided indicate that the cross-sections were "typical", as in an approximation. The diagrams were not meant to be dispositive of the diaphragms to be encountered. The contractor had an obligation to conduct a thorough site inspection pursuant to § 2.03 of the Standard Specifications, but failed to do so."

On the issue of site inspection, the Contractor did visit the site. However, to inspect the diaphragms, the Contractor contends, would have required a police detail and substantial traffic control provisions on heavily traveled Route I-91. These traffic controls would be excessive prior to any contract being let.

However, these bridges that were being repaired carried over other "on" and "off" ramps to Route I-90. Had the Contractor traveled under the bridges he would easily have seen that all the diaphragms were encased in concrete.

FINDINGS:

I find that the Special Provisions and the Cross-Sections indicated that the diaphragms may have been encased in concrete. I further find that a reasonably prudent contractor would have taken the time on a site visit to drive under the existing bridges scheduled to be repaired. Such a site visit would have clearly shown that the disphragms were all encased in concrete.

I find no changed condition existed either under 4.04 of the Standard Specifications or under M.G.L. c. 30 § 39(N).

RECOMMENDATION:

P. Gioioso & Sons, Inc.s claim on Contract #93301 for a changed condition to wit: the removal of the cement concrete encasement from 48 diaphragms in the amount of $15,926.27 should be denied.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: August 1, 1997

RE: Board of Contract Appeals
(PFN-053355)

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **Jay Cashman, Inc.**
CONTRACT #: **95191**
CITY/TOWN: **Falmouth (Menauhant Rd. Bridge)**
CLAIM: **Type II Changed Condition in the amount of $72,043.30.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, AUGUST 6, 1997**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro

Assoc. Comm. Botterman
Assoc. Comm. Broz
Assoc. Comm. Blundo
Chief Eng. Broderick
D. Anderson, Dep.Ch.Eng.,Constr.
Alex Bardow, Br. Eng.
Secretary's Office
Ned Corcoran, Ch. Counsel
B. McCourt, DHD, District #5
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

Jay Cashman, Inc.
285 Dorchester Ave.
South Boston, MA 02127

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **JAY CASHMAN, INC.**, 285 Dorchester Avenue, South Boston, MA 02127, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, AUGUST 6, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

Jay Cashman, Inc. (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) failure to pay a Type II Changed Condition in the amount of $72,043.30 on Contract #95191 (the Contract) appealed to the Board of Contract Appeals.

This Contract was for a bridge replacement in Falmouth, Menauhant Road over Green Pond.

The work under this contract consisted of the demolition of the existing bridge and fishing pier and reconstruction of Menauhant Road in Falmouth and the modifications to bridge number F-3-2 spanning Green Pond.

Work also consisted of guardrail removal, furnishing and installing highway guard, removing and installing a 12" water line, installing granite curb, installing roadway pavement elements, furnishing and installing traffic signs and pavement markings, and other incidental items of work listed in the proposal.

All work done under this contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, THE PLANS and these SPECIAL PROVISIONS.

The Contract was awarded October 26, 1994, Item #7. It was dated November 9, 1994. The Contract bid price was $2,043,000.00. The Contract completion date was November 25, 1995.

Three separate hearings were held on this matter. The reason for the additional hearing was the Contractor withdrew his original claim without prejudice and amended the claim from a delay claim to a changed condition claim.

A hearing was held on July 23, 1996 on the original delay claim

which was withdrawn after the hearing. Present representing the parties on this date were:

Peter Milano	Chief Administrative Law Judge
Dean Kalavritinos	Asst. Chief Counsel
Gary Higgins	Resident Engineer - MHD
Robert Fierra	District #5
Gil Alegi	District #5
Kevin Green	Legal Intern - MHD
Allen Waller	Jay Cashman, Inc.
Bruce Wood	Jay Cashman, Inc.

A second hearing was held on the amended claim on April 15, 1997. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Dean Kalavritinos	Asst. Chief Counsel
Gary Higgins	Resident Engineer - MHD
Bruce Wood	Jay Cashman
Allen Waller	Jay Cashman

After this hearing I requested a written submission of the Contractor, which when submitted created a need for a final hearing held on June 26, 1997. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Dean Kalavritinos	Asst. Chief Counsel
Gary Higgins	Resident Engineer - MHD
Allen Waller	Jay Cashman

Entered as Exhibits at the April 15 and June 26, 1997 hearings were:

Exhibit #1	Contract #95191
Exhibit #2	Amended Statement of Claim
Exhibit A	Memo from Gary Higgins to Michael Delaney, District Construction dated May 9, 1997.

FACTS:

This Contract referred to in its special provisions that an Army Corp of Engineer's Permit would be needed on this job and the Army Corp permit was discussed at the pre-construction meeting. The Contractor was told that the 4.04 permit was in the works. This meeting was held on December 1, 1994; December 8, 1994 the Contractor submitted his schedule of work; and on December 15, 1994 the superintendent was on

the job.

On January 16, 1995 the Contractor commenced work. On the afternoon of that day Gil Alegi and Robert Fierra of the District #5 Construction Office were on the site and orally stopped the job because the permit needed was a Coast Guard permit and not a 4.04 permit. MassHighway was informed by George Scalise, the Falmouth Town Engineer, that we were chasing the wrong permit and that we needed the Coast Guard permit instead (over a navigable waterway).

The Coast Guard issued a demolition permit on January 24, 1995 and a construction permit was issued on or about February 15, 1995.

In its original schedule, submitted and approved December 8, 1994, the Contractor's sequencing of construction was:

1) Mobilize barge mounted crane and excavator.
2) Saw out bridge deck.
3) Remove bridge deck, railings, water line and fishing pier with excavator.
4) Deliver precast piles by truck to the remaining bridge abutments.
5) Off load piles and drive for new piers from spudded barge.
6) Demobilize floating equipment.
7) Demolish abutments with land based excavator and drive coated H piles using truck crane.
8) Construct abutments

As constructed, the Contractor scheduled the work as follows to prosecute the work successfully in the time specified by the Contract with the additional added access constraints imposed by the absence of the Coast Guard permit.

1) Strip bridge rail, waterline and fishing pier manually.
2) Saw out and remove bridge deck as originally planned.
3) Remove bridge abutments using barge mounted backhoe. This required barge moves for tide work and crane rehandling to load trucks rather than the scheduled land based excavator only loading trucks directly.
4) Drive abutment piling with barge mounted 150 ton crane rather than an 82 ton truck crane on land. Barge moves required to unload trucks.
5) Drive pier piles from barge as anticipated, barge moves required to handle piles instead of remaining spudded in position.

It should be noted that the Town of Falmouth wanted the job

expedited to accommodate the summer tourism season.

The Massachusetts General Laws contains a so-called changed condition clause. This mandates that all contracts awarded pursuant to Chapter 30 must contain a changed condition clause (see 4.04 of the Standard Specifications for Highways and Bridges).

M.G.L. c. 30 § 39N provides:

> **§ 39N. Construction contracts; equitable adjustment in contract price for differing subsurface or latent physical conditions.**
>
> Every contract subject to section forty-four A of chapter one hundred and forty-nine or subject to section thirty-nine M of chapter thirty shall contain the following paragraph in its entirety and an awarding authority may adopt reasonable rules or regulations in conformity with that paragraph concerning the filing, investigation and settlement of such claims:
>
> If, during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the contractor or the contracting authority may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions, and, I. if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or II. a change in the construction methods required for the performance of the work which results an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the contract shall be modified in writing accordingly. (Emphasis and Roman Numerals added).

This statute commonly refers to two types of change conditions: Type I is subsurface change and Type II is a change in construction method.

Due to the unforeseen requirements for Coast Guard permits, the scheduled activities were essentially reversed in order changing the anticipated land based work into water work. This required the use of larger equipment to work at the longer radius. Due to the untimely removal of the existing bridge abutments, the barge had to be continually moved to stay with the capacity of the crane.

An axiom of construction is to "turn it into a land job" to the greatest extent feasible due to the cost and risk factors associated with water work. In this case the Coast Guard access restraints combined with the MassHighway's requirements turned land work into water work.

The MassHighway Resident Engineer, Gary Higgins, confirmed that the change in permits resulted in having to have the barge with crane mounted on the job for a period of approximately three months as opposed to the original two weeks after which truck cranes were to be used at a much cheaper cost.

The issue of the amount of damages was never contested at any of the three hearings.

FINDINGS:

I find a Type II changed condition occurred as a result of pursuing the wrong permit and thus changed a land job into a marine job.

I find that as a result of this Type II changed condition, the Contractor incurred additional cost totaling $72,043.30.

RECOMMENDATION:

The appeal of Jay Cashman, Inc. on Contract #95191 for an equitable adjustment due to a Type II changed condition should be approved in the amount of $72,043.30.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: September 12, 1997

RE: Board of Contract Appeals
(PFN-023950)

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **Bates Sand & Gravel Co., Inc.**
CONTRACT #: **94569**
CITY/TOWN: **Montague**
CLAIM: **Changed condition in the amount of $47,715.15.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, SEPTEMBER 17, 1997**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro

Assoc. Comm. Botterman
Assoc. Comm. Broz
Assoc. Comm. Blundo
Chief Eng. Broderick
D.Anderson, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
J. Hoey, District #2
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

Bates Sand & Gravel
Co., Inc.
57 Lawrence Street
Clinton, MA 01510

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **BATES SAND & GRAVEL CO.,INC.**, 57 Lawrence Street, Clinton, MA 01510, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, SEPTEMBER 17, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

Bates Sand & Gravel Co., Inc. (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) failure to pay a claim in the amount of $47,715.15 for an alleged changed condition encountered by its subcontractor, Michael J. Gresh Painting Co., Inc. (Subcontractor) on Contract #94569, appealed to the Board of Contract Appeals.

Contract #94569 (the Contract) was for a bridge rehabilitation project in Montague.

The work done under this Contract involved the rehabilitation of Bridge No. M-28-17.

The work done on this project included partial demolition of the existing superstructure and substructure elements, and the reconstruction of a bridge located at Eleventh Street over the Utility Canal in the town of Montague, Massachusetts. Also included was minor approach roadway work, detour signage, bridge excavation, and incidental work associated with the demolition and rehabilitation of the bridge structure.

The Contractor was advised that the existing steel superstructure was coated with lead-based paint. The Contractor was obligated to comply with all requirements mandated by law, regulation or executive order by the federal, state and local governments and their administrative agencies. In the event that the requirements of either federal, state or local law, regulation or executive order was more stringent than the other, the Contractor was obligated to comply with the more stringent requirements. In the event of an obvious conflict or ambiguity, the federal requirements superseded and prevailed over state or local requirements.

In addition, relocation of existing utility poles and gas main was required to be performed by the affected utility companies. The Contractor had to coordinate his work with the work to be performed by others.

All work done under this contract were in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the PLANS and the SPECIAL PROVISIONS.

The Contract was awarded June 10, 1994, Item #84. The Contract was dated August 24, 1994. The original completion date was November 26, 1994. The Contract bid price was $1,103,490.00.

A hearing was held on July 8, 1997. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
John Driscoll	Deputy Chief Counsel
Steven Doyle	Resident Engineer
Christopher McGown	V.P., Bates
Frank Kearney	M.J. Gresh
John O'Brian	M.J. Gresh

Entered as Exhibits were:

Exhibit #1	Contract #94569
Exhibit #2	Statement of Claim
Exhibit #3	3 pages: Page 1 - Specification for Item #106.301 of the Contract Page 2 - Table 1 - Summary of Surface Preparation Specification dated 6/1/91 Page 3 - Memo from Andy Baer to Gresh received by Gresh on 5/17/96 which defines what work should be expected on SP-2 or above job.
Exhibit #4	Interoffice Memo dated 10/2/96 from John Hoey to Eric Botterman
Exhibit #5	Letter from Michael J. Gresh Painting to Bates Sand & Gravel dated 5/17/96
Exhibit #6	Letter from John Hoey to Bates dated 3/20/96
Exhibit #7	Letter from Bates dated 5/21/96 to Frank Kearney of Gresh
Exhibit #8	Gresh's response to Exhibit #6 dated 4/1/96

FACTS AND ISSUES:

The Special Provisions provided provisions for cleaning the Trusses at 106.301. The section, starting at page 16 of the Special Provisions, provides in part:

> **ITEM 106.301 (continued)**
>
> **CLEANING**
>
> GENERAL
> All metal surfaces to be painted shall be cleaned so as to remove all oil, grease, dirt, rust scale, loose mill scale, loose rust, loose paint or coatings and contamination of birds. The Contractor shall lay out areas to be cleaned, limiting his activities to one location and confine this operation only to a point where the application of the spot coat, can be completed the same day. A cleaned area must be inspected and approved before the application of the spot coat is started.
>
> Cleaning operations will not be started when it is raining and cleaned areas must not be left unpainted overnight unless they are cleaned again before the spot coat is applied.
>
> The Contractor may be required to furnish and erect temporary flood lights not less than 150 watts each, if certain areas have insufficient light for proper cleaning and painting operations, in the opinion of the Engineer. Electrical power shall be supplied by the Contractor. If necessary, scaffolding, ladders, or staging, shall be provided, or rearranged, to afford complete inspection by the Engineer.
>
> SURFACE PREPARATION
> The intent of this specification is to provide for a proper and thorough surface preparation, thus increasing the performance and longevity of the painting system. Surface preparation shall be, in the opinion of the Engineer, of a quality that will provide for proper application of the specified paint material.
>
> Surface preparation and subsequent application shall be so programmed that dust and other contaminants from the cleaning process will not fall on surfaces about to receive paint or on wet, newly-painted surfaces.
>
> METHODS OF CLEANING
> All metal surfaces to be painted shall be cleaned as follows: Cleaning operations shall be accomplished by steam cleaning in accordance with SSPC-SP 1 followed by power tool cleaning in accordance with SSPC-SP 3 and these

Special Provisions. The use of hand scrapers and wire brushes will not be permitted, except in areas difficult to clean and only when approved by the Engineer.

STEAM CLEANING SSPC-SP 1

Steam cleaning is required for all areas that are to be painted, unless otherwise directed by the Engineer. All dirt, oil, grease, tar, rust or mill scale, loose paint, road salt, bird contamination or other foreign material which has accumulated on surfaces to be painted shall be removed with a steam cleaning apparatus which shall precede all other phases of cleaning. Containment during steam cleaning operations shall also include use of a micro-net type filter to screen all debris which is washed from the structure. Steam cleaning shall not be performed more than (1) week prior to painting or other phases of cleaning. Public traffic should be warned of steam cleaning operations being conducted. The Contractor shall be solely responsible for damages arising from the cleaning operations.

The following equipment and materials shall be used in steam cleaning operations:

1) Portable steam generating units shall be capable of producing a temperature of approximately 300 degrees F., at the nozzle, water pressure at between 150 to 200 psi and water consumption of about 200 gallons per hour with both fan and round nozzles.

2) Each unit shall have a cleaning compound supply tank with appropriate gates for control of the cleaning compound being added to the feed water line.

3) The Contractor shall supply all water necessary to complete the steam cleaning operation in a satisfactory manner, in the opinion of the Engineer.

4) The Contractor shall use non phosphate, non-polluting detergent, acceptable to the Department that will clean the steel in a satisfactory manner.

It is estimated that 0.5% by weight of cleaning compound at the nozzle is sufficient. Concentrations above 0.75% could possibly remove sound paint, which if utilized shall require remedial work to be accomplished at the expense of the Contractor. Once steam cleaning work is underway, the Contractor shall change or adjust the compound or percentage of each in order to attain a clean surface properly prepared, without damage the sound paint.

STEAM CLEANING PROCEDURE

The Contractor shall be responsible for proper cleaning procedures, with the following serving only as a guideline for him to consider. The operator should hold the face of the nozzle within 6" of the steel surfaces and tilted

slightly in the direction of travel. The surface should first be wetted to allow the cleaning compound to loosen foreign matter which is later removed by a cleaning pass. The time interval between wetting and cleaning should be regulated according to the degree of dirt accumulations but usually it is sufficient to go twice over area that is conveniently reached from one position. The speed of pass over an area is comparable to that in spray painting. The operator should not direct the steam at one place or the surface for any length of time as it is quite easy to "cook" the sound paint.

A properly cleaned surface will feel firm and somewhat tacky but it should not be slick or grimy to the touch. In 90% of the cases, the areas that are properly cleaned can be verified by sight. Approval of all steam cleaned surfaces must be received from the Engineer prior to the application of the protective coating. Excessive deposits of cleaning liquids remaining on surfaces that will not drain shall be flushed off with clean, fresh water or steam without detergent. In as much as a certain amount of liquid will remain on horizontal surfaces after cleaning, the cleaning program should be followed through from top to bottom very systematically. The last pass on any surface should be made with plain water to remove surplus solution.

Under no circumstances will power tool cleaning or painting be started over steam cleaned surfaces in less than 24 hours after steam cleaning operations are completed, and only after the Engineer has given approval. It may be necessary to extend the drying time longer than 24 hours in the event the surfaces retain moisture.

POWER TOOL CLEANING SSPC-SP 3

A Power Tool Cleaned Surface Finish is defined as one from which all loose mill scale, loose rust, loose paint, and other loose detrimental foreign matter have been removed from the surface. It is not intended that adherent mill scale, rust, and paint be removed by this process. Mill scale, rust, and paint are considered adherent if they cannot be removed by lighting with a dull putty knife.

METHODS OF POWER TOOL CLEANING

The Contractor shall use rotary or impact power tools to remove all stratified rust (rust scale) and weld slag. The Contractor shall also use power wire brushing, power abrading, power impact or other power rotary tools to remove all loose mill scale, loose or non-adherent rust and loose paint. The Contractor shall operate the power tools in a manner that prevents the formation of burrs, sharp ridges, and sharp cuts. The Contractor shall not burnish the surface, and regardless of the method used for cleaning, he shall feather edge remaining old paint so that the repainted surface can have a reasonably smooth appearance. After power tool cleaning and prior to painting, the Contractor shall remove dirt, dust or similar

> contaminant from all areas that are to be painted to the satisfaction of the Engineer. This shall be accomplished by the use of a HEPA vac or approved equal.

The Subcontractor contends that the amount of paint removal was greater than that anticipated by an SP 3 cleaning system. This subcontractor contends that an SP 3 system is used as a spot cleaner and does not imply that 70% of the trusses would be cleaned by this method as was the case here.

It was established at an on-site meeting involving the Contractor and District Construction personnel that SSPC-SP 3 cleaning was necessary on 100 per cent of the truss surface for Phase One in order to achieve the specified degree of surface preparation. It was also determined that approximately 40 per cent of the old coating had deteriorated prior to the commencement of work. An additional 30 per cent of the existing paint system was removed during the cleaning operations. Therefore, a total of 70 per cent of the metal surface was ultimately exposed, requiring spot coating in accordance with the contract. The Contractor chose to apply primer to the entire surface of the truss, presumably because that was a more cost-effective approach.

The Contractor's claim appears to be based on the following assertions:

- SSPC-SP 3 defines a lesser degree of surface preparation than what the structure actually required.
- "Spot" coating implies that much less than 70 per cent of the structure will be involved.

The Contractor had an obligation to conduct a thorough site inspection pursuant to § 2.03 of the Standard Specifications.

Section 2.03 states:

> **2.03 Examination of Plans, Specifications, Special Provisions, and Site of Work.**
>
> The Department will prepare plans and specifications giving directions which will enable any competent mechanic

> or contractor to carry them out. The Bidder is expected to examine carefully the site of the proposed work, the proposal, plans, specifications, supplemental specifications, special provisions, and contract forms, before submitting a Proposal. The submission of a bid shall be considered prima facie evidence that the Bidder has made such examination of the site of the proposed work, plans, proposal, etc. and is familiar with the conditions to be encountered in performing the work and as to the requirements of the plans, specifications, supplemental specifications, special provisions, and Contract.

This site was and is almost entirely open and accessible for inspection. A visual inspection of the site would have shown the extent of the paint erosion.

FINDINGS:

I find that the Special Provision indicated an SP-3 cleaning method.

I further find that although an SP-3 cleaning process is usually a spot cleaner, nothing in the Special Provisions limited it to such.

I find that a site inspection would have clearly shown the extent of the paint erosion on the trusses.

I find no changed condition existed either under § 4.04 of the Standard Specifications or under M.G.L. c. 30 § 39(F).

RECOMMENDATION:

Bates Sand & Gravel Co., Inc.'s claim for a changed condition filed on behalf of its painting subcontractor, Michael J. Gresh Painting Co., Inc., in the amount of $47,715.15 should be denied.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTRODUCTION:

The Granger-Lynch Construction Corporation (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) denial of a claim for a changed subsurface condition encountered on Contract #96251 (the Contract) in the amount of $52,422.48, appealed to the Board of Contract Appeals.

The work done on this Contract was for the reconstruction of Route 62. The work under this Contract consisted of reconstructing Route 62 from the Princeton/Hubbardston town line to Gates Road. Reconstruction consisted of widening the existing roadway to a width of 30 feet and included modifications to the vertical and horizontal alignment to improve sight distance. Also included was the installation of a drainage system, guardrail, and bituminous concrete berm. Hay bales and/or silt fence was used as necessary at drainage inlets and/or outlets and along steep slopes adjacent to wetlands.

All work done under this contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATION FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES with latest revisions, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the latest edition of AMERICAN STANDARD FOR NURSERY STOCK, the PLANS and these SPECIAL PROVISIONS.

Contract #96251 was awarded September 27, 1995, Item #10. It was dated October 13, 1995. The original completion date was July 21, 1997. The Contract bid price was $1,865,707.90.

A hearing was held on June 15, 1999. Representing the parties at the hearing were:

Peter Milano	Chief Administrative Law Judge
Isaac Machado	MHD – Counsel
Peter Romano	MHD – Dist. #3 Construction
Sharon Begley	MHD – Resident Engineer
Frank Aceto	Granger-Lynch
Greg Lynch	Granger-Lynch
Vincent DeQuarttro	Granger-Lynch

Entered as Exhibits were:

Exhibit #1 …….	Contract #96251
Exhibit #2 …….	Statement of Claim
Exhibit #3 …….	Letter to Margaret O'Meara, DHD, dated August 2, 1996 from Granger-Lynch
Exhibit #4 …….	Letter from Margaret O'Meara, DHD, to Granger-Lynch dated August 15, 1996.

FACTS AND ISSUES PRESENTED:

The Contract called for the Contractor to perform reconstruction work on Route 62 from the Princeton/Hubbardston town line to Gates Road, a distance of 2.22 miles. The Contractor alleges that during excavation they encountered subsurface materials that they argue constituted a changed condition. The material is alternately referred to as peat or muck.

The Contractor requested payment for a new item, muck excavation, in the amount of $52,422.48. MassHighways Boston Construction Section denied the claim based on the definition of Earth Excavation that was covered in Item 120 of the Special Provisions on the contract.

The Contract drawings required the removal of two feet of subgrade material below the proposed subgrade and the replacement of this material with special borrow. The Contract drawings did not indicate that the two feet was a minimum thickness. Neither the plans nor the special provisions indicated or implied that unsuitable material could be encountered at greater depths than shown on the typical section.

The Contractor did in fact excavate muck to depths as low as eleven feet around cross drain areas as testified to by the resident engineer Sharon Begley. In fact Ms. Begley did pay the Contractor an additional $6500.00 for excavations performed around those cross drain areas.

The Contract called for an estimated quantity of Earth Excavation of 48,000 cubic yards. The actual quantity of excavation was 55,481 cubic yards, an increase of 15.59%, clearly not within the 25% limit as specified in Subsection 4.06 of the Standard Specifications as amended on December 23, 1998.

Thus, for this claim to have any validity it must come under Subsection 4.04 of the Standard Specification, Changed Conditions and M.G.L. c. 30 § 39(N). In point of fact, the Contractor presented his claim on this issue and no other point of liability.

M.G.L. c. 30 §(N) states:

"Every contract subject to section forty-four A of chapter one hundred and forty-nine or subject to section thirty-nine M of chapter thirty shall contain the following paragraph in its entirety and an awarding authority may adopt reasonable rules or regulations in conformity with that paragraph concerning the filing, investigation and settlement of such claims:

> If, during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in contract documents either the contractor or the contracting authority may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract

> documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the contract shall be modified in writing accordingly."

M.G.L. c. 30 § 39(N) mandates a Changed Condition clause in all MassHighway Contracts. Section 4.04 of the Standard Specifications for Highways and Bridges is the Changed Condition section of MassHighways Contracts. The verbiage has similarities to the statute and need not be restated here.

It is critical to the issues in this claim to restate two other clauses in this Contract.

Subsection 2.03 of the Standard Specifications states:

2.03 Examination of Plans, Specifications, Special Provisions, and Site of Work.

> The Department will prepare plans and specifications giving directions which will enable any competent mechanic or contractor to carry them out. The Bidder is expected to examine carefully the site of the proposed work, the proposal, plans, specifications, supplemental specifications, special provisions, and contract forms, before submitting a Proposal. The submission of a bid shall be considered prima facie evidence that the Bidder has made such examination of the site of the proposed work, plans, proposal, etc. and is familiar with the conditions to be encountered in performing the work and as to the requirements of the plans, specifications, supplemental specifications, special provisions, and Contract. (emphasis added)

And the actual Item this claim is brought under, Item 120 which states in total:

> ITEM 120 EARTH EXCAVATION CUBIC YARD
>
> The work under this Item shall conform to the relevant provisions of Section 120 of the Standard Specifications and the following:
>
> The work shall include the excavation of all materials obstructing the execution of the required work as shown on the plans as directed except materials for which payment is made under the Items of Class A Trench Excavation, Class B Trench Excavation Class B Rock Excavation, and Class A Rock Excavation of this Contract, and except those materials for

> which payment is made inclusive with complete work specified to be performed under other items of this contract.
>
> Also included shall be the removal and disposal of existing roadway pavement, curb, edging, berm, existing drainage pipe, and existing castings, and all other materials as directed by the Engineer not classified and paid for under other Items. The item shall also include excavation and removal of materials associated with proposed slope excavation including but not limited to topsoil and all other materials not paid for under other items. Removal of trees and stumps encountered in roadway or slope excavation shall be paid for under item 101 Clearing and Grubbing.
>
> The work shall also include the removal of any temporary pavements placed for the maintenance and protection of vehicular and pedestrian traffic.
>
> The work shall also include the disposal of existing materials shown on the drawings to be removed and reset, but which in the judgement of the Engineer are unsuitable for reuse in the proposed work. Payment for existing drainage pipes to be abandoned shall be considered incidental to this item at no additional compensation.
>
> No separate payment will be made for the off-site disposal of all existing material unsuitable for reuse in the proposed work, but all costs in connection therewith shall be included in the price bid for unclassified excavation.
>
> Edges of excavations made in existing pavements shall be squared by saw cutting with power driven tools to provide a neat clean edge for joining new pavement as shown on the plans. Ragged uneven edges shall not be accepted. Pavement areas which have been broken or undermined shall be edged neatly with minimum disturbance to the remaining pavement. Payment for installation of temporary bituminous concrete ramps shall be included under item 472.1. Payment for saw cutting work shall be included under item 482.3 Saw Cutting Bituminous Concrete.

The Contractor by submitting a proposal is held to the standards established in Subsection 2.03 stated above. In point of fact the Contractor's home office is approximately twenty miles from the actual project site. The Route 62 roadway was in pretty bad condition. According to Peter Romano of District #3 there were signs of foundation failure which would indicate that in some places a contractor would encounter impervious material.

I have attached hereto and made a part hereof (marked Attachment #1) a color copy of the U.S.G.S. Topographic Map/1988 Sterling Quadrangle. Route 62 is clearly in the middle of wetland area. A reasonably prudent contract would be aware that impervious matter may have existed especially in context with a site visit and the failures which were visible to the eye.

In the case of Perini Corporation, et al v. The United States 381 F. 2d 403 (1967), the United states Court of Claims gives a detailed analysis of the changed condition clause. There are similarities between the present matter and the Perini case in that both dealt with overruns of the estimated quantities of an item in the contract.

The Perini court case states at page 409:

> "Written in the disjunctive, the Changed Conditions article sets forth two alternatives as the basis for the existence of a changed condition. The first allows an adjustment of the discovery of "subsurface and/or latent physical conditions" which differ materially from those shown on the drawings or indicated in the specifications. This clause has no application here since the specifications were replete with warnings of the water-bearing capacity of the rock strata in the worksite area."

This goes on further on page 410 to state:

> "It is the second half of the operative language of the Changed Conditions article upon which the defendant places its principal reliance in this case. First, it argues that a substantial variation from an estimated quantity, without more, constitutes an "unknown physical condition of an unusual nature differing materially from those ordinarily encountered' and, therefore, amounts to a changed condition. We reject this argument in view of our consistent holdings that to qualify as a changed condition, the unknown physical condition must be one that could not be reasonably anticipated by the contractor from his study of the contract documents, his inspection of the site, and his general experience if any, as a contractor in the area."

The first cite from the Perini Case refers to a Type I changed condition: To wit, a changed subsurface condition. The second site refers to a Type II changed conditions: To wit, a

change in the construction method. As in the Perini case, I reject a Type I changed condition as this project was replete with warnings that would lead a reasonably prudent contractor to conclude that there would be impervious material under the roadway. A site inspection would have revealed both the failures in the foundation of the roadway and the wetlands surrounding the roadway (see Attachment I)

As for a Type II changed condition, the Contractor testified that the method of excavation really never changed. In fact Sharon Begley, the resident engineer, testified that on July 16, 1996 the first day of excavation they used a John Deere Backhoe and a Cat 13 Grader. No dozer was on the site until after August 1,1996.

FINDINGS:

I find that no changed condition existed for earth excavation on this Contract.

RECOMMENDATION:

The claim of Granger-Lynch Construction Corporation on Contract #96251 for a changed condition in the amount of $52,422.48, should be denied.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

APPENDIX D-1

DECISIONS/RULINGS

Disputes re: Damage Calculations and Final Estimates

INTRODUCTION:

N.E.L. Corporation (the Contractor) alleged to be aggrieved by the Massachusetts Highway Department's (MassHighway) denial of a claim for additional cost in the amount of $6822.56 due to bond cost paid for items not in the contract on Contract #95204 (the Contract), appealed to the Board of Contract Appeals.

This Contract was for scheduled and emergency structural bridge repairs at various locations in District #4.

The work to be done under this contract consisted of preparing structural repair designs and furnishing various artisans (iron workers, mechanics, welders, carpenters, laborers) and materials, supplies, equipment, and engineering services to perform non-routine structural maintenance and emergency repairs to bridges in District Four. The Contractor was to be notified of scheduled repair work formally by work order. The work order would identify the location of the work. The Contractor had to commence work on each work order within thirty days from the approval date by the Highway Department and by the proper railroad authority (when applicable) on the proposed design of the repair by the Contractor.

All work done under this Contract had to be in conformance with the Department of Highways STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977

CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, THE PLANS and these SPECIAL PROVISIONS.

Contract #95204 was awarded October 19, 1994, Item #47. It was dated October 26, 1994. The original completion date was November 3, 1995. The bid price was $245,561.00.

A hearing was held on December 7, 1999. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Isaac Machado	Deputy Chief Counsel
Charles Verrocchi	MHD – Finals
Prasun Sen	MHD – Resident Engineer
Prem Kapoor	MHD – Structures Maint. Eng.
Albert Enos	N.E.L. – Pres.
Thomas Durkin	N.E.L. – Durkin, DeVries & Pizzi Ins.
Donald McCartez	N.E.L. – St. Paul's Surety Co.

Entered as Exhibits were:

Exhibit #1 ……. Contract #95204
Exhibit #2 ……. Statement of Claim

This matter was held open for thirty days for submissions by the Contractor. No further submissions have been received as of the date of this report.

FACTS AND ISSUES PRESENTED:

The Contractor is looking to obtain his proportional cost of this bond due to $516,860.76 which was paid by MassHighway under Item 999. Item 999 is used by MassHighway to pay the Contractor where there is no bid item for the particular item of work, for example, police details and extra work.

The following is an itemized list of the items:

Item 999.001 – 999.019	Police	46,047.40
Item 999.200	Railroad Insurance	7,000.00
Item 999.201	MBTA Permit	750.00
Item 999.202	Relocation Fire Alarm Box	2,655.00
Item 999.800	Material	213,108.73
Item 999.801	Equipment	216,262.51
Item 999.802	Tools	31,047.12
		$516,860.76

The 999.001 – 999.019 items are for police details. Subsection 7.11 Traffic Officers and Railroad Flagging Service states in part:

> "The Party of the First Part will reimburse the Contractor for payments made for the services of all required traffic officers, together with such payments as he will have made for reserve or special officers under the Massachusetts Workmen's Compensation Act (General Laws, Chapter 152, Section 1, as amended), Liability Insurance, and for payments as the Contractor is required in writing by proper authority to make under the Massachusetts Employment Security Act (General Laws, Chapter 151A) and the Federal Social Security Act (United States Code, Title 26 and 42). The Contractor is required to submit to the Engineer copies of this written requirement for the Massachusetts Employment Security Act and the Federal Social Security Act."

No mention is made of any percentage paid for bond cost.

Items 999.200, 201 and 202 are straight reimbursements. Items 999.800, 801, and 802 for materials, equipment and tools respectively are covered by the Special Provisions pages 5 and 6 which state in part:

RATES OF PAYMENT

The Contractor will be paid at the contract unit rate for the different contract items. Payment will be made for time spent on the project doing actual work on the Department's bridges and shall not include travel time to and from the Contractor's place of business and it shall also not include time for investigational field trips to find out how much material, equipment, tools etc., may be needed for the work.

The contract price per hour shall include full payment for testing devices, tools, and incidental equipment necessary to properly carry out the work. Payment will be based on bills submitted, covering all charges for labor, materials, and equipment according to the respective terms of the contract. Bills covering the total charges incurred in any given month are to be submitted by the fifteenth of the following month for processing.

"PAYMENT FOR MATERIALS

The Contractor will be paid his actual cost for materials that are required to maintain or repair a bridge plus fifteen percent. However, no materials shall be ordered

until approved by the Engineer and competitive prices may be required if the Engineer directs.

The Contractor is required to seek permission from the Resident Engineer for use of artisans and for the acquisition of materials and equipment.

A dollar value is written into each proposal as an estimate of cost for this item. The Contractor will not bid this item.

PAYMENT FOR RENTAL EQUIPMENT

The Contractor must get the authorization of the Resident Engineer before any equipment is rented.

The Contractor will be paid the actual cost for rental equipment that is required to maintain or repair a bridge, plus fifteen percent.

A dollar value is written into each proposal as an estimate of cost for this item. The Contractor will not bid this item.

The Department will add the cost of equipment rental and materials to the Contractor's bid to get the total cost of this project.

All rental equipment and tools shall be in excellent working condition. The Contractor shall not be paid for equipment down time at the discretion of the Engineer".

This type of emergency repair contract is made to be flexible. All cost other than unit prices bid on have a mark-up. This mark-up should include the percentage cost of

the bond. To deal with this increase in bond cost in any other way, except as provided in SubSection 9.03, would be effectively circumventing the bid law which this Contract was bid under (See M.G.L. c. 30 § 39(M)). Courts construe the terms of a contract according to their ordinary meaning. Cardin v. Royal Ins. Co. of America 394 Mass 450, 476 NE 2d 200 (1985).

This Contract does not say bond cost is reimbursable. Thus it is included in the bid. I did not hear the Contractor complain that the cost of the Contract went from $245,561.00 to $1,325,295.56.

FINDINGS:

I find that the Contractor can not recover the proportional increased bond costs for the additional cost of Items 999.001 – 019, Items 999.200, 202, and Items 999.800 – 802.

RECOMMENDATION:

N.E.L. Corporation's claim on Contract #95204 for $6822.56 for increase in bond cost should be denied.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTRODUCTION:

The RDA Construction Corporation (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) failure to approve three claims: one for the difference between the actual footage of piles driven versus the contract quantity in the amount of $30,531.68; a claim for reimbursement of $3662.40 for being precluded from working on three Friday nights; and for a claim for sheeting allegedly purchased but not used on the project in the amount of $4555.20 on Contract #98079 (the Contract), appealed to the Board of Contract Appeals.

The Contract was a bridge reconstruction project – Tremont Street (Route 3A) over Route 3 in Duxbury.

The work under this Contract consisted of furnishing all necessary labor, materials, equipment and services to reconstruct Bridge D-14-6 carrying Tremont Street (Route 3A) over Route 3. The work also included, but was not limited to, reconstruction of the approach roadways, the removal and reconstruction of sidewalks, curbs, traffic signs, pavement markings, grass areas, guardrails and drainage pipe and structures and all incidental items necessary to complete the work shown on the plans and described in the Contract.

The work included furnishing all necessary temporary traffic control measures necessary to safely stage the reconstruction as shown on the plans.

All work done under this contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated November 30, 1994, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES with the latest revisions, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the latest edition of AMERICAN STANDARD FOR NURSERY STOCK, the PLANS and these SPECIAL PROVISIONS.

The Contract was awarded August 10, 1997. The Contract was dated August 18, 1997. The original completion date was June 10, 1999. The Contract bid price was $1,949,524.00.

A hearing was held on March 28, 2000. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Kathleen Pendergast	Deputy Chief Counsel
Kevin Morrissey	Resident Engineer – MHD
Jong Yoon	Assistant to Resident Eng. – MHD
Richard Gunderson	RDA
Eugene Kelley	RDA

A post hearing submission was requested of the Contractor on all three claims. No briefs have been received as of this writing.

Entered as Exhibits were:

Exhibit #1 …….	Contract #98079
Exhibit #2 …….	Statement of Claim for pile driving as a result of a Changed Condition.
Exhibit #3 …….	Statement of Claim for preclusion of Friday work.
Exhibit #4 …….	Statement of Claim for sheeting not used.

FACTS AND ISSUES OF LAW:

The claim for the difference in piles driven versus the estimated quantity for Item 942.122 is based on the estimated quantity of 5700 linear feet. The total amount of steel H piles driven in place amounted to only 4500 linear feet. The Contractor believes he is entitled to be paid 1188 linear feet at its bid price of 25.70 per linear foot. (Note: by letter dated April 28, 1999 to Bernard McCourt, Contractor indicated that the estimated quantity was actually 5688 L. F.)

Item 942.122 is governed by Item 940.40 through 940.82. Item 940.80 under compensation states in part "The length of piles to be paid for shall be the total length in place, measured from the tip of the pile to the plane of the plan cut-off elevation."

The question which remains is whether a changed condition occurred because of the discrepancies in quantity. M.G.L. c. 30 § 39 (N) and Section 4.04 defines changed condition as a change in the subsurface conditions on the project or a change in the construction methods.

The facts of this case do not warrant a designation of a changed condition.

The other section of our Standard Specifications which may govern is Section 4.06 which would allow for an equitable adjustment to the contract unit price if the quantities vary 25% up or down. Here the quantity underrun is 21% which does not trigger Section 4.06.

The second claim was for preclusion of Friday work in the amount of $3662.40. The Contractor worked 3 Fridays. However, the fourth paragraph on page 2 of the Special Provisions entitled "Provisions for Travel and Prosecution of Work" includes the statement '… work on the proposed bridge may have to be performed during hours other than the normal work hours when approved by the Engineer.' The Contractor never sought the approval of the Friday work.

The final claim for sheeting displaced by the lagging retention system used around an unmarked drainage pipe was denied because the sheeting was used at a separate location and no additional cost incurred. These facts were in dispute. Jong Yoon testified that an extra work order for $18,000. was used to pay for some of these piles. I requested a copy of this extra work order but never received it from the Contractor.

FINDINGS:

I find that three claims filed on this Contract are without any basis in fact and without any basis in law.

RECOMMENDATION:

The claims filed by RDA on Contract #98079 for the difference between the actual footages of piles driven versus the contract quantity in the amount of $30,531.68, for a claim for reimbursement of $3662.40 for being precluded from being compensated for working 3 Friday nights, and for a claim for sheeting purchased, but allegedly not used in the amount of $4555.20 should be denied.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTRODUCTION

The Kodiak Corporation (the Contractor), aggrieved by the Massachusetts Highway Departments' (MassHighway) Finals Section reducing the final estimate on Contract #91098 (the Contract), appealed to the Board of Contract Appeals.

The work done on this project was a bridge rehabilitation on the bridge carrying Interstate 495 over Interstate 93.

The work done under this Contract involved the rehabilitation of the superstructure and portions of the substructure on Bridge No. A-9-31.

The work included, but was not limited to, the removal of all existing materials above the top flange of existing beams to the limits shown on the drawings. All existing structural steel was to be blast cleaned and painted. New reinforced concrete deck slabs were to replace the existing decks. Existing bridge copings were to be replaced with new jersey shape copings. New stud shear connectors were to be provided for each beam. All existing roadway joints had to be replaced with new roadway armored joint assemblies.

The work also included minor repairs to abutments and reconstruction of approximately 800 feet of Route 495, including pavement excavation by cold planer, bituminous concrete resurfacing, removing and resetting granite curb and edging, furnishing and installing guard rail and traffic signs, applying pavement markings, installing and subsequently removing temporary precast barriers, and other appurtenances and incidental items as set forth in the Contract required to complete the work.

The work also included the necessary cold planing, bituminous concrete pavement resurfacing, drainage structure adjustment and pavement markings for Route 133 as indicated on the plans.

All work done under this Contract had to be in conformance with the Department of Public Works STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1981 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the PLANS and these SPECIAL PROVISIONS.

Contract #91098 was awarded July 19, 1990, Item #40. It was dated July 25, 1990. The original completion date was November 30, 1991. The Contract bid price was $2,220,259.00

A hearing was held on February 20, 2000. Present representing the parties at the hearing were:

Peter Milano	Chief Administrative Law Judge
Isaac Machado	Deputy Chief Counsel
Charles Verrocchi	MHD – Finals
William Barr	Kodiak Corp.

The Contractor was asked to submit a copy of Extra Work Order #13 that was for 1.6 million dollars and called for the Contractor to rebuild structure A-09-31. The submission is in the file and has been reviewed by Mr. Verocchi and myself to see if any of the items involved in this claim were paid under EWO #13.

FACTS AND ISSUES OF LAW PRESENTED:

John Brady was the resident engineer on this project. He has since retired and was not available at the hearing. I had dealings with Mr. Brady and although he was, in my opinion, an excellent resident engineer, he had his own ways of accomplishing certain projects.

Six items were involved in this claim. They were:

120.1	-	197.9 cy @ $15	-	$	2,968.50	-	CSD 683	- 43
170	-	1428.59 SF @ $2	-		2,857.18	-	CSD 683	- 43
151	-	547.63 cy @ $12	-		6,571.56	-	CSD 683	- 43
460	-	172.69 TON @ $27	-		4,662.63	-	CSD 683	- 43
999.851	-	LS @ $2428 (1)	-		2,427.00	-	CSD 683	- 25
999.824	-	LS $12,140 (1)	-		12,140.00	-	CSD 683	- 25

The matters came before me because all MassHighway records for this project were lost. At the hearing agreements were reached by the Contractor and MassHighway.

The parties agreed that Item 120.1 should be rejected. Items 151, 170 and 460, Gravel borrow, fine grading and compacting, and asphalt mix for parking area for the field office and roadway to get to the field office, were also agreed upon by both parties.

Items 999.851 and 999.824 were created by the resident engineer and prorated for the period of time needed to accomplish EWO #13. These items are safety related items and should have been included in the extra work order but were not. MassHighway now agrees with these payments.

At the hearing, the issue of a credit to remove asphalt in the amount of $840.00. was raised and agreed upon by all parties.

Thus, we have agreement that $28,659.37 should be restored to the final estimate minus $840.00 credit due MassHighway.

RECOMMENDATION:

The claim of the Kodiak Corporation to restore payments to the final estimate for work performance should be approved in the amount of $27,819.37

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTRODUCTION:

P. Gioioso & Sons, Inc. (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) failure to pay $5000.00 plus interest representing retainage the Contractor claims was due to a revised final on Contract #91499 (the Contract), appealed to the Board of Contract Appeals.

The Contract was for the construction of two separate parking facilities, one located at Court Street and one located at Newton Street in the City of Marlborough.

The work under this Contract consisted of the construction of two separate open air parking facilities and modifications to their respective sites. The first structure was located at the intersection of Court Street and Granger Boulevard, hereinafter referred to as "Court Street Garage". The second structure was located at the intersection of Newton Street and Granger Boulevard, hereinafter referred to as "Newton Street Garage".

The work included excavation, ordinary borrow, gravel borrow, water supply alteration, drainage system, precast concrete culvert, bituminous concrete pavement, sidewalks, curbing, guardrail, fence, loam, landscaping, parking meters, traffic signs, removal and resetting of traffic signal equipment, facility lighting and miscellaneous items as shown on the plans, as listed in the Contract, and as directed by the Engineer.

All work done under this Contract had to be in conformance with the Department

of Public Works STANDARD SPECIFICATIONS FOR HIGHWAY AND BRIDGES dated 1988, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the 1980 AMERICAN STANDARDS FOR NURSERY STOCK, as amended, the PLANS, and these SPECIAL PROVISIONS.

Contract #91499 was awarded January 16, 1991, Item #4. It was dated January 21, 1991. The original completion date was May 29, 1993. The Contract award price was $3,760,631.50.

A hearing was held on August 10, 2000. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Kathleen Pendergast	Deputy Chief Counsel
Lynn Brendemuehl	Assistant Chief Counsel
Charles Verrocchi	Finals
Frank Gioioso	P. Gioioso & Sons
Mario Romania	P. Gioioso & Sons
James Jones	Counsel to P. Gioioso

Entered as Exhibits were:

Exhibit #1 ……..Contract #91499
Exhibit #2 ……..Statement of Claim
Exhibit #3 ……..Memo from Michael Byrne to Peter Milano dated June 6, 2000
Exhibit #4 ……..Revised Final Estimate from C. Verrocchi dated November 8, 1999

A post hearing submission was requested of both parties as to proposed findings of facts. Both parties have filed these submissions. For the sake of fairness I have adopted the findings of MassHighway and made them a part of this report.

FACTS AND DISCUSSION OF LAW:

"MHD is seeking reimbursement for alleged overcharges in the amount of $93,212.33 on Contract No. 91499, Marlborough parking garages. Of this total amount MHD is holding $21,736.42 of retainage funds due to P. Gioioso & Sons, Inc. ("Gioioso") on four contracts:

Contract No. 91499	$5,000.00
Contract No. 91112	$ 556.28
Contract No. 91602	$9,713.00
Contract No. 93301	$6,467.14

MHD alleges that the project records were audited and that there were insufficient records to support the amounts paid to the Contractor. P. Gioioso & Sons, Inc. ("Gioioso") requested copies of the project records supporting the audit conclusions from MHD but never received any records. It appears that the records of MHD are incomplete. There were four record books covering the work on the job but MHD has located only three of these books. The information concerning quantities of work performed contained in the fourth record book would be needed to confirm that the total money paid to Gioioso was correct.

Section 9.00 of the Standard Specifications sets out the requirements for "Measurement and Payment" on the contract. Section 9.01 requires that

> "The quantities of the various items of work performed shall be determined for purposes of payment by the engineer and by the Contractor for purposes of the certification(s) of work performed..."

On this project the Engineer kept all of the quantity records and these records were then reviewed with the Contractor on a daily basis with both parties agreeing on the quantities of work done on each item of work. The Engineer had sole custody of all of the quantity records on the contract.

Section 9.04 of the Standard Specifications requires in part that

> "The Engineer shall biweekly make an estimate of the total amount of the work done from one estimate to the next."

As the work progressed the Engineer did prepare the required estimates. These estimates were then reviewed with the Contractor. Once the quantities of work satisfactorily performed were agreed to by the parties a requisition was processed for the work done during the time period covered by the estimate and payment was made. As a part of this payment process the contractor is:

‘

> "…required to certify, in writing, that the work for which he is being paid on the estimate in question has in fact been done."

Gioioso did certify that the work was done on each requisition for which an estimate was prepared.

Section 9.01 also contains the provisions covering final payment on the contract. The section requires in part that

> "Upon the completion of the work and before final payment is made the Engineer will make final measurement to determine the quantities of the various items of work performed, as the basis for final settlement."

The Resident Engineer developed the final Requisition No. 34 after determining the final measurement of quantities of each work item performed on the contract. Once this final Requisition No. 34 was developed it was presented to the contractor, approved by the contractor, processed for payment by MHD and payment was made and accepted by the contractor. The contractor asserts that this Requisition No. 34 accurately reflects the final quantities of work performed on the project.

‘Discussion:

The records concerning the quantities of work performed on the project were maintained solely by the Engineer as required by the Standard Specifications. As a regular course of business the contractor and the Engineer met on a daily basis to review the quantity records for work performed on each day. These daily records were then compiled to determine the work performed on a weekly basis and a biweekly basis. The Engineer then prepared the required estimates on a biweekly basis covering work performed for the two week period. These estimates were reviewed by both parties, approved by both parties and then, and only then, processed for payment.

At the completion of the work the Engineer complied the final quantities for all work performed based on the daily records kept as the work proceeded. An estimate covering all of the work satisfactorily performed was then prepared by the Engineer, approved by both parties and then, and only then, processed for payment.

This record keeping/payment process was done at the time the work was performed. It represents the best evidence of the actual quantities of work performed and paid for by the MHD. There is no evidence that any of the work for which payment was made was not

actually performed. Both the MHD engineer and the contractor's representative confirmed that the work was done when they jointly approved each estimate for payment. There were no unresolved work items at the conclusion of the work when the last estimate was prepared.

The audit work included review of all of the records for the work performed that could be found. In the absence of a complete set of records the best evidence concerning the actual amounts of work satisfactorily performed by the contractor are the periodic estimates prepared by MHD as the work proceeded and agreed to by the contractor at that time. There has been no allegation by MHD representative who worked on the project as it was built that the estimates are wrong or that any of the work paid for was not performed. There have been no allegations of any improprieties on the part of any person related to the measurement and payment for work performed. The only dispute concerning quantities results from an audit of the job records that did not include records covering all of the work performed because a portion of the quantity records is missing.

The final estimate of the resident engineer signed on May 11, 1994 is the best evidence of the final quantities of work performed. It should be readopted as the final estimate for

Contract No. 91499 and Gioioso should be paid the retainage funds currently being held by the Department on the four affected contracts plus interest from the date that payment was due under each of the four affected contracts until the date of payment." (Facts as submitted by Kathleen Pendergast, Deputy Chief Counsel, dated September 7, 2000).

It is a well-founded principal of law that contract terms which are plain and free from ambiguity must be interpreted in accordance with their ordinary and usual sense. Edward R. Sage Company v. Foley, 421 N.E. 2d 460 (1981). This Contract had no ambiguities and as such each unit of work accomplished by the Contractor should be compensated at the unit price bid by the Contractor for the item of work performed.

When the project records were left with the finals section they were unable to confirm the quantities. The previous Finals Engineer reduced the final estimate accordingly.

The evidence and facts submitted suggests that the residents' last estimate would be the fairest estimate of quantities performed. The Finals section was unable to document their deductions.

FINDINGS:

I find that the position of the Contractor, that the Resident Engineers' final, estimate #34, is supported by the weight of evidence in this matter and should be adopted as the final estimate on this project.

RECOMMENDATION:

The appeal of P. Gioioso & Sons, Inc. on Contract #91499 should be resolved by adopting Estimate #34 as the Final estimate on this project.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

(See corrected Bd Vote on 3/12/97 correcting contr. # to 87389)

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: January 24, 1997

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **M. DeMatteo Construction Company**
CONTRACT #: **87384**
CITY/TOWN: **Charlestown**
CLAIM: **Police service fee in the amount of $12,969.95.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, JANUARY 29, 1997**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro

Chief Eng. Broderick
E.Botterman, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
E. Botterman, Act.DHD.Dist.4
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

M. DeMatteo Constr. Co.
200 Hancock Street
No. Quincy, MA 02171

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **M. DeMATTEO CONSTRUCTION COMPANY**, 200 Hancock Street, No. Quincy, MA 02171, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, JANUARY 29, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: March 7, 1997

RE: **Board Vote Revision**

Please revise board vote for M. DeMatteo Construction Company, Charlestown which was approved by the Board of Contract Appeals on January 29, 1997, Item #1 for Police Service Fee in the amount of $12,969.95. Contract number was incorrectly stated as #87384 in lieu of correct number of 87389.

PM/JD
cc:
Comm. Sullivan
Dep. Comm. Kostro
Assoc. Comm. Botterman
Assoc. Comm. Broz
Assoc. Comm. Blundo
Chief Eng. Broderick
E. Botterman, Dep. Ch. Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
E. Botterman, Act. DHD, Dist. #4
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

M. DeMatteo Constr. Co.
200 Hancock Street
No. Quincy, MA 02171

(See revised Bd. Vote on 3/12/97 correcting Contract #87384 to correct #87389)

INTRODUCTION:

M. DeMatteo Construction Company (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) failure to reimburse the Contractor for Police Service Fees in the amount of $12,969.65 on Contract #87384, appealed to the Board of Contract Appeals.

Contract #87384 was for the construction of detour roads and structures for the I-93/Rte. 1 interchange in Charlestown.

The work consisted of constructing detour roadways and structures to handle traffic traversing the Tobin Memorial Bridge, Route 1, Interstate Route 93 and local streets in the vicinity of Charlestown's City Square. The detour facilities were to be used in the future to provide for safe movement of traffic during the construction of proposed tunnels in the City Square area, the tunnel approaches to the Tobin Memorial Bridge and other transportation facilities which were to be constructed in future construction contracts.

In general, the work involved construction of new roadways, ramps, local streets, bridges and modifications of traffic signal systems. The work also included modifications to the approaches to the Tobin Memorial Bridge and portions of Route 1 northbound, Route 1 southbound and Chelsea Street; the relocation of Gray Street; the abandoning of the Henley Street off ramp and Park Street on ramp to Route 1 southbound. The work included mobilization, clearing, demolition, earthwork, grading, drainage, utility relocations, retaining walls, modification of traffic signal systems, paving, curbing, guard rail, sidewalk, lighting, signing, pavement markings, fencing and other related highway and bridge work as indicated on the plans and as directed by the Engineer. Furthermore, the work included maintenance of traffic during construction, maintenance of vehicular

and pedestrian access to abutting properties and, uninterrupted and acceptable utility service.

All work done under this contract had to conform with the Department of Public Works STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1973, the SUPPLEMENTAL SPECIFICATIONS dated June 19, 1985, the 1977 CONSTRUCTION STANDARDS, the 1978 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1981 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the PLANS and the SPECIAL PROVISIONS.

The Contract was awarded February 25, 1987, Item #23. The Contract was dated February 27, 1987. The original completion date was May 31, 1989. The Contract award price was $13,530,843.00.

A hearing was scheduled for December 10, 1996, but both parties agreed to waive the hearing and to rely on written submissions.

FACTS AND ISSUES OF LAW:

The Department reimbursed the Contractor for Police Service Fees in the partial estimates as the job was in progress. During the final quantity review by the Department's Final Review Section, the Department deducted the sum of $12,969.95 from Item No. 999.004 - Police Service Fee.

This Contractor also did the Southeast Expressway contract and on that job he was reimbursed for the service fee.

MassHighway's position was that Massachusetts General Laws Chapter 44 § 53C states in pertinent part that "A city, town or district may establish a fee not to exceed ten percent of the costs of services authorized under this section, which shall, except in the case of a city, town, district or the **Commonwealth** (emphasis added), be paid by the persons requesting such private detail."

The Contractor argued that Policy Directive 002 for MassHighway would allow this service fee (see Attachment I).

In the discussions of this matter with the Chief Counsel's Office

after submissions were in, it was agreed that this claim should be paid.

RECOMMENDATION:

It is recommended that the M. DeMatteo Construction Company's claim on Contract #87384 for $12,969.95 for Police Service Fee should be paid.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTRODUCTION:

The CCM Corporation (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) denial of a claim for additional compensation due to accelerating the completion of Contract #97121 (the Contract) ordered by MassHighway totaling $9586.64, appealed to the Board of Contract Appeals.

The work on this Contract was for the construction of a tourist information center at Route 2 West in Lancaster.

The work done under this Contract consisted of, but was not limited to the following:

1) Furnishing all labor, materials and equipment necessary to construct a Tourist Information Center as shown on the Drawings and in accordance with the specifications. Work included construction of a Tourist Information Center Building, Vending Machine Shed and Kiosk.

2) Furnishing all labor, materials and equipment necessary for construction of site work associated with the Tourist Information Center as shown on the Drawings and as specified in the special provisions. Site work included but was not limited to grading, pavement, granite curbing, drainage structures, pavement markings, site lighting, landscaping and signage.

3) Underground electrical service had to be provided in accordance with all local and state applicable codes.

4) Heating, Ventilating and Plumbing systems, including all related accessories had to be furnished by heating and plumbing contractors as shown in the drawings and as specified in the special provisions.

5) Furnishing labor and materials for installation of sanitary system and discharge to proposed on-site waste treatment system as shown on Drawings, or as otherwise required. Contractor had to obtain all required permits prior to beginning construction, DEP-approved plans as required and meet all state and local requirements for execution of such work.

All work done under this Contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated November 30, 1994, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES with latest revisions, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the latest edition of AMERICAN STANDARD FOR NURSERY STOCK, the PLANS and these SPECIAL PROVISIONS.

Contract #97121 was dated September 6, 1996. The original completion date was September 3, 1997. Contract bid price was $1,130,510.55.

A hearing was held on February 11, 1999. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
John Driscoll	MHD - Dep. Chief Counsel
Dale Lutz	MHD - Audit Operations
Edmund Beshara	CCM
Charles Beshara	CCM

Entered as Exhibits were:

Exhibit #1 …….	Contract #97121
Exhibit #2 …….	Statement of Claim
Exhibit #3 …….	Audit Report #98A-554 dated June 15, 1998 (a copy of which is attached to this report and made a part thereof)

FACTS AND ISSUES PRESENTED:

This project was originally scheduled to be completed and opened for Labor Day Weekend, 1997 (completion date of September 3, 1997). However, MassHighway made a decision to accelerate the opening to Memorial Day Weekend 1997. To this end the District

requested the Contractor to submit to it how much it would cost the Contractor to accomplish this acceleration. The Contractor submitted claimed cost of $54,422.40. The Contractor proceeded with its work and the information center was indeed opened to the public by Memorial Day weekend.

The Claims Committee reviewed the submission of the Contractor and referred the matter to MassHighways Audit Operations Section (Audit). Audit classified the cost of the claim thusly:

Accepted Costs	-	$37,634.90
Unresolved Costs	-	$9725.54
Questioned Costs	-	$7061.87

The Claims Committee then awarded the Contractor $44,855.56 which has been paid. The Contractor appealed to this office for the balance of $9586.84. During the course of the hearing no evidence was submitted as how the Claims Committee arrived at the $44,855.56.

The evidence presented by Dale Lutz clearly showed that the Claims Committee denied all the questioned costs of $7061.87. It awarded the Contractor all of the accepted costs of $37,634.99. Further, of the unresolved cost, they gave the Contractor $7220.57. No explanation or testimony was offered as to the rational for excluding $2504.97. Mr. Lutz upon further review, felt that the $2504.97 would be appropriate damages.

Thus, we are left with the issue of the questioned cost of $7061.87. The bulk of this cost was for the alleged rental of a Vermeer Rock Cutter. Due to the Contractor's inability to supply audit adequate documentation, Mr. Lutz assigned a rental cost of $19.03 per hour for twenty-four hours totaling $456.72.

Because documentation was not submitted to Mr. Lutz during the audit process, testimony was needed to establish a reasonable cost for this piece of equipment plus operator

cost. The Contractor and Lutz agreed that $56.00 per hour (salary plus benefit) was a reasonable rate for the operator. Application of the additive for overhead and profit result in a rate of $67.76 per hour for a total cost of $1626.24.

Furthermore, it was agreed that the rental established by audit was low. However, the Contractor could not document his requested rate of $300.00 per hour. Thus, a compromise was reached to give the Contractor an additional $1000.00 inclusive of additives. The total questioned cost allowed was $2626.24.

FINDINGS:

I find that MassHighway did accelerate Contract #97121 and has paid the Contractor $44,855.26 of a claimed amount of $54,422.40.

I find that of the total claim in the present matter of $9586.84 the Contractor is entitled to an additional $2504.97 in unresolved cost (see Exhibit #3 attached).

I further find that of the questioned cost, the bulk of which is associated with the 24 hours of operation of Vermeer Rock Cutter, the Contractor is entitled to an additional $2626.24 under questioned cost.

RECOMMENDATION:

CCM Corporation's claim on Contract #97121 for additional costs due to MassHighway accelerating the completion of the project in the amount of $9586.84 should be approved in the lesser amount of $5131.21.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTRODUCTION:

P. Gioioso & Sons, Inc. (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) failure to pay $93,472.00 plus interest from December 19, 1994 pursuant to M.G.L. c. 30 § 39(G) which arose because of an agreement between MassHighway and the New England Telephone Company dated January 13, 1993, Agreement Number 6441 (the Agreement) attached hereto and marked Attachment I on Contract #93595 (the Contract), appealed to the Board of Contract Appeals.

New England Telephone Company merged with New York Telephone Company under the name NYNEX which was subsequently acquired by Bell Atlantic (hereinafter referred to as NYNEX).

The Contract was for roadway improvements and traffic control signal systems at ten locations in the City of Lynn.

The work done under this Contract consisted of furnishing all necessary labor, materials, and equipment required for the reconstruction of Washington Street and portions of several downtown city streets with necessary drainage and utility improvements; and to upgrade traffic control with related work at the locations listed below in the City of Lynn.

The work included, but was not limited to, furnishing and installing electrical conduit and cable, installing traffic signal systems with coordination, road reconstruction, resurfacing, roadway widening, construction of new channelizing islands, removing and resetting granite curb, installation of new granite curb, construction and reconstruction of

bituminous and cement concrete sidewalks and driveways, landscaping, the application of pavement markings, the erection of signs, the provision of safety controls and signing for construction operations, and all other items of any character whatsoever necessary for the completion of the work as specified or as shown.

The work also included the construction of a drainage system. The installation of the drainage system included pipe jacking in some lengths.

All work done under this contract had to be in conformance with Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, THE PLANS and these SPECIAL PROVISIONS.

LOCATIONS

The project included traffic signal work at the following locations:

1. Washington St. and Broad St.	Upgrade existing signal (fully-actuated, coordinated)
2. Union St., Exchange St., and Central Avenue (Central Square)	New signal (semi-actuated, coordinated)
3. Washington St. and Union St.	New signal (semi-actuated, coordinated)
4. Washington St., Central Ave. and Oxford St.	New signal (semi-actuated, coordinated)
5. Oxford St. and Willow St.	New signal (semi-actuated, coordinated)

6.	Washington St. and Liberty St.	New signal (semi-actuated, coordinated)
7.	Washington St. and Essex St.	Alterations to existing signal (semi-actuated, coordinated)
8.	Market St., Oxford St. and State St.	Alterations to existing signal (pretimed, coordinated)
9.	Boston St. and Washington St.	New signal (semi-actuated, coordinated)
10.	Boston St., Franklin St., and North Franklin St.	Upgrade existing signal (semi-actuated, coordinated)

Contract #93595 was awarded June 1, 1993, Item #23. It was dated June 2, 1993. The original completion date was September 30, 1995.

Hearings were held on May 5, 1998 and September 17, 1998. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen, Esq.	Chief Counsel
Joseph D'Angelo	MHD - District #4
John Corrigan, Esq.	Attorney - Bell Atlantic
Sui Chin	Planning Manager - Bell Atlantic
Kevin Kelley	Area Operating Manager - Bell Atlantic
Mary Anderson	Director - Bell Atlantic
Carolyn Hough	Staff Director - Bell Atlantic
James Jones, Esq.	Attorney for Gioioso
Frank Gioioso	Gioioso
Mario Romania	Gioioso

Entered as Exhibits were:

Exhibit #1 ……	Contract No. 93595
Exhibit #2 ……	Statement of claim filed by the Contractor
Exhibit #3 …….	Interest rate schedule
Exhibit #4 …….	Two-page document entitled "Revised Damage Info" Compiled by NYNEX for Contract #93595
Exhibit #5 ……	Original breakdown of the NYNEX

	claim
Exhibit #6A ……..	Bill to Contractor from NYNEX for $21,518.62
Exhibit #6B …….	Bill to Contractor from NYNEX for $38,471.51
Exhibit #7 …….	Document entitled "Interest Calculated through this day 9/17/98", calculated pursuant to Mass. General Laws Chapter 30, Section 39G
Exhibit #8 ……..	Package entitled "Gioioso's Superintendent's Field Log: - selected entries only
Exhibit #9 ……..	Summary of Gioioso's log book as complied by NYNEX

FACTS AND ISSUES OF LAW PRESENTED:

The Contractor is claiming for payments owed on estimates dated November 14, 1994 in the amount of $80,130.60 and November 15, 1994 in the amount of $13,908.00 totaling $93,472.84. MassHighway submitted these two estimates to NYNEX for payment.

NYNEX had paid $321,982.96 on Agreement No. 6441 but did not pay the above captioned $93,472.84. The Contractor is not a party to Agreement No. 6441. This Contract is only with MassHighway. NYNEX agreed with MassHighway in Agreement No. 6441 that they would pay to relocate "an existing 36" sewerage line in lieu of relocating the Company's facilities" (see Attachment I). As a result of the force account agreement, NYNEX's exposure was contractually capped at $420,000.00. Mass Electric picked up twenty (20%) per cent.

Joseph D'Angelo, the area superintendent for District #4, testified that there was no question that the Contractor did the work and was entitled to be paid for the estimate.

The problem arose when NYNEX had to relocate conflicts with the sewer line that cost it $64,156.83.

It is a well founded principle of law that contract terms which are plain and free from ambiguity must be interpreted in accordance with their ordinary and usual sense. Edward R. Sage Company v. Foley, 421 N.E. 2d 460 (1981). However, to establish whether the plan and ordinary meaning of contract language will govern the agreement itself, courts must establish whether ambiguity is present. Ambiguity is defined as "an uncertainty of meaning in the terms of a written contract, a wanting of clearness or definiteness; something difficult to comprehend or distinguish; and of doubtful language." Tribe, Government Contracts, Vol 1, c. 2 §10. Stated another way, a provision is ambiguous if it is reasonably susceptible to two or more difference interpretations, each of which is found to be consistent with the contract language. Id. At 2.10(1). The uncertainty of meaning, however, must be both substantial and reasonable. Id. At 2.10(1). Thus, contract language is ambiguous if there is an inherent substantial and reasonable uncertainty of meaning, and if the language is reasonably susceptible to two or more different meanings.

In the present mater, there is no ambiguity either in the Contract or in Agreement No. 6441. Both the Contract and the Agreement are subject to Chapter 506 of the Acts of 1976 M.G.L. c. 30 § 39(G) and the Contract was also subject to M.G.L. c. 30 § 39(K) which both have similar requirements for payment of interest M.G.L. c. 30 § 39(K).

> "If the awarding authority fails to make payment as herein provided, there shall be added to each such payment daily interest at the rate of three percentage points above the rediscount rate then charged by the

> Federal Reserve Bank of Boston commencing on the first day after said payment is due and continuing until the payment is delivered or mailed to the contractor; provided, that no interest shall be due, in any event, on the amount due on a periodic estimate for final payment until fifteen days (twenty-four days in the case of the commonwealth) after receipt of such a periodic estimate from the contractor, at the place designated by the awarding authority if such a place is so designated."

Attached hereto and marked Attachment II is an interest schedule which reflects the statutory requirements.

Through David Mullen, Chief Counsel, NYNEX has agreed to pay $80,130.60 contingent upon receipt of a release executed in triplicate. MassHighway's release will become a part of this report.

FINDINGS:

I find that the Contractor is owed $137,169.23 as of July 31, 1999.

RECOMMENDATION:

P. Gioioso & Sons, Inc.'s claim for work completed on Contract #93595 should be approved in the total amount of $137,169.23 payable as follows $80,130.60 payable to the Contractor by NYNEX and $57,038.63 payable by MassHighway and the Commissioner is hereby authorized to sign the release for MassHighway.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

RELEASE AND SETTLEMENT OF CLAIM

For the sole consideration of Eighty Thousand One Hundred thirty 60/100 ($80,130.60) Dollars paid to P. Gioioso & Sons, Inc., P. Gioioso & Sons, Inc., and the Massachusetts Highway Department and for other valuable consideration hereby release forever discharge New England Telephone and Telegraph Company, Bell Atlantic and NYNEX, their successors, assigns, agents or employees from any and all claims, demand, rights, action or cause of action or account of or in any way growing out of work performed under Contract Number 93595 by P. Gioioso & Sons, Inc. for the Massachusetts Highway Department in the City of Lynn on or after June 2, 1993, which was the subject of a hearing before Administrative Law Judge Peter Milano, including any claim for interest and attorneys' fees.

It is expressly understood that Massachusetts Highway Department will pay the balance of the requisitions and accrued interest (to date of payment) on all late payments to P. Gioioso & Sons, Inc.

P. Gioioso & Sons, Inc. and the Massachusetts Highway Department do hereby for themselves, their successors, assigns covenant to indemnify and save harmless New

England Telephone and Telegraph Company, Bell Atlantic and NYNEX from all claims, demands costs, loss of services, expenses and compensation on account of or in any growing out of the above described work.

It is expressly understood and agreed that payment of or the acceptance of the said above amounts is in full accord and satisfaction of a disputed claim and that payment of the said above amounts are not an admission of liability by any party.

In witness hereof, we hereunto set our hand and seal this _____ day of _____, 1999.

_____ _____
Witness P. Gioioso & Sons, Inc.

_____
Date

_____ _____
Witness Massachusetts Highway Department

_____
Date

APPENDIX E-1

DECISIONS/RULINGS

Disputes re: Liquidated Damages

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: April 25, 1995

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **Granger-Lynch Corp.**
CONTRACT #: **93359**
CITY/TOWN: **Sturbridge**
CLAIM: **Liquidated damages assessment**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, MAY 3, 1995**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge
PM/jd
Attachment
cc:
Comm. Bedingfield
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Church
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis

Chief Engineer Dindio
Dep. Chief Eng. Gill
Secretary's Office
Ned Corcoran, Chief Counsel
P. Donohue, DHD, District #3
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

Granger-Lynch Corp.
18 McCracken Road
Millbury, MA 01527

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **GRANGER-LYNCH CORPORATION**, 18 McCracken Road, Millbury, MA 01527, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, MAY 3, 1995** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The Granger-Lynch Corporation (the Contractor) aggrieved by the Massachusetts Highway Department's (the Department) assessment of liquidated damages on Contract #93359 in the amount of $15,375.00 appealed to the Board of Contract Appeals.

Contract #93359 (the Contract) was for the resurfacing and related work on a section of Route 20.

The work to be done under this contract consisted of Bituminous Concrete Excavation by Cold Planer and resurfacing with Class I Bituminous Concrete. In addition, the work included areas of Full Depth Reconstruction, repairing and adjusting drainage structures, installing Bituminous Concrete and Granite Curbing and removing and resetting guardrail. Placing permanent and temporary pavement markings, instituting traffic control operations during construction and other incidental work included in this project.

All work done under the contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, THE 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, THE 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, THE PLANS and these SPECIAL PROVISIONS.

The work covered by the Contract was located on Route 20 in Sturbridge, beginning at the Brimfield/Sturbridge Town Line, station 0+19.67 thence proceeding Easterly through Sturbridge to station 50+00. Beginning again at station 55+96.96 and continuing Southeasterly and ending at station 105+33, for a total distance of 1.88 miles.

The Contract was awarded on March 3, 1993, Item #7. The Contract was dated March 16, 1993. The Notice to Proceed was dated April 22, 1993. The bid date was February 2, 1993. The Contract award price totaled $641,100.66.

A hearing was held on April 18, 1995. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
John Donohue	District #3 Construction Engineer
Roland Michaud	District #3 Asst. Construction Eng.
David Mullen	Deputy Chief Counsel
John McDonnell	Chief Counsel's Office
Timothy Keenan	Granger-Lynch Project Supt.
Bill Beauregard	V.P., Granger-Lynch

Entered as exhibits were:

Exhibit #1.....Contract #93359
Exhibit #2.....Statement of Claim
Exhibit #3.....District's Response dated August 24, 1994

FACTS:

The Department accepted the work done on the Contract as of January 6, 1994. Liquidated damages were assessed in the amount of $15,375.00 based on October 21, 1993 (the original completion date) to December 10, 1993, a total of 48 days at $250.00 per day equaling $12,000.00 and December 10, 1993 to January 6, 1994, a total of 27 days at $25.00 per day equaling $3375.00.

The Special Provisions at page 13 stated in part:

> "... and the completion thereof within 180 Calendar days (excl. the dates 11/15 thru 4/15)..."

Thus the Special Provision had a winter shutdown between November 15 and April 15.

The 1988 Standard Specifications for Highways and Bridges states in part at Subsection 8.10:

> **8.10 Determination and Extension of Contract Time for Completion.**
>
> The maximum time limit for the satisfactory completion of the work set forth in the Proposal is based upon the requirements of public convenience and the assumption that the Contractor will prosecute the work efficiently and with the least possible delay, in accordance with the maximum allowable working time per week as specified herein. It is an essential part of this Contract that the Contractor

> shall perform fully, entirely, and in an acceptable manner, the work required within the time stated in this Contract, except that the contract time for completion shall be adjusted as follows:
>
> **A.** If the Contractor does not receive the Notice to Proceed for a Federally Aided project within 70 days of bid opening (or for a Non-Federally Aided project, within 55 days of bid opening), it shall be entitled to an extension of time equivalent to the number of days beyond 70 (or 55) that it takes for the Contractor to receive the Notice to Proceed. Any such extension of time shall be reduced by the number of days beyond 14 days from the date of receipt of the Notice of Award that the Contractor takes to return the executed Contract and the required surety (emphasis added).

The Contract was a Non-Federally Aided project. The Bids were opened on February 2, 1993. The notice to proceed is dated April 22, 1993. February, 1993 had 28 days, so a total of 27 days should be added to the 31 days in March and the 22 days in April or a total of 80 days. The Contractor is entitled as a matter of contract to 25 days extension (80 days - 55 days).

FINDINGS:

I find that pursuant to 8.10 of the Standard Specifications that the Contractor is entitled to a 25 day extension.

I find that the completion date should have been extended to January 6, 1994.

I find that the Contractor completed the work on January 6, 1994.

I find that the Contract mandated a winter shutdown between Novmeber 15 and April 15.

I further find that no liquidated damages should be assessed.

RECOMMENDATION:

It is my recommendation that the completion date on Contract #93359 should be extended from October 21, 1993 to January 6, 1994 and that the liquidated damages assessed from October 21, 1993 to January 6, 1994 (75 days) totaling $15,375.00 should be rescinded.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: July 27, 1995

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **E. H. Perkins Construction, Inc.**
CONTRACT #: **93207**
CITY/TOWN: **Boylston/Shrewsbury**
CLAIM: **Liquidated damages**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, AUGUST 2, 1995**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Bedingfield
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis

Chief Eng. Dindio
J. Crescio, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
P. Donohue, DHD, District #3
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

E. H. Perkins Constr.,Inc.
560 Main Street
P.O. Box 752
Hudson, MA 01749

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **E.H. PERKINS CONSTRUCTION, INC**, 560 Main Street, P.O. Box 752, Hudson, MA 01749, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, AUGUST 2, 1995** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

E. H. Perkins Construction, Inc. (the Contractor) aggrieved by the Massachusetts Highway Department's (Department) assessment of liquidated damages totaling $15,875.00 assessed from April 7, 1994 to August 12, 1994, 127 days at $125.00 per day, appealed to the Board of Contract Appeals.

Contract #93207 (the Contract) was for pavement reclamation, resurfacing and related work on a Section of Route 140.

The work to be done under this contract consisted of Pavement Reclamation of Boylston Route 140 and Bituminous Concrete Excavation by Cold Planer of Shrewsbury Route 140 (including ramps), resurfacing with Class I Bituminous Concrete, repairing and adjusting drainage structures, installing new catch basins to improve drainage, cleaning drainage structures and drainage pipes, removing existing cable guard rail and replacing with steel beam highway guard, rebuilding paved waterways, installing bituminous concrete berm, pavement markings and removing bituminous concrete curb and other incidental work necessary to complete the project.

The work under this contract had to conform to the 1988 Standard Specifications for Highways and Bridges, the Supplemental Specifications dated August 7th, 1991, the 1977 Construction Standards, the 1988 Manual on Uniform Traffic Control Devices, the 1990 Standard Drawings for Signs and Supports, and these Special Provisions.

The Contract was awarded October 28, 1992, Item #2. The Contract was dated November 9, 1992. The original completion date was October 29, 1993 extended to April 7, 1994. The actual completion date was August 12, 1994. The Contract award price was $930,977.15.

A hearing was held on July 18, 1995. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Deputy Chief Counsel
Peter S. Romano	Asst. Constr. Eng.- Distr. #3
Mark Pelletier	Resident Engineer
James T. Hayes	Area Constr. Engineer
Sean P. Brosnan	E. H. Perkins
David Kelley	E. H. Perkins

Entered as exhibits were:

Exhibit #1.....Contract #93207
Exhibit #2.....Statement of Claim
Exhibit #3.....District's Response

FACTS AND ISSUES PRESENTED:

The Contractor in the present claim performed the work on this contract and a project one mile from the location of work on Contract #93207. Both contracts contained Item 770 Lawn Sodding. At the Contractor's request, the District allowed the Contractor to seed areas where sod was to be used on the Contractor's two adjacent contracts. The seeding took on the adjacent project to Contract #93207. The District insisted on the sod but we had a severe winter and the embankments were covered with snow until May. The Contractor could not get any sod until later in the year. Consequently, the sod was done on or about August 12, 1994, 127 days past the completion date.

The Contract in the Standard Specifications at 8.11 Failure to Complete Work on Time states:

> **8.ll Failure to Complete Work on Time.**
>
> On or before the date stated in the proposal for completion or the date to which the time of completion shall have been extended under the provisions of Subsection 8.10 the whole work shall have been performed in accordance with the terms of the Contract. The time in which the various portions and the whole of the Contract are to be performed and the work is to be completed is an essential part of the Contract.
>
> In case the work embraced in the Contract shall not have been physically completed by the time stipulated therein

(to the foregoing requirements) the Contractor shall pay to the party of the First Part a designated sum per day for the entire period of overrun in accordance with the Schedule of Deductions listed in the Contract. In the event the Contract has been substantially completed and the project opened for traffic as directed in writing by the Engineer, but physical completion of the work is subject to because of minor uncompleted items which do not impair the usefulness of the project, the designated sum per day shall be ½ the charges shown. In addition to the daily charge, the Contractor shall pay without reimbursement the entire cost of all traffic officers, railroad flagmen and inspectors the Engineer or the Chief Engineer of the railroad determines to be necessary during the period of overrun of time.

In the event the physical work embraced in the Contract has been completed and accepted in writing by the Chief Engineer but there remains to be submitted to the Department by the Contractor any reports or other documents in accordance with the provisions of the Contract, the Contract shall not be considered satisfactorily completed with the meaning of Section 39G of Chapter 30 of the General Laws until the receipt of such reports or documents by the Department, but the designated sum per day during this interval shall be zero.

Whatever sum of money may become due and payable to the Party of the First Part by the Contractor under this Subsection may be retained out of belonging to the Contractor in the hands and possession of the Party of the First Part. It is agreed that this Subsection shall be construed and treated by the parties to the Contract not as imposing a penalty upon said Contractor for failing fully to complete said work as agreed on or before the time specified in the Proposal, but as liquidated damages to compensate said Party of the First Part for all additional cost incurred by said Party because of the failure of the Contractor fully to complete said work on or before the date of completion specified in the Proposal.

Permitting the Contractor to continue and finish the work or any part of it after the time fixed for its completion, or after the date to which the time for completion may have been extended, shall in nowise operate as a waiver on the party of the Party of the First Part of any of its rights under the Contract.

Furthermore the special provision contains the following schedule:

Supplementing SubSection 8.11

SCHEDULE OF DEDUCTIONS

PROJECT VALUE $			DEDUCTIONS $1/day
0	to	100,000.	150.00
100,000.	to	500,000.	200.00
500,000.	to	1,000,000.	250.00
1,000,000.	to	2,000,000.	400.00
2,000,000.	to	3,000,000.	450.00
3,000,000.	to	4,000,000.	500.00
4,000,000.	to	5,000,000.	550.00
5,000,000.	to	10,000,000.	650.00
10,000,000.	to	15,000,000.	750.00
over 15,000,000.00			1,000.00

The District assessed half of $250.00 per day or $125.00 per day as the previous two sections of 8.11 provides, to wit: if the roadway is open to traffic the district can only assess half the damages.

The key issue to be determined is whether the scheduling issue was within the control of the Contractor. Cases are found that the general contractor should not be held liable for matters "beyond the control of and without the fault or negligence of the contractor." (See Appeal of Andresen, ASBCA 633, 5 CCF 61182).

FINDINGS:

I find that scheduling when sod should be applied is within the control of the general.

I further find that the general chose of his own accord to seed the embankments on this project and that seeding did not take place.

I find that the $15,875.00 assessed as liquidated damages was fair under the Contract even though only $337.63 of sod was placed on the embankment.

RECOMMENDATION:

It is recommended that the liquidated damages totaling $15,875.00 representing 127 days assessment from April 7, 1994 to August 12, 1994 at $125.00 per day should not be waived.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: August 2, 1996

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **E.H. Perkins Construction, Inc.**
CONTRACT #: **93335**
CITY/TOWN: **Boylston**
CLAIM: **Liquidated damages in the amount of $4200.00.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, AUGUST 7, 1996**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Dengenis

Chief Eng. Broderick
E.Botterman, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
M. O'Meara, DHD, District #3
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

E. H. Perkins Constr.,Inc.
560 Main Street
P.O. Box 752
Hudson, MA 01749

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **E.H. PERKINS CONSTRUCTION, INC.**, 560 Main Street, P.O. Box 752, Hudson, MA 01749, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, AUGUST 7, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

E. H. Perkins Construction, Inc. (the Contractor) aggrieved by the Massachusetts Highway Department's (Department) assessment of liquidated damages totaling $4200.00 assessed from May 17, 1994 to June 6, 1994, 21 days at $200.00 per day, appealed to the Board of Contract Appeals.

Contract #93335 (the Contract) was for full depth recycling, resurfacing and related work on a Section of Route 70 in the Town of Boylston.

The work done under this contract consisted of full depth reclamation of the existing roadway and resurfacing with Class I Bituminous concrete base course, binder course and modified top course. The work also included the installation of subdrain, rehabilitation of the existing drainage system, updating guardrail, and other related work.

The work under this Contract had to conform to the 1988 STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES, the SUPPLEMENTAL SPECIFICATIONS dated August 7th, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, and these SPECIAL PROVISIONS. The Contract was awarded February 17, 1993, Item #6. The Contract was dated February 24, 1993. The original completion date was May 16, 1994. The actual completion date was June 6, 1994. The Contract award price was $1,242,419.50.

A hearing was held on July 30, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Dean Kalavritinos	Asst. Chief Counsel
Kevin Green	Chief Counsel's Office
Peter Romano	Asst. Construction Eng. - Dist. #3
James Hayes	Area Construction Engineer
Sean Brosnan	E. H. Perkins

Entered as Exhibits were:

Exhibit #1..........Contract #93335
Exhibit #2..........Statement of Claim

FACTS AND ISSUES PRESENTED:

In the summer of 1993 a Department Engineering Directive was issued stating that all permanent pavement markings installed under construction contracts were to be of thermoplastic material and that permanent painted markings were not to be installed under these contracts. As a result of this directive Extra Work Order No. 1 was issued for the subject project.

Extra Work Order No. 1, in the amount of $25,945.00, called for the installation of permanent thermoplastic pavement markings in lieu of painted lines which were originally called for in the project.

The Contractor actually topped the road off in the fall and could have painted lines at that time had it not been for the change to thermoplastic. Because of weather conditions, the district restricted the application of the thermoplastic lines until May and June. The Contractor requested an extension of time, but was denied.

The Contract in the Standard Specifications at 8.11 Failure to Complete Work on Time states:

> **8.11 Failure to Complete Work on Time.**
>
> On or before the date stated in the proposal for completion or the date to which the time of completion shall have been extended under the provisions of Subsection 8.10 the whole work shall have been performed in accordance with the terms of the Contract. The time in which the various portions and the whole of the Contract are to be performed and the work is to be completed is an essential part of the Contract.
>
> In case the work embraced in the Contract shall not have been physically completed by the time stipulated therein (according to the foregoing requirements) the Contractor Shall pay to the party of the First Part a designated sum per day for the entire period of overrun in accordance with the Schedule of Deductions listed in the Contract. In the event the Contract has been substantially completed and the

> project opened for traffic as directed in writing by the Engineer, but physical completion of the work is subject to delay because of minor uncompleted items which do not impair the usefulness of the project, the designated sum per day shall be ½ the charges shown. In addition to the daily charge, the Contractor shall pay without reimbursement the entire cost of all traffic officers, railroad flagmen and inspectors the Engineer or the Chief Engineer of the railroad determines to be necessary during the period of overrun of time. In the event the physical work embraced in the Contract has been completed and accepted in writing by the Chief Engineer but there remains to be submitted to the Department by the Contractor any reports or other documents in accordance with the provisions of the Contract, the Contract shall not be considered satisfactorily completed with the meaning of Section 39F of Chapter 30 of the General Laws until the receipt of such reports or documents by the Department, but the designated sum per day during this interval shall be zero.
>
> Whatever sum of money may become due and payable to the Party of the First Part by the Contractor under this Subsection may be retained out of money belonging to the Contractor in the hands and possession of the Party of the First Part. It is agreed that this Subsection shall be construed and treated by the parties to the Contract not as imposing a penalty upon said Contractor for failing fully to complete said work as agreed on or before the time specified in the Proposal, but as liquidated damages to compensate said Party of the First Part for all additional cost incurred by said Party because of the failure of the Contractor fully to complete said work on or before the date of completion specified in the Proposal.
>
> Permitting the Contractor to continue and finish the work or any part of it after the time fixed for its completion, or after the date to which the time for completion may have been extended, shall in nowise operate as a waiver on the party of the Party of the First Part of any of its rights under the Contract.

The key issue to be determined is whether the scheduling issue was within the control of the Contractor. Cases are found that the general contractor should not be held liable for matters "beyond the control of and without the fault or negligence of the contractor." (See Appeal of Andresen, ASBCA 633, 5 CCF 61182).

FINDINGS:

I find that completing the thermoplastic markings by the original completion date was beyond the control of the Contractor. In his original schedule the Contractor would have painted the lines within the original completion date but for the change to thermoplastic material.

RECOMMENDATION:

It is recommended that the liquidated damages totaling $4200.00 representing 21 days assessment from May 17, 1994 to June 6, 1994 at $200.00 per day should be waived and the Contract completion date should be extended by 21 days to June 6, 1994.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: August 7, 1997

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **J.H. Lynch & Sons, Inc.**
CONTRACT #: **91301**
CITY/TOWN: **Attleboro (Rte. 1)**
CLAIM: **Liquidated damages, retainage and overassessment of liquidated damages in the amount of $129,280.93.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, AUGUST 13, 1997**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro

Assoc. Comm. Botterman
Assoc. Comm. Broz
Assoc. Comm. Blundo
Chief Eng. Broderick
D.Anderson, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
Dave Mullen, Dep.Ch.Counsel
B. McCourt, DHD, District #5
Beth Pellegrini, Audit
Steve O'Donnell, Contr.Adm.
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

John T. Walsh, Jr., Esq.
Higgins, Cavanagh & Cooney
The Hay Building
123 Dyer Street
Providence, RI 02903-3987

J.H. Lynch & Sons, Inc.
50 Lynch Place
Cumberland, RI 02864

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **JOHN T. WALSH, JR., ESQ.**, Higgins, Cavanagh & Cooney, The Hay Building, 123 Dyer Street, Providence, RI 02903-3987, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, AUGUST 13, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

J. H. Lynch & Sons, Inc. (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) assessment of liquidated damages in the amount of $37,575.00 based on an assessment from March 21, 1993 to November 5, 1993 for a total of 167 days at $225.00 per day on Contract #91301 (the Contract), appealed to the Board of Contract Appeals (the Board). The Contractor further appealed to the Board for retainage due of $71,905.53 and an overassessment of liquidated damages of $19,800.00 for a total value of $129,280.93.

The work done under this contract consisted of reconstructing, widening and resurfacing 1.32 miles of Washington Street (U.S. Route 1) in the City of Attleboro. The work included, but was not limited to: the installation of traffic signals at Bacon Street, Mendon Road and Brown Street, including a new left turn storage lane at Bacon Street, excavation of existing cement concrete and bituminous pavements and sidewalks, grading, drainage, water supply alterations and installation of curb, edging, sidewalks, pavement markings and other incidental items of work as listed in the Contract.

The work done under this Contract also included the rehabilitation of the superstructure and portions of the substructure of Bridge No. A-16-34, which carries Washington Street over AMTRAK/MBTA.

The Bridge work included, but was not limited to, the removal of all existing materials, except where noted, above the top flange of the concrete and gunite encasement of the exterior beams; and the removal of the concrete slab at both ends of the deck to the limits shown on the plans. Reinforced concrete of the same thickness and slope of the existing deck slab replaced the excavated portions of the deck slab. New gunite was applied to the exterior beams and patched

the remaining existing structural steel as necessary. Existing sidewalks were replaced with new sidewalks. Existing reinforced concrete balustrades were replaced with aluminum bridge rail with protective screening.

Modification to the abutments, reconstruction of the backwalls, repair of deteriorated beam seats, the replacement of existing approach slabs, repair of the deteriorated portions of the piers, pavement excavation, modifications to the top of the wingwalls, bituminous concrete resurfacing, and the incidental items required to complete the work as shown in the drawings, as listed in the Contract and as directed by the Engineer were also included.

The work done under this Contract conformed to the 1988 STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES, the PLANS, the 1977 CONSTRUCTION STANDARDS OF THE DEPARTMENT, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES FOR STREETS AND HIGHWAYS AND SUPPLEMENTS, the 1981 STANDARD DRAWINGS FOR SIGN SUPPORTS, the AMERICAN STANDARD FOR NURSERY STOCK (ANSI 760.1 - 1980) and the SPECIAL PROVISIONS.

Contract #91301 was awarded September 19, 1990, Item #2. It was dated October 2, 1990. The original completion date was September 25, 1992. The Contract bid price was $2,967,163.90.

A hearing was held on January 18, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Dep. Chief Counsel - MHD
Gilbert Alegi	Dist. 5 Construction Eng.-MHD
Daniel Silvia	Resident Eng. - MHD
Bin Lee	Area Constr. Eng. - MHD
John T. Walsh	Atty. for Lynch
Harry E. Myers, III	General Super. - Lynch
Nicholas A. Giardino	Contracts Administrator

Entered as Exhibits were:

Exhibit #1	Contract #91301
Exhibit #2	Statement of Claim
Exhibit #3	Letter dated March 24, 1992 to J.H. Lynch from District
Exhibit #4	Letter dated May 1, 1992 to J.H. Lynch from District

Exhibit #5	Letter dated June 11, 1992 from District to Contractor relative to delays in the Contractor's submittals
Exhibit #6	Items 1 through 74 with Chronology

After the hearing, I requested Proposed Findings of Facts and Rulings of Law from both counsels. No submissions were returned. However, both counsels continued to negotiate a settlement of the matter. I have been advised by Deputy Chief Counsel, David Mullen that an agreement has been reached between counsels to waive the liquidated damages and to award the Contractor $129,000.00.

FACTS:

All road work on this job was completed within nine months. The Contractor had planned to do the road work and bridge work simultaneously. However, the Contractor had to deal with Amtrak relative to shop drawings review. The Contractor dealt with the Boston office of Amtrak, then was referred to their Providence office, from there they were sent to their New Haven office and finally they had to deal with their Philadelphia office.

Each office of Amtrak took looks at the plans but, the Philadelphia office was a real headache, especially a Mr. Hudson. Amtrak's approval process appears to be the real culprit for the delays incurred in this matter.

FINDINGS:

I find the agreement to settle this matter reached by counsel for $129,000.00 and to waive all liquidated damages to be fair and reasonable.

RECOMMENDATION:

It is respectfully recommended that in the matter of the appeal of J.H. Lynch & Sons, Inc. on Contract #91301 that the completion date on the Contract be extended from March 21, 1993 to November 5, 1993

and liquidated damages be rescinded on the Contract and further that J. H. Lynch & Sons, Inc. be awarded $129,000.00.

Respectfully sublmitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: September 25, 1997

RE: Board of Contract Appeals
(PFN-601204)

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **RDA Construction Corp.**
CONTRACT #: **96286**
CITY/TOWN: **Boston/Somerville**
CLAIM: **Assessment of liquidated damges in the amount of $8750.00.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, OCTOBER 1, 1997**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro

Assoc. Comm. Botterman
Assoc. Comm. Broz
Assoc. Comm. Blundo
Chief Eng. Broderick
D.Anderson, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
E. Botterman, DHD, District #4
Alex Bardow, Bridge Eng.
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

RDA Construction Corp.
111 Sumner Street
East Boston, MA 02128

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **RDA CONSTRUCTION CORP.**, 111 Sumner Street, East Boston, MA 02128, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, OCTOBER 1, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

RDA Construction Corporation (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) assessment of liquidated damages in the amount of $8750.00 based on an assessment from December 28, 1995 to May 6, 1996 for a total of 70 days at $125.00 per day on Contract #96286 (the Contract), appealed to the Board of Contract Appeals.

The work done under the Contract was for structural repairs to I-93 viaduct columns.

The work under this contract consisted of performing weld repairs at two bent columns, removing and replacing existing downspout drain pipes and fire protection lines which interfered with column repair work, and the drilling of drain holes in all of the box columns of each bent of the I-93 viaduct structure, Bridge No. B-16-281 = S-17-38 located in Boston and Somerville, Massachusetts.

Incidental work included the removal and storage of the existing clamps at the two columns, reusing them during the weld repair operation, and delivering them to a location as indicated or directed, and all other work items necessary for the proper completion of the work as indicated in the Contract.

All work done under this Contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated November 30, 1994, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES with latest revisions, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the latest edition of AMERICAN STANDARD FOR NURSERY STOCK, the PLANS and these SPECIAL PROVISIONS.

The Contract was awarded October 25, 1995, Item #1. The Contract was dated October 30, 1995. The original completion date was December 27, 1995. The Contract award price was $69,498.93.

A hearing was held on July 29, 1997. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Deputy Chief Counsel
Reginald Jacobs	Dist. #4-Structural Maint. Section
Eugene Kelley	RDA
Martin Kashar	RDA

Entered as Exhibits were:

Exhibit #1	Contract #96286
Exhibit #2	Statement of Claim
Exhibit #3	Board vote dated 3/5/97, Item #64

FACTS:

By Board of Commissioner's Vote of March 5, 1997, Item #64, the Commission voted to assess liquidated damages of $8750.00. The amount is based on non-compliance from December 28, 1995 to May 6, 1996, a total of 70 days. Exactly how the 70 days was calculated is confusing to me, but the Board Vote clearly reflects 70 days.

Although the Contract is dated October 30, 1995, a pre-construction meeting was not held until December 5, 1995. MassHighway was having difficulty getting approval for Right of Entry on MBTA property. The approval for entry came January 10, 1996, 13 full days after the completion date. The original Contract had a 60 day work period. Plus, there was a 53% increase in the total cost of this project from $69,498.00 or about $106,000.00±.

The Standard Specifications at Section 8.10 provides in part:

> **8.10 Determination and Extension of Contract Time for Completion.**
>
> The maximum time limit for the satisfactory completion of the work set forth in the Proposal is based upon the requirements of Public convenience and the assumption that the Contractor will prosecute the work efficiently and with the least possible delay, in accordance with the maximum allowable working time per week as specified herein. It is an essential part of this Contract that the Contractor shall perform fully, entirely, and in an acceptable manner, the work required within the time stated in this Contract, except that the contract time for completion shall be adjusted as follows:

A. If the Contractor does not receive the Notice to Proceed for a Federally Aided Project within 70 days of bid opening (or for a Non- Federally Aided Project, within 55 days of bid opening), it shall be entitled to an extension of time equivalent to the number of days beyond 70 (or 55) that it takes for the Contractor to receive the Notice to Proceed. Any such extension of time shall be reduced by the number of days beyond 14 days from the date of receipt of the Notice of Award that the Contractor takes to return the executed Contract and the required surety.

B. In case the commencing of the work is delayed or any part thereof is delayed or suspended by the Party of the First Part (except for unsuitable weather, winter months, or reasons caused by the fault or neglect of the Contractor), the Contractor will be granted an extension of time in which to complete work or any portion of the work required under the Contract equivalent to the duration of the delay less a reasonable period of time within which he could have done necessary preliminary work.

C. If satisfactory completion of the work shall require performance of work in greater quantities than those set forth in the Proposal, the time allowed for performance shall be increased in the same ratio as the total final estimate value of the contract items bears to their total bid value. (emphasis added)

FINDINGS:

I find that since the Contract work could not commence until January 10, 1996 due to delays caused by the MBTA, the Contract should have been extended by 60 days from the original term of the Contract (see Section 8.10 (B) above).

I further find that the quantity of work increased by 53% requiring an additional 32 days extension (see Section 8.10 (C) above).

I find that 92 days could have been granted as an extension and since the Contractor was only assessed 70 days, then the liquidated damages should be waived.

RECOMMENDATION:

It is respectfully recommended that in the matter of the appeal of the RDA Construction Corporation on Contract #96286 that the completion date be extended to May 6, 1996 and that the liquidated damages of 70 days at $125.00 totaling $8750.00 be rescinded.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTRODUCTION:

Granger-Lynch Construction Corporation (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) assessment of liquidated damages in the amount of $6187.50 based on an assessment from November 15, 1995 to December 1, 1995 and March 15, 1996 to April 9, 1996 for a total of thirty-three days at $187.50 per day on Contract #95565 (the Contract), appealed to the Board of Contract Appeals.

The work done under this Contract was for the resurfacing and related work on a section of Route 140 in the Town of Westminster.

The work consisted of cold planing the existing roadway and resurfacing with Class I Bituminous Concrete. Drainage improvements included cleaning drainage structures, and placing aprons to existing paved waterways. Catch basins and manholes were placed approximately 250 feet and 450 feet south of Narrows Road and were tied into existing drainage structures.

Damaged posts, brackets, and panels of the existing steel beam highway guard will be replaced. Bituminous concrete berm (Type A modified) will be installed. Placing permanent and temporary pavement markings, instituting traffic control operations during construction and other incidental work will also be included.

All work done under this Contract had to conform to the 1988 STANDARD SPECTIFICATIONS for HIGHWAYS and BRIDGES, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL on UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD

DRAWINGS for SIGNS and SUPPORTS, the 1968 STANDARD DRAWINGS for TRAFFIC SIGNS and HIGHWAY LIGHTING, TRAFFIC MANAGEMENT PLANS, DETAIL SHEETS and these SPECIAL PROVISIONS.

The Contract was awarded May 14, 1995, Item #8. The Contract was dated June 6, 1995. The original completion date was November 15, 1995. The Contract bid price was $318,929.25.

A hearing was held on May 27, 1999. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Isaac Machado	Legal Counsel - MHD
Peter Romano	District #3 - MHD
Sharon Begley	District #3 - MHD
John Neeser	Granger-Lynch
Frank Aceto	Granger-Lynch
David DeLollis	Granger-Lynch

Entered as Exhibits were:

Exhibit #1 …….	Contract #95565
Exhibit #2 …….	Statement of Claim
Exhibit #3 …….	Letter to Contractor from Peter Donohue, DHD, District #3 dated November 13, 1995
Exhibit #4 …….	Letter to Contractor dated January 5, 1996 from Peter Donohue

FACTS AND ISSUES OF LAW PRESENTED:

William Beauregard, the former Vice President of the Contractor, told Peter Romano of District #3 only two months would be needed to complete the job and no office trailer would be needed since the resident engineer, Sharon Begley, was a resident on another job in Hubbardston to Gardner. The trailer for that job was in Hubbardston and Mr. Beauregard suggested that trailer could service both jobs. Mr. Romano agreed.

The pre-construction conference was held on Thursday, July 20, 1995, but the Contractor did not commence work until August 24, 1995. MassHighway had nothing to do with the month delay.

A diary note in Ms. Begley's diary on November 8, 1995 showed no effort was made to complete the job by the completion date and no work had been done prior two weeks. The district repeatedly informed the Contractor that liquidated damages would be assessed if the job was not completed by November 15, 1995. The Contractor never requested an extension of time. The job was accepted on April 9, 1996.

The Contractor basically argued what is commonly referred to as the "second look" doctrine, which basically looks at the actual damages suffered by the party assessing the damages.

The period of assessment was from November 15 to December 1, 1995 and March 15 to April 9, 1996. The district excluded the winter shut down period of December 1 to March 15 (see Section 8.10 Determination and Extension of Contract Time for Completion of the Standard Specifications).

In a recent case decided by the Supreme Judicial Court, Kelley et al vs Steven Marx et al 428 Mass. 877 (1999), the court stated at page 878:

> "We affirm the decision of the Superior Court because we reject the "second look" approach, and conclude that a liquidated damages clause in a purchase and sale agreement will be enforced where, at the time the agreement was made, potential damages were difficult to determine and the clause was a reasonable forecast of damages expected to occur in the event of a breach."

The Court goes on to state:

> "Our position is that "(w)here actual damages are difficult to ascertain and where the sum agreed upon by the parties at the time

> of the execution of the contract represents a reasonable estimate of the actual damages, such a contract will be enforced."

Finally, the Court cites Chief Justice Oliver Wendell Holmes in the case of Guerin v. Stacy, 175 Mass. 595, 597 (1900) where the eminent justice states:

> "(T)he proper course is to enforce contracts according to their plain meaning and not to undertake to be wiser than the parties, and therefore that in general when parties say that a sum is payable as liquidated damages they will be taken to mean what they say and will be held to their word."

FINDINGS:

I find that the liquidated damage provisions in the Contract fair and reasonable as evidenced by the fact that the Contractor signed and executed the Contract with no objections to any of the provisions of the Contract.

I further find that no one forced the Contractor to bid on this project and the Contractor was fully aware that the liquidated damages provision would be a part of the Contract.

RECOMMENDATIONS:

It is respectfully recommended that the appeal of Granger-Lynch Construction Corporation on Contract #95565 to waive liquidated damages totaling $6187.50, should be denied.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

APPENDIX F-1

DECISIONS/RULINGS

Disputes re: Inspection of Materials

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: November 14, 1996

RE: Board of Contract Appeals
(PFN-600438)

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **A. Amorello & Sons, Inc. & Subsidiaries**
CONTRACT #: **94561**
CITY/TOWN: **Leominster (Rte. 13)**
CLAIM: **Replacement of Bituminous Concrete in the amount of $58,183.70.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, NOVEMBER 20, 1996**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro

Chief Eng. Broderick
E.Botterman, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
M. O'Meara, DHD, District #3
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

A. Amorello & Sons, Inc.
115 Southwest Cutoff
P.O. Box 277
Worcester, MA 01613

P.J. Keating Co.
P.O. Box 367
Fitchburg, MA 01420

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **A. AMORELLO & SONS, INC.**, 115 Southwest Cutoff, P.O. Box 277, Worcester, MA 01613, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, NOVEMBER 20, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

A. Amorello & Sons, Inc. & Subsidiaries (the Contractor) aggrieved by the Massachusetts Highway Department's (the Department) failure to pay a claim in amount of $58,183.70 the Contractor filed on behalf of its subcontractor P.J. Keating Corporation (Keating) on Contract #94561, appealed to the Board of Contract Appeals.

Contract #94561 (the Contract) was for resurfacing and related work on a section of Route 13.

Work under the Contract consisted of cold planing and overlaying a section of Prospect Street, Hamilton Street and River Street with Route 13. Existing drainage structures had to be cleaned, adjusted and rebuilt where warranted. Placing permanent and temporary pavement markings, instituting traffic control operations during construction and other incidental work was also included in this project.

All work done under this contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAY AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, THE PLANS and these SPECIAL PROVISIONS.

The Contract was awarded June 22, 1994, Item #84. The Contract was dated August 24, 1994. The original completion date was May 24, 1995. The Contract award price was $243,292.00.

A hearing was held on September 5, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Peter S. Romano	Dist. #3 Asst. Construction Eng.
James T. Hayes	Area Construction Eng. - Boston
John Gingras	Dist. #3 - Materials Eng.
Leo Stevens, Jr.	Research and Materials Eng.
Heidi Bassuk	Legal Intern - MHD

Dean Kalavritinos	Asst. Chief Counsel
Robert Spence	A. Amorello & Sons
John Cawthern	P.J. Keating
Mario Brasili	P.J. Keating

At the hearing, I requested post hearing submissions of both parties. All submissions are now in and are a part of the file in this matter.

FACTS AND ISSUES OF LAW:

Contract No. 94561, entered into by and between the Department and the Contractor, involved the resurfacing of a portion of Route 13 in Leominster, Massachusetts (hereinafter the "Project"). The bituminous concrete (hereinafter "bit conc") for the Project was manufactured at Keating's new drum mix plant in Lunenberg (hereinafter the "Plant").

Prior to the commencement of work at the Project site, Department plant inspectors visited the Plant to obtain samples of the bit conc mixture. Tests of the samples indicated that the bit conc mixtures conformed to the approved job mix formula submitted by Keating and were accepted by the Department. At approximately 7 a.m. on August 8, 1995, District Construction Engineer David Baker visited the Project site for the purpose of inspecting the placing of the bit conc modified top (see Exhibit A). At the site, Baker questioned Tom Kwiatkowski, Assistant District Materials Engineer, as to "...what mat [fresh mix] temperature would be suitable to support traffic." Kwiatkowski responded that "...at approximately 140 degrees [Fahrenheit], the bit conc could support traffic without damaging the mat."

Throughout the day, Baker "placed a dial type [asphalt] thermometer in the mat joint [during the rolling process], to determine mat temperature." Baker maintains that "...traffic was [not] allowed on the bit conc until a temperature of 140 degrees was reached." Around 2 p.m., Baker noticed that "...areas of segregated

bit conc occurred throughout the mat, without any pattern to it." According to Baker, "...paving continued on 8/9/95 to finish up to the job limits" and the "...same method of traffic control over newly placed bit conc was used as on 8/8/95." In order to determine the cause of the "segregation" and to determine if the bit conc conformed to the approved job mix formula, the Department proceeded to take test core samples (18" by 18" squares) at six (6) locations.

According to Peter Romano, Assistant Construction Engineer, results of the gradation and sieve analysis tests indicated the following (see Exhibit B):

1. Five (5) of the six (6) test core samples were not within the approved job mix formula.
2. Three (3) of the six (6) test core samples were not within the master range.
3. Four (4) of the six (6) test core samples were found to be relatively high in #75 micrometer (No. 200 sieve) content [laboratory sample numbers B0624, B0625, B0626, and B0628]. In other words, a high percentage of very fine aggregate was found.

Both the District Construction Engineer's first hand observation ("segregated bit conc throughout the mat") and the test results indicated to Department personnel that "bleeding" had occurred. "Bleeding of an asphalt mixture occurs when the asphalt cement flows to the top of the mix surface under the action of traffic[1]." "Bleeding is often seen as two flushed longitudinal streaks in the wheelpaths of the roadway[2]." In general, bleeding "...is more prevalent with mixtures that contain high percentages of fine aggregate (oversanded mixes) and on mixtures that contain aggregates that have a high porosity[3]." "If all the moisture in the coarse and fine aggregate is not removed during the drying and mixing

[1] U.S. Army Corps of Engineers Hot-Mix Asphalt Paving Handbook, July 31, 1991, page 3-101.
[2] Id. at 3-102
[3] Id. at 3-101, 102

operation at the asphalt plant, the moisture will pull asphalt cement to the surface of the mix behind the paver as the moisture escapes from the mix and evaporates[4]." A major cause of bleeding "...is related to an excess of fluids in the asphalt mixture, either asphalt cement or moisture or both[5]." This excess of fluids may stem from "the design of the asphalt mixture, the operation of the asphalt plant (more complete removal of the moisture), or both.[6] "Under traffic, the extra moisture and asphalt cement will be pulled to the surface by passage of the vehicle tires[7]." "This bleeding phenomenon usually occurs on new mix and during hot weather when the viscosity of the asphalt cement is at its lowest level[8]." "Typically, the bleeding will occur shortly after traffic is allowed to travel over the fresh mix, while there is still some moisture in the mix and while the viscosity of the asphalt cement binder is still relatively low[9]." In other words, traffic or the passage of the vehicle tires on the newly paved roadway only serves to accelerate the problem of bleeding by bringing the asphalt and fine aggregate to the surface more rapidly, especially during hot weather. As previously stated, the actual cause of bleeding is the presence of moisture and the presence of a high percentage of fine aggregate in the mix which stems from the manufacturing process at the asphalt plant.

In a letter to Peter J. Donohue, the Department's District Highway Director for District Three, dated August 10, 1995, Leo C. Stevens, Jr., the Department's Research and Materials Engineer, stated that "the above mentioned bituminous concrete producer [P.J. Keating, Lunenberg] is having difficulties producing specification material (see Exhibit C)." Similarly, at the September 5, 1996 hearing on the claim, Romano echoed Stevens' statement by testifying

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[4] Id. at 3-102
[5] Id.
[6] Id.
[7] Id.
[8] Id.
[9] Id.

that Keating had experienced difficulties producing specification material on a number of other Department resurfacing projects. This further supports the Department's contention that the non-specification bit conc supplied by Keating was most likely due to a problem in the manufacturing process.

The Department subsequently directed the Contractor to remove the non-specification bit conc and to replace it with bit conc that conformed to the approved job mix formula. Although the Contractor complied with this request, it requested reimbursement from the Department for the costs of labor, equipment, and materials associated with the removal and replacement of the bit conc in the amount of $58,183.70.

In its Statement Of Claim, the Contractor relies on an April 3, 1996 letter from Keating as the basis of its appeal (see Exhibit D). In its letter, Keating argues that "...the Mass Highway Department's use of infield cores to reject bituminous concrete material is without foundation under the terms of [Amorello's] contract with the MHD." Keating contends that "core results have no bearing on the acceptance or rejection of bituminous concrete materials" and that "there is no reference [in subsection M3.11.09] of cores being used to accept or reject bituminous concrete. Therefore, Keating argues, "it would appear that the MHD has applied [the] test result in a manner that [is] outside the governing specifications for the project."

The Contractor cites subsections 460.21 and M3.11.09 of the Standard Specifications to support its contention that the Department cannot use test cores to accept or reject bit con.

Subsection 460.21 provides:

> Where plant inspection is maintained, the material will be considered acceptable for use when the specified tests from samples obtained at the production plant indicate conformance to M3.11.09.

Subsection M3.11.09 states:

> Where plant inspection is maintained, the material will not be considered acceptable for use unless the specified tests from samples obtained at the production plant indicate conformance to the approved job mix formula.
>
> The applicable tolerances defining reasonably close conformity with the specifications (as outlined in Sub-section 5.03) shall be the amount of bitumen, the percentage by weight passing 2.36 millimeter (No. 8) and 75 micrometer (No. 200) sieves as specified under M3.11.03, Table A.

The Contractor's sole reliance on Sub-sections 460.21 and M3.11.09 is misplaced, since other sub-sections of the Standard Specifications clearly authorize the Department to sample and test materials both at the source and at the work site, thereby allowing the Department greater flexibility to accept or reject materials, including bit conc. Since not all problems are evident at the source (i.e., the asphalt plant), the inspection of materials at the source is merely one method the Department may utilize to ensure a contractor is supplying specification materials throughout the course of the project.

In fact, Sub-section 6.02 of the Standard Specifications provides:

> The inspection and sampling of materials will be carried out, ordinarily, at the source **or at the site of the Contract work in accordance with established policies and procedures of the Department; but the Department will not assume any obligation for the inspection and sampling of materials at the source. The responsibility of incorporating satisfactory material in the work rests entirely with the Contractor, notwithstanding any prior inspection or test**. (emphasis added)

On the basis of Sub-section 6.02, the Department reserves the right to inspect and sample materials not only at the Plant (i.e., the source) but also at the Project site. Prior to its final acceptance of the physical work, the Department may perform additional quality acceptance tests in accordance with "established

policies and procedures of the Department" to determine if the materials supplied by the contractor conform to Department specifications, "...notwithstanding any prior inspection or test (emphasis added)."

The "established policies and procedures of the Department" mentioned in Sub-section 6.02 are found in the Department's 1987 Materials Manual (hereinafter the "Materials Manual"). Compared to the Standard Specifications, the Materials Manual describes field sampling and the testing of materials in more detail. According to the Materials Manual, one type of sample and test the Department may perform is *Job Control*. "*Job Control* samples and tests form the prime basis for determining the quality and acceptability of the materials and workmanship which have been or are being incorporated into the project. This is primarily the day to day sampling and testing that is done at the project site, batch plant, borrow pit, or at the manufacture or fabricators plant[10]." The sampling and testing of the bit conc mixtures at the Plant by Department plant inspectors is an example of a *Job Control* sample and test.

As previously stated, however, the Department reserves the right to perform additional quality acceptance tests on materials at the Project site prior to its final acceptance of the physical work. The Department's analysis of the six (6) test core samples taken at the Project site is an example of such a test. Sub-sections 6.2.1 (Bitumen Content of Paving Mixture (AASHTO T164)) and 6.2.2 (Sieve Analysis of Extracted Aggregate (AASHTO T30)) of the Materials Manuals detail the procedures for the gradation and sieve analysis tests that were performed on the six (6) test cores.

Once the Department determines that the bit conc for a particular resurfacing job does not conform to the approved job mix formula, the following sub-sections of the Standard Specifications

[10] 1987 Materials Manual, Sub-section 1.1

and the Materials Manual detail the rights and liabilities of the Department and its contractor:

Sub-section 5.03

> In the event the Engineer finds the materials or the finished product in which the materials are used or the work performed are not in reasonably close conformity with the plans and specifications and have resulted in an inferior or unsatisfactory product, the work or materials shall be removed and replaced or otherwise corrected by and at the expense of the Contractor.

Sub-section 5.09

> If the Engineer so requests, the Contractor, at any time before acceptance of the work, shall remove or uncover such portions of the finished work as may be directed. After examination, the Contractor shall restore said portions of the work to the standard required by the specifications.
>
> Should the work so exposed or examined prove unacceptable, the uncovering or removing and the replacing of the covering or making good of the parts removed, will be at the Contractor's expense.

Sub-section 5.10

> 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.

Sub-section 6.04

> Materials not conforming to these specifications shall be rejected and removed from the work by the Contractor as directed.

Sub-section 460.60

> The Engineer may require the Contractor to remove and replace at his own expense, any defective mix not conforming to the specific job mix formula within the stipulated tolerances; on the basis of Department testing.

Sub-section 1.1 of the Materials Manual

> *Failing material and Corrective Action* - In case a sample does not meet, or is not in reasonably close conformity with, the requirements, the material represented by the sample shall be rejected or remedied, or otherwise handled in accordance with the specifications.
>
> If completed work is found to contain material that is not in reasonably close conformity with the specifications, the resident engineer will make the appropriate disposition in accordance with Section 5.00 of the Standard Specifications.

In sum, Sub-sections 5.03, 5.09, 5.10, 6.02, 6.04, 460.60 of the Standard Specifications and Sub-section 1.1 of the Materials Manual clearly provide the following:

1. The Department may carry out the inspection or sampling of materials at the source (i.e., the Plant) or at the Project site for quality control and quality acceptance purposes.
2. The Department does not assume any obligation for the inspection and sampling of materials at the source.
3. The Contractor is responsible for incorporating satisfactory material in the work, notwithstanding any prior inspection or test.
4. The Department shall reject (a) materials which do not conform to the Standard Specifications, or (b) portions of the finished work which are unacceptable to the Department. Non-specification materials or unacceptable portions of the work shall be removed by the Contractor and replaced or restored to meet specification.
5. The Department is not required to compensate the Contractor for the removal and replacement of (a) any non-specification materials, or (b) portions of the finished work which are unacceptable to the Department.

Pursuant to Sub-section 6.02, the Department's sampling, testing, and preliminary acceptance of the bit conc mixture at the Plant (i.e., the source) did not impose upon the Department a legal obligation to accept either bit conc subsequently found not to be in conformance with the approved job mix formula or any finished work deemed unacceptable by the Department. In other words, the Department's initial *Job Control* (quality control) sampling and testing of the bit conc at the Plant did not preclude the Department from performing any further quality acceptance sampling and testing "...at the site of the Contract work in accordance with..." the Materials Manual[11]. Since the gradation and sieve analysis tests performed on the six (6) test cores, as part of the Department's quality acceptance sampling and testing, indicated that a majority of the samples failed to meet Department specifications, the Contractor is responsible for removing and replacing the non-specification bit conc at no additional cost to the Commonwealth.

At the September 5, 1996 hearing on the claim, John Cawthern, Construction Manager for Keating, argued that the segregation of the bit conc was caused by the Department allowing traffic to enter upon the newly completed pavement prior to the time it had cooled sufficiently.

As previously stated, District Maintenance Engineer David Baker inspected the Project site, used a dial type asphalt thermometer to determine mat temperature, and did not allow traffic on the completed pavement until a temperature of approximately 140 degrees Fahrenheit was reached.

[11] Standard Specifications, Sub-section 6.02.

FINDINGS:

1. I find that on the basis of Sub-section 6.02 of the Standard Specifications, the Department reserves the right to perform both quality control and quality acceptance tests on materials either at the source or at the work site. The Department's sampling, testing and preliminary acceptance of materials at the source do not preclude it from performing additional tests at the work site to determine if materials conform to Department specifications. In the present case, the results of the gradation and sieve analysis tests performed on the six (6) test cores indicated that the Keating bit conc did not conform to Department specifications.
2. I find that the Department did not cause the bleeding or segregation of the bit conc at the Project, as it carefully monitored the temperature of the mat to ensure that a temperature of approximately 140 degrees Fahrenheit was reached prior to allowing traffic to enter onto the newly completed pavement. The cause of the bleeding is directly related to the Contractor's use of a non-specification bit conc mixture manufactured at the Plant.
3. I find that since "the responsibility of incorporating satisfactory material in the work rests entirely with the Contractor[12]," the Department is not required to compensate the Contractor for the removal and replacement of portions of the finished work which are unacceptable to the Department.

[12] Id.

RECOMMENDATION:

The A. Amorello & Sons, Inc. claim on Contract #94561 filed on behalf of its subcontractor, P.J. Keating to remove and replace defective bituminous concrete in the amount of $58,183.70 should be denied.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

APPENDIX G-1

DECISIONS/RULINGS

Disputes re: Specifications

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: April 21, 1994

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: B & M Construction, Inc.
CONTRACT #: 23722
CITY/TOWN: Hadley (Route 47)
CLAIMS: 1) Additional cost for Bridge Deck excavation in the amount of $8451.00 plus interest.
2) Additional cost for Sidewalk Excavation in the amount of $6021.75 plus interest.

- -

Please place this report and recommendation on the Docket Agenda WEDNESDAY, APRIL 27, 1994, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Church
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis
Chief Engineer Dindio
Ned Corcoran, Ch. Counsel
Joseph Crescio, Dep.Ch.Eng.,Constr.
Secretary's Office
P. Sullivan,DHD,Dist.2
Cosmo Fedele,Fin.Rev.Eng.
Frank Garvey,Fisc.Mgmt.
Beth Pellegrini, Audit

B & M Construction, Inc.
P.O. Box 346
30 Lawrence Plain Road
Hadley, MA 01035

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **B & M CONSTRUCTION, INC.**, P.O. Box 346, 30 Lawrence Plain Road, Hadley, MA 01035, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, APRIL 27, 1994** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The B & M Construction, Inc. (the Contractor) aggrieved by the Department's failure to pay $14,472.75 plus interest on two claims on Contract #23722, appealed to the Board of Contract Appeals.

Contract #23722 (the Contract) was for repairs to the bridge carrying Route 47 over the Fort River, in Hadley, Bridge Maintenance No: 163-222-038, Bridge Division No. H-1-5. The structure is an eight span continuous reinforced concrete deck slab structure supported by piles at 15' 6" spacing.

The work to be done under this contract consisted of the following:

1. Uncover concrete deck.
2. Replace all deteriorated concrete in deck, sidewalk, bridge railing, wheel guards, abutments, backwalls and copings with Class "E" (Hi-Early) Cement Concrete.
3. Place membrane waterproofing on deck.
4. Place bituminous concrete protective course on deck.
5. Place bituminous concrete wearing course on approaches and deck.
6. Place lengths of plain galvanized pipe around toes of piles.
7. Fill gap between pile and pipe with Class "E" (Hi-Early) Cement Concrete.

The contract incorporated by reference the 1973 Edition of the Standard Specifications for Highways and Bridges and the AASHTO Standard Specifications for Highways and Bridges.

The Contract was awarded May 9, 1984. The Contract was dated May 24, 1984. The original completion date was June 17, 1985. The Contract award price totaled $108,425.00.

A hearing was held on April 14, 1994. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
John T. Driscoll, Esq.	Deputy Chief Counsel, MHD
Robert Demers	Resident Engineer
Theodore Mieczkowski	Vice President, B & M Construction, Inc.

Entered as exhibits were:

Exhibit #1.....	Contract #23722
Exhibit #2.....	Statement of Claim
Exhibit #3.....	Claims Committee Report
Exhibit #4.....	Subpoena Duces Tecum of Robert Demers
Exhibit #5.....	Construction Sketches page 46 of the Contract which showed "Potential" Deterioration of the Bridge Deck
Exhibit #6.....	Same Construction Sketch as Exhibit #5 showing "Actual" Deterioration of the Bridge Deck.
Exhibit #7.....	Photos marked #'s 47, 48 and 49.
Exhibit #8.....	Completion Schedule submitted by the Contractor and approved by the Department dated July 17, 1984.

FACTS AND ISSUES PRESENTED:

Claim No. 1 - Bridge Deck Excavation

In arriving at his bid price for reinforced Concrete Excavation, the Contractor assumed that much of the existing deck reinforcement would be removed. In fact only 1,705 pounds of reinforcing steel (preliminary quantity: 10,000 lbs.) was removed and replaced. It is claimed that the steel which was retained (because of the underrun) hindered the excavation operation, resulting in additional cost.

Claim No. 2 - Sidewalk Excavation

> The Contractor claims that he was required to perform work beyond the scope of the Contract where it was directed that the full depth of a concrete sidewalk be removed.

In the first claim the Contractor alleges that a changed condition occurred as a result of the under run of reinforced steel used in the deck. The contractor was required to sand blast any steel that was salvageable in the engineers opinion.

Item 127.1 and Item 910 are the controlling Special Provisions and are restated here in total.

> **ITEM 127.1 REINFORCED CONCRETE EXCAVATION CUBIC YARD**
> The work to be done includes the removal and satisfactory disposal of all deteriorated or otherwise unsatisfactory concrete in the bridge deck, copings, wheel guards, abutments, backwalls, bridge railings and sidewalks.
>
> In no event shall any pneumatic or power hammer be used for the removal of concrete other than the chipping hammer type or a demolition tool type of the 25 pound class, such as a Chicago Pneumatic #111. Care is to be taken with the steel expansion joints in the deck.
>
> Whenever concrete disintegration extends below the compression steel in any are four (4) square feet or more, the concrete shall be excavated to the full depth of the deck. In full depth areas, the concrete shall be removed from the centerline of the nearest beam to the centerline of the adjacent beam.
>
> In areas of excavation where reinforcing steel is encountered the concrete shall be excavated to a minimum depth of 3/4 inch below the reinforcing steel. All reinforcing steel encountered in the excavation shall be cleaned thoroughly by sand blasting before being encased in new concrete. Any

steel damaged or otherwise made unsatisfactory for continued use by the contractor's operations shall be replaced by him at his own expense. (emphasis added)

Perimeters, of deteriorated areas in bridge deck, to be outlined with 1" depth saw cuts parallel with and at right angles to curb lines to insure neat edges on concrete patch work.

Compensation for work under this Item shall be paid for at the contract unit price per cubic yard. This payment shall include all labor, material and equipment.

ITEM 910. STEEL REINFORCEMENT FOR STRUCTURES POUND

The work to be done under this Item consists of the removal of any steel reinforcement found to be in poor condition and furnishing and placing new steel in the various concrete locations, as directed by the Engineer. (emphasis added)

Any steel reinforcement that has to be removed, due to deterioration from exposure or the repair of concrete, shall be replaced with new steel reinforcement of the same size and shape conforming with the applicable requirements of Subsection 901.61.

No welding of reinforcing steel will be permitted.

All work and material shall be in accordance with the relevant provisions of Section 901.

Compensation for this work will be paid for as provided in subsection 901.81.

The concrete has to be excavated in order to make a determination as to the condition of the reinforcing steel. In the districts' judgment much of the steel did not have to be replaced. The excavation was then continued to a point below the steel as required by the Special Provisions and the Contractor was compensated under the appropriate Contract Item 127.1.

As for claim 2, for additional cost for sidewalk excavation, the Contractor had to do a lot of form work. This deck had more deterioration than anyone could have anticipated and perhaps something could have been done in the field to compensate the Contractor for all the additional cost. However, the Special Provisions anticipated full depth excavation. Such items as form work and care necessary to preserve sound reinforcing steel are considered incidental to the excavation and as such the Contractor was paid under the appropriate item. The basic contention I believe the contractor is resting his case on, although not clear, is that the specifications were ambiguous.

FINDINGS:

As for claim 1, I find no changed condition occurred as a result of the underrun in the reinforcing steel. Section 4.06 of the 1973 Standard Specifications states:

> **4.06 Increased or Decreased Contract Quantities.**
>
> When the accepted quantities of work vary from the quantities in the bid schedule, the Contractor shall accept as payment in full, so far as contract items are concerned, payment at the original contract unit prices for the accepted quantities of work done.
>
> The Engineer may order omitted from the work any items or portions of the work found unnecessary to the improvement and such omission shall not operate as a waiver of any condition of the Contract nor invalidate any of the provisions thereof, nor shall the Contractor have any claim for anticipated profit.
>
> No allowance will be made for any increased expenses, or loss of anticipated profits suffered or claimed by

> the Contractor resulting either directly or indirectly from such increased or decreased quantities or from unbalanced allocation, among the contract items of overhead expense on the part of the Bidder and subsequent loss of expected reimbursement therefor or from any other cause. (emphasis added)

Quantities as listed in our contracts are merely estimates and are adjustable up or down until the final quantities are actually determined. (See Marinucci Bros. & Co., Inc. v. Commonwealth 263 N.E. 2d 450 and Campanella & Cardi Const. co. v. Commonwealth 351 Mass. 184)

As for the second claim for the additional cost for sidewalk excavation, the Contractor failed to identify what he alleged as the ambiguous specification so I cannot address same here. I find the specifications to be unambiguous.

RECOMMENDATION:

The B & M Construction, Inc.'s claims on Contract #23722 for additional cost for bridge excavation in the amount of $8451.00 plus interest and for additional cost for sidewalk excavation in the amount of $6021.75 plus interest should be denied.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: June 15, 1994

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **T. Equipment Corporation**
CONTRACT #: **91448**
CITY/TOWN: **Kingston/Plymouth**
CLAIM: **Department's failure to pay a claim for Safety Controls for construction operations in the amount of $3,815.41.**

- -

Please place this report and recommendation on the Docket Agenda WEDNESDAY, JUNE 22, 1994, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Church
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis
Chief Engineer Dindio
Ned Corcoran, Ch. Counsel
Dep. Ch. Eng.,Hwy. Oper. Petronio
Secretary's Office
B.McCourt, DHD, Dist. 5
Cosmo Fedele,Fin.Rev.Eng.
Frank Garvey,Fisc.Mgmt.
T. Equipment Corp.
170 Granite Avenue
Dorchester, MA 02122

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **T. EQUIPMENT CORP.**, 170 Granite Avenue, Dorchester, MA 02122, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, JUNE 22, 1994** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

T. Equipment Corporation (the Contractor) aggrieved by the Department's failure to pay $3,815.41 for safety controls for construction operations on Contract #91448, appealed to the Board of Contract Appeals.

Contract #91448 (the Contract) was awarded on December 19, 1990, Item #15. It was dated January 2, 1991. The Contract bid price was $151,855.00. The Contract completion date was November 2, 1991. The Contract was a bridge betterment job in Plymouth-Kingston, Smith's Lane over Route 3 and Route 3A over Town Brook.

Scope of Work for Bridge No. K-1-14:

1. Remove and replace roadway joint filler.
2. Excavate and patch areas of deteriorated concrete from various locations as directed by the engineer.
3. Remove existing bituminous concrete and waterproofing membrane from bridge deck.
4. Remove and replace areas of unsound concrete from bridge deck as directed by the Engineer.
5. Replace waterproofing membrane and bituminous concrete on bridge deck.
6. Traffic controls.

Scope of Work for Bridge No. P-13-1:

1. Patch cracks at various locations on wingwalls as directed by the Engineer.
2. Excavate and patch areas of deteriorated concrete under the cantilevered sidewalk and coping wall as directed by the Engineer.
3. Traffic controls.

All work done under this contract had to be in conformance with the Department of Public Works STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the PLANS and these SPECIAL PROVISIONS.

The bridges (2) on which the work was to be done are located in Kingston and Plymouth. Bridge K-1-14 caries Smith's Lane over

Route 3. The Bridge Maintenance number is 897-722-001-100. Bridge P-13-1 carries Route 3A over Town Brook. The Bridge Maintenance number is 037-734-024-101.

A hearing was held on May 15, 1994. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Assist. Chief Counsel
Nicholas Adams	Resident Engineer - MHD
Clifford Chausse	Maintenance Eng. - District 5
Paul Newman	T. Equipment Corp.
Joe Tamulis	T. Equipment Corp.

Entered as exhibits were:

Exhibit #1.....	Contract #91448
Exhibit #2.....	Statement of Claim
Exhibit #3.....	Extra Work Order for Contract #91339, a job performed in District #4
Exhibit #4.....	Extra Work Order for Contract #91009, a job performed in District #4.

FACTS AND ISSUES PRESENTED:

The Contractor bid the above referenced project based on the plans and specifications provided by the MHD. The specifications did not include Item #851 - Safety controls for Construction Operations. They did include Item #852 - Safety Signing for Construction Operations which states:

> Work to be done under this Item shall consist of furnishing, positioning, repositioning and maintaining relatively permanent signs and supports in accordance with lane closure sketches included in this proposal. These relatively permanent signs shall be in place for the time period of the contract, in accordance with Section 850. It shall be the sole responsibility of the Contractor to routinely shield any signs at the work site that contain legends that do not represent existing traffic conditions during non-working hours (emphasis added).

During the progress of the work, it was necessary to close and open lanes on Route 3, below the bridge during concrete excavation and concrete placement, in order to protect the motoring public. The

resident engineer directed the Contractor to do the work on a force account basis. The district ultimately denied the extra work order.

Item #852 deals with relatively permanent signs e.g. barrels which may have to be repositioned occasionally, but do not have to be broken down daily. The work involved in this claim required set-ups and break downs daily which requires extensive labor input. Exhibits 3 and 4 have been attached hereto as Attachments I and II to show how other districts have dealt with the omission of Item 851. Also, although the facts were different, I recommended approval of a claim filed by AGM Marine Contractors, Inc. on Contract #92123 voted by this Board as Item #1, dated July 21, 1993.

FINDINGS:

I find that the omission of Item #851 created a contract ambiguity whereby a reasonably prudent contractor would assume that it would not have to breakdown its safety controls daily. Requiring the Contractor to close and open the lanes on Route 3 created extra work for which the Contractor is entitled to be compensated for.

RECOMMENDATION:

T. Equipment Corporation's claim for Safety Controls for Construction Operations on Contract #91448 should be approved in the amount of $3,815.41.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: August 23, 1994

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR:	**Brox Industries, Inc. (Traffic Control Corp., subcontractor)**
CONTRACT #:	**91046**
CITY/TOWN:	**Lowell**
CLAIM:	**Department's failure to pay a claim for removal of 9797.5 square feet of pavement marking removal in the amount of $10,777.25.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, AUGUST 31, 1994**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge
PM/jd
Attachment
cc:

Comm. Bedingfield
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Church
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis
Chief Engineer Dindio
Ned Corcoran, Ch.Couns.
J. Crescio, Dep.Ch.Eng.
Secretary's Office
S. Eidelman, DHD,Dist.4
Cosmo Fedele, Fin.Rev.Eng.

P. Monahan, Specifications Eng.

F. Garvey, Fisc. Mgmt.

Brox Industries, Inc.
1471 Methuen Street
Dracut, MA 01826

Traffic Control Corp.
P.O. Box 40
Shrewsbury, MA 01545-0040

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **BROX INDUSTRIES, INC.**, 1471 Methuen Street, Dracut, MA 01826 notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, AUGUST 31, 1994** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

Brox Industries, Inc. (the Contractor) aggrieved by the Department's failure to pay a claim it filed on behalf of its subcontractor, Traffic Control Corp. (the Subcontractor) for removal of 9797.5 square feet of pavement marking removal at the unit price of $1.10 per square foot totaling $10,777.25 on Contract #91046, appealed to the Board of Contract Appeals.

Contract #91046 (the Contract) was awarded July 19, 1990, Item #41. The Contract was dated July 26, 1990. The completion date was November 22, 1992. The Contract award price was $3,429,541.70.

Contract #91046 was for the Reconstruction and Widening of Pawtucket Boulevard, Lowell.

The work under this Contract consisted of furnishing all necessary labor, materials and equipment required to widen and reconstruct a portion of Pawtucket Boulevard; beginning at Station 351+90 to Station 400+60, and from Station 428+00 to Station 458+60, for a total distance of 1.502 miles, and other street improvements.

The work also included excavation, borrow, grading, drainage, water, sewers, traffic signals, traffic signs and lines, lighting, conduits, landscaping, dust control, surface treatment, curbing and edging, highway guard, bounds, walks, plantable soil, seed, sod and other incidental items of work as listed in the Proposal.

All work done under the contract was to be in conformance with the Department of Public Works STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1981 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the PLANS, and these SPECIAL PROVISIONS and THE AMERICAN STANDARD FOR NURSERY STOCK, (ANSI 260-1980).

A hearing was held on August 2, 1994. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Assistant Chief Counsel - MHD
David Rinaldo	Brox Industries
Joseph DeFalco	Traffic Control
Joan E. Matys	Traffic Control

Entered as exhibits were:

Exhibit #1.....Contract #91046
Exhibit #2.....Statement of Claim
Exhibit #3.....Department Counsels' Legal Analysis

A post hearing affidavit has been submitted by Traffic Control Corp. and has been annexed hereto and marked Attachment I.

FACTS, ISSUES AND GENERAL DISCUSSIONS OF LAW:

The Contractor claims that the Contract was ambiguous relative to pavement marking removal paint. The Contract Standard Specifications at Subsection 850.24 states as follows:

> **850.24 Temporary Pavement Markings and Raised Pavement Markers**
>
> Temporary Pavement Markings and Raised Pavement Markers consists of furnishing, applying, maintaining and removing temporary white and/or reflectorized pavement markings during construction and maintenance operations.
>
> For the purpose of this specification, temporary markings shall mean an effective marking for a period of 90 days.

Furthermore, the Standard Specification provides, in part, at 850.81 Basis of Payment...

> "Payment for Temporary Pavement Markings and Raised Pavement Markers will include full compensation for furnishing, installing, maintaining removing as specified the markings and markers."

The Contract had a payment item, 854.1 PAVEMENT MARKINGS REMOVAL - PAINT which the Contractor bid at $1.10 per square foot.

The district paid the Contractor 7020 S.F. at $1.10 under Item 854.1 and then denied payment of 9797.5 S.F. based on 850.24 and

850.81.

In a letter dated August 25, 1992 Laurinda T. Bedingfield, District Highway Engineer to Michael W. Swanson, Chief Engineer, Ms. Bedingfield states in part:

> "While the contractor feels that the specification is a little ambiguous and the District agrees to some extent, we can only interpret the Specifications as written" (see Exhibit #2).

Since this Contract, Paul Monahan, MHD's Specifications Engineer, has redrafted 850.81 (see Attachment II).

Given the discrepancy cited, there is no question that the contract language at issue is ambiguous. The sole question, therefore, is how the ambiguity now ought to be resolved.

When faced with what are determined to be ambiguous contract provisions, courts must apply certain rules to resolve the ambiguities. These rules, as will be discussed later, are applicable to government and other public contracts as well as to private contracts. School Committee of Boston v. Board of Education, 363 Mass. 20, 292 N.E. 2d 338 (1973); Zoppo v. Comm., 353 Mass. 401, 232 N.E. 2d 346 (1967). The Zoppo case further states the generally accepted rule at 405 "Where words or other manifestations of intentions bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from ...[which] they proceed [the Commonwealth]...".

Where an ambiguity in the contract language is found to exist, the courts will first try to resolve that ambiguity by determining the intent of the parties. Fay, Spofford & Thorndike v. Massachusetts Port Authority, 7 Mass. App. 336, 387 N.E. 2d 206 (1979). ("Common sense and the probable intent of the parties are guides to a court's construction of a written instrument").

Since it is rarely possible to discern the actual intent of the parties, the courts rely upon a so called "objective test". This involves interpreting the language of the contract in the way it would be interpreted by a reasonably intelligent person familiar with all

the facts and circumstances surrounding contract formation, Corbetta Construction Co. v. United States, 198 Ct. Cl. 712, 461 F.2d 1330 (1972), stating at 623 that the crucial question is "what plaintiff would have understood as a reasonable construction contractor," not what the drafter of the contract terms subjectively intended..."

To this end the courts look at two sources of information. First, they consider the contract document as a whole, United States v. Essley, 284 F. 2d 518 (10th) Cir. 1960).

When the ambiguity cannot be resolved by reference to the contract document as a whole, then an examination is made of the circumstances attending the transaction such as the conduct of the parties, trade customs, usages, etc., United States v. Bethlehem Steel Co., 205 U.S. 105 (1907);

Since the ultimate goal in construing an agreement is to determine the intention of the parties, when attempting to resolve the ambiguity, courts must look to the main purpose of the contract. This is best achieved by viewing the agreement in its entirety and by construing provisions with reference to one another, where possible. Taunton Municipal Lighting Plant v. Quincy Oil Inc. 503F. Supp. 235 (Mass. 1980). Indeed, even where certain language viewed alone more readily suggests something else, construction which comports with the agreement as a whole is preferred. These principals are demonstrated in a number of Massachusetts cases, e.g. Shaw & Sons, Inc. v. Rugo, Inc., 343 Mass. 635 (1982), Hosmer v. Commonwealth, 302 Mass. 495 (1939).

In this instance, unfortunately, resorting to the contract documents as a whole will not resolve the aforementioned ambiguity.

Very little contained in the documents is of relevance or use in such an inquiry.

Moreover, in this case, resorting to §5.04 of the Standard Specifications to resolve the direct conflict in the contract

language is not appropriate.[1] An order of precedence clause such as is contained in §5.04 will not be applied automatically where, as here, there are obvious conflicts or errors, Franchi Construction v. United States, 609 F. 2d 984 (1979).

This claim resolves itself around the actions of the MHD and the inaction of the Contractor. It is well settled that where one of the contracting parties, either expressly or by its actions, clearly makes known to the other party its interpretation of a particular term of the contract and the other party remains silent, that interpretation will be binding on the parties. This is true whether the interpretation is made known prior to award or during performance. The rule applies with particular force, however, where the interpretation and acquiescence take place before the contract is executed. Perry and Wallis Inc. v. United States, 192 Ct. Cl. 310, 427 F. 2d 722 (1970).

As the U.S. Court of Claims noted in the Perry and Wallis case, supra, " party who willingly and without protest enters into a contract with knowledge of the other party's interpretation of it is bound by such interpretation and cannot later claim that it thought something else was meant." 427 F. 2d at 725.

In the present matter, the Subcontractor's affidavit (Attachment I) lists four (4) contracts where he was paid under Item 854.1 Pavement Markings Removal which would show the Department that the Contractor/Subcontractor clearly interpreted the Contract to mean payment for Pavement Markings Removal would be paid under Item 854.1. Further, even the district initially interpreted the payment item as Item 854.1 because it paid the Contractor 7020 S.F. at $1.10. (Note: No credit was ever requested of this payment by the Department.)

[1] In relevant part §504 of the Standard Specifications provides: "Special provisions shall govern over Standard Specifications, Supplemental Specifications, and Plans."

FINDINGS:

1. I find there was an ambiguity in Contract #91046 relative to the basis of payment for Pavement Marking Removal - Paint.

2. I find that the Contractor's interpretation that the basis of payment for Pavement Marking Removal - Paint was Item 854.1 to be reasonable and that the Department's interpretation of the basis of payment for Pavement Marking Removal to be included under Item #854.24 and Item #850.81 to be unreasonable.

RECOMMENDATION:

The Brox Industries, Inc.'s claim on behalf of its subcontractor, Traffic Control Corp., on Contract #91046 for payment of 9797.5 S.F. of Payment Marking Removal at $1.10 per square feet should be approved in the amount of $10,777.35.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: May 18, 1995

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR:	**M. DeMatteo Construction Company (Traffic Control Corp., subcontractor)**
CONTRACT #:	**91357**
CITY/TOWN:	**Harvard-Littleton-Boxborough-Acton**
CLAIM:	**Department's failure to pay a claim for removal of 16,572.5 square feet of pavement marking removal in the amount of $16,572.50.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, MAY 24, 1995**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:

Comm. Bedingfield
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Chief Eng. Dindio
J. Crescio, Dep.Ch.Eng., Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
P. Donohue, DHD, District #3
S. Eidelman, DHD, District #4
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.
P. Monahan, Spec.'s Eng.
Assoc. Comm. Church
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis

M. DeMatteo Constr. Co.
200 Hancock Street
No. Quincy, MA 02171

Traffic Control Corp.
P.O. Box 40
Shrewsbury, MA 01545-0040

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **M. DEMATTEO CONSTRUCTION CO.**, 200 Hancock Street, No. Quincy, MA 02171, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, MAY 24, 1995** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

M. DeMatteo Construction Company (the Contractor) aggrieved by the Department's failure to pay a claim it filed on behalf of its subcontractor, Traffic Control Corp. (the Subcontractor) for removal of 16,572.5 square feet of pavement marking removal at the unit price of $1.00 per square foot totaling $16,572.50 on Contract #91357, appealed to the Board of Contract Appeals.

Contract #91357 (the Contract) was awarded October 10, 1990, Item #34. The Contract was dated October 11, 1990. The completion date was November 27, 1993. The Contract award price was $17,518,960.00.

Contract #91357 was for the Reconstruction of Route 2 including 7 bridge deck replacements and 4 bridge deck repairs.

The work under this contract consisted of resurfacing and/or reconstructing portions of Route 2 from approximately 1000' west of Route 110 in Harvard easterly to Taylor Street in Acton and replacing the bridge decks of Bridge No. L-13-18, Route 2 over the MBTA/B&M Railroad, Bridge No. L-13-17, Route 2 over Foster Street, Bridge No. B-18-1, Route 2 over Littleton Road, Bridge No. A-2-29, Route 111 over Route 2 Eastbound, Bridge No. A-2-35, Arlington Street over Route 2, Bridge No. A-2-36 carrying Hayward Road over Route 2 and Bridge No. H-9-14 carrying Oak Hill Road over Route 2. Also included were repairs to 4 bridges crossing Route 2. These bridges were Bridge No. L-13-15, Whitcomb Avenue over Route 2, Bridge No. H-9-11, Ayer Road (Route 110) over Route 2, Bridge No. H-9-12, Boxboro Road over Route 2 and Bridge No. H-9-13, Littleton Road over Route 2.

The roadway work included: clearing and grubbing, excavation, borrow and grading; paving with bituminous concrete; furnishing and installing granite edging, concrete median barrier, guardrail and traffic signs; installing bituminous concrete berm; landscaping with plantable soil borrow and seed, reconstructing an existing drainage system; constructing temporary traffic control signal systems; applying pavement markings; and other appurtenances and incidental

items as set forth in the contract and required to complete the work.

The work on the seven (7) bridge deck replacements (L-13-18, L-13-17, B-18-1, A-2-29, A-2-35, A-2-36 and H-9-14) included the removal of the existing decks as shown on the plans, protection of the existing utilities, removing railings, removing existing and erecting new structural steel framing, reconstruction of concrete decks, new metal bridge rails and protective screens, armored joints, cleaning and painting structural steel, paving the new decks with bituminous concrete surfaces, installing median railing, repairing masonry at the abutments, piers and walls, and other items as set forth in the Contract, shown on the drawings or required to complete the work.

During the work on the four (4) bridge deck repairs (L-13-15, H-9-11, H-9-12, and H-9-13) the bridges had to be left open to traffic during construction. The work included the partial removal of the existing decks as shown on the plans, protection of the existing utilities, removing railings, repair of the existing concrete decks, providing new metal bridge rails and protective screens and armored joints, cleaning and painting structural steel, paving the repaired decks with bituminous concrete surfaces, repairing masonry at the abutments, piers and walls, and other items as set forth in the Contract, shown on the drawings or required to complete the work.

All of the above bridge and roadway work had to be undertaken in accordance with the Traffic Management Plan.

All work done under the contract was to be in conformance with the Department of Public Works STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1981 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the PLANS, THE AMERICAN STANDARD FOR NURSERY STOCK, the PLANS and the SPECIAL PROVISIONS.

A hearing was held on May 16, 1995. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
John McDonnell	Assistant Chief Counsel - MHD
Edward J. O'Neil	M. DeMatteo Construction
Joseph DeFalco	Traffic Control Corp.
John Papachristos	MHD - Resident Engineer
Robert J. Armitage	Area Construction Engineer
Peter S. Romano	Previous Dist. 4 Asst. Constr. Eng.

Entered as exhibits were:

Exhibit #1.....Contract #91357
Exhibit #2.....Statement of Claim

An affidavit of Traffic Control Corp. submitted at a previous claim hearing is annexed hereto and marked Attachment I.

FACTS, ISSUES AND GENERAL DISCUSSIONS OF LAW:

The Contractor claims that the Contract was ambiguous relative to pavement marking removal paint. The Contract Standard Specifications at Subsection 850.24 states as follows:

> **850.24 Temporary Pavement Markings and Raised Pavement Markers**
>
> Temporary Pavement Markings and Raised Pavement Markers consists of furnishing, applying, maintaining and removing temporary white and/or yellow reflectorized and/or black non-reflectorized pavement markings during construction and maintenance operations.
>
> For the purpose of this specification, temporary markings shall mean an effective marking for a period of 90 days.

Furthermore, the Standard Specification provides, in part, at 850.81 Basis of Payment...

> "Payment for Temporary Pavement Markings and Raised Pavement Markers will include full compensation for furnishing, installing, maintaining and removing as specified the markings and markers."

The Contract had a payment item, 854.1 PAVEMENT MARKINGS REMOVAL - PAINT which the Contractor bid at $1.00 per square foot.

Since this Contract, Paul Monahan, MHD's Specifications Engineer, has redrafted 850.81 (see Attachment II).

Given the discrepancy cited, there is no question that the contract language at issue is ambiguous. The sole question, therefore, is how the ambiguity now ought to be resolved.

When faced with what are determined to be ambiguous contract provisions, courts must apply certain rules to resolve the ambiguities. These rules, as will be discussed later, are applicable to government and other public contracts as well as to private contracts. School Committee of Boston v. Board of Education, 363 Mass. 20, 292 N.E. 2d 338 (1973); Zoppo v. Comm., 353 Mass. 401, 232 N.E. 2d 346 (1967). The Zoppo case further states the generally accepted rule at 405 "Where words or other manifestations of intentions bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from ...[which] they proceed [the Commonwealth]...".

Where an ambiguity in the contract language is found to exist, the courts will first try to resolve that ambiguity by determining the intent of the parties. Fay, Spofford & Thorndike v. Massachusetts Port Authority, 7 Mass. App. 336, 387 N.E. 2d 206 (1979). ("Common sense and the probable intent of the parties are guides to a court's construction of a written instrument").

Since it is rarely possible to discern the actual intent of the parties, the courts rely upon a so called "objective test". This involves interpreting the language of the contract in the way it would be interpreted by a reasonably intelligent person familiar with all the facts and circumstances surrounding contract formation, Corbetta Construction Co. v. United States, 198 Ct. Cl. 712, 461 F.2d 1330 (1972), stating at 623 that the crucial question is "what plaintiff would have understood as a reasonable construction contractor," not what the drafter of the contract terms subjectively intended..."

To this end the courts look at two sources of information. First, they consider the contract document as a whole, United States v.

Essley, 284 F. 2d 518 (10th) Cir. 1960).

When the ambiguity cannot be resolved by reference to the contract document as a whole, then an examination is made of the circumstances attending the transaction such as the conduct of the parties, trade customs, usages, etc., United States v. Bethlehem Steel Co., 205 U.S. 105 (1907); 205 U.S. 105 (1907);

Since the ultimate goal in construing an agreement is to determine the intention of the parties, when attempting to resolve the ambiguity, courts must look to the main purpose of the contract. This is best achieved by viewing the agreement in its entirety and by construing provisions with reference to one another, where possible. Taunton Municipal Lighting Plant v. Quincy Oil Inc. 503F. Supp. 235 (Mass 1980). Indeed, even where certain language viewed alone more readily suggests something else, construction which comports with the agreement as a whole is preferred. These principals are demonstrated in a number of Massachusetts cases, e.g. Shaw & Sons, Inc. v. Rugo, Inc., 343 Mass. 635 (1982), Hosmer v. Commonwealth, 302 Mass. 495 (1939).

In this instance, unfortunately, resorting to the contract documents as a whole will not resolve the aforementioned ambiguity.

Very little contained in the documents is relevant in such an inquiry.

Moreover, in this case, resorting to §5.04 of the Standard Specifications to resolve the direct conflict in the contract language is not appropriate.[1] An order of precedence clause such as is contained in §5.04 will not be applied automatically where, as here, there are obvious conflicts or errors, Franchi Construction v. United States, 609 F. 2d 984 (1979).

This claim resolves itself around the actions of the MHD and the inaction of the Contractor. It is well settled that where one of the

[1] In relevant part §504 of the Standard Specifications provides: "Special provisions shall govern over Standard Specifications, Supplemental Specifications, and Plans."

contracting parties, either expressly or by its actions, clearly makes known to the other party its interpretation of a particular term of the contract and the other party remains silent, that interpretation will be binding on the parties. This is true whether the interpretation is made known prior to award or during performance. The rule applies with particular force, however, where the interpretation and acquiescence take place before the contract is executed. Perry and Wallis Inc. v. United States, 192 Ct. Cl. 310, 427 F. 2d 722 (1970).

As the U.S. Court of Claims noted in the Perry and Wallis case, supra, "A party who willingly and without protest enters into a contract with knowledge of the other party's interpretation of it is bound by such interpretation and cannot later claim that it thought something else was meant." 427 F. 2d at 725.

In the present matter, the Subcontractor's affidavit, submitted on a previous claim (Attachment I) lists four (4) contracts where he was paid under Item 854.1 Pavement Markings Removal which would show the Department that the Contractor/Subcontractor clearly interpreted the Contract to mean payment for Pavement Markings Removal would be paid under Item 854.1.

FINDINGS:

1. I find there was an ambiguity in Contract 91357 relative to the basis of payment for Pavement Marking Removal - Paint.

2. I find that the Contractor's interpretation that the basis of payment for Pavement Marking Removal - Paint was Item 854.1 to be reasonable and that the Department's interpretation of the basis of payment for Pavement Marking Removal to be included under Item #854.24 and Item #850.81 to be unreasonable.

RECOMMENDATION:

M. DeMatteo Construction Company's claim on behalf of its subcontractor, Traffic Control Corp., on Contract #91357 for payment of 16,572.5 S.F. of Pavement Marking Removal at $1.00 per square foot should be approved in the amount of $16,572.50.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: September 21, 1995

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **Granger-Lynch Corp.**
CONTRACT #: **92475**
CITY/TOWN: **Westborough-Hopkinton-Milford**
CLAIMS: **(1) Increased placement costs for gravel**
(2) Sweeping I-495 prior to paving operations

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, SEPTEMBER 27, 1995**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Bedingfield
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis

Chief Enginer Dindio
J.Gill, Dep.Ch.Eng.,Hwy.Oper.
Secretary's Office
Ned Corcoran, Chief Counsel
P. Donohue, DHD, Dist. 3
S. Eidelman, DHD, Dist. 4
B. McCourt, DHD, Dist. 5
Cosmo Fedele
Frank Garvey, Fisc. Mgmt.

John J. Spignesi, Esq
Three Baldwin Green Common
Woburn, MA 01801-1835

Granger-Lynch Corp.
18 McCracken Road
Millbury, MA 01527

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **GRANGER-LYNCH CORPORATION**, 18 McCracken Road, Millbury, MA 01527, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, SEPTEMBER 27, 1995** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The Granger-Lynch Corporation (the Contractor) aggrieved by the Department's failure to pay $63,062.22 on two claims on Contract #92475 (the Contract) appealed to the Board of Contract Appeals.

Contract #92475 was for the resurfacing and related work on a section of Interstate 495.

The work to be done under this contract consisted of Bituminous Concrete Excavation by Cold Planer, resurfacing with Class I Bituminous Concrete, repairing and adjusting drainage structures, removing and resetting granite edging and steel beam highway guard, installing Type A-Modified Bituminous Concrete Berm, pavement markings and other incidental work necessary to complete the project.

The work done under this contract incorporated by reference the 1988 STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the PLANS, and the SPECIAL PROVISIONS.

The location of the work was southbound from Station 91+25, in the Town of Westborough, southerly to the Westborough/Hopkinton Town Line continuing southerly to the Hopkinton/Milford Town Line continuing southerly to Station 101+00 in Milford; Northbound from Station 92+83, in the Town of Westborough, southerly to the Westborough/Hopkinton Town Line continuing southerly to the Hopkinton/Milford Town Line continuing southerly to Station 100+00 in Milford.

The Contract was awarded March 25, 1992, Item #2. The Contract was dated April 3, 1992. The Contract award price totaled $5,796,403.80.

A hearing was held on August 25, 1994. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
John J. Spignesi	Attorney for Granger-Lynch
David DeLollis	Granger-Lynch
Arthur Scothon	Granger-Lynch
Bill Beauregard	Granger-Lynch
David Mullen	Assist. Chief Counsel-MHD
Peter S. Romano	Assist. District Construction Eng., District #3
Michael Hartnett	Resident Engineer

Entered as exhibits were:

Exhibit #1.....	Contract #92475
Exhibit #2.....	Statement of Claim – Gravel Placement
Exhibit #3.....	Statement of Claim - Sweeping
Exhibit #4.....	District's response – gravel claim
Exhibit #5.....	District's response – sweeping claim
Exhibit #6.....	Letter dated March 3, 1993, from Peter Donohue to Granger-Lynch
Exhibit #7.....	Addendum #2 to a job in Lancaster-Leominster as to Item #630.1 dated 3/5/93
Exhibit #8.....	Addendum #1 to a job in Marlborough-Hudson-Berlin dated 3/5/93
Exhibit #9.....	April 16, 1993 District's letter in response to Contractor's letter of April 1, 1993
Exhibit #10.....	October 12, 1993 District's letter in response to Contractor's letter of July 22, 1993

Post hearing submissions were requested of both counsels. All submissions are now in and are a part of the file.

FACTS AND ISSUES PRESENTED:

The Contractor filed two separate claims on this job. The first one was a changed condition claim which resulted allegedly when the Contractor informed the district that it intended to remove all guardrail on the project at the same time so as to be more efficient in the installation of the berm, gravel, plantable soil and ordinary borrow in these guard rail areas. The project extended for nine miles on Route 495. Items 630.2 called for an estimated 59,000 L.F. of guard rail.

It was the Contractor's intention to use reflectorized drums in

the shoulder areas and then use a road widener to spread the gravel. The district refused to allow the Contractor to remove all the guard rail for safety reasons. Instead, the Contractor could only remove so much of the rail as it could reset in the same day because the "removal of guard rail would make an unsafe highway, since the safety runoff area between the travel lane and the unprotected 2 to 1 embankment would be less than the specified 30 feet" (see Exhibit #4). As a result of these instructions, the Contractor alleges that the cost of placing borrow was increased because he could not use the road widener and was required to spread the borrow by hand. The Contractor alleges that the cost of borrow increased to $18.46/c.y. less the Contract Unit price of $9.50/c.y., a difference of $8.96/c.y. times 4000 c.y. which equals an additional $35,840.00.

The second claim is a sweeping claim which the Contractor performed after the winter, but prior to putting the final coat down. The Contractor had repaved portions of the roadway prior to the cessation of operations in the latter part of 1992. Under the Contract, the Contractor was required to cold plane the existing road surface and sweep the surface prior to commencement of the paving operations. In the Spring of 1993, when work was to resume, the District instructed the Contractor again to sweep the paved surface free of all accumulated debris from the preceding winter months. Wherefore the Contractor alleges that he is due an additional $27,222.22 (544,444 s. y. at $0.05/s. y.). The Contractor contends that the accumulation of sand is the responsibility of the Party of the First Part pursuant to Subsection 7.17 Traffic accommodation of the Standard Specifications.

I. WHETHER A CHANGED CONDITION OCCURRED LEADING TO INCREASED COSTS FOR THE REMOVAL AND RESETTING OF GUARDRAIL

The Special Provisions of Contract No. 92475 direct the Contractor's attention "to the fact that I-495 is a very heavily

travelled road and that it (the road) shall be kept open to traffic at all times." This initial directive to the Contractor mandates safety measures and the free flow of traffic. Guardrails line I-495 to provide safety for motorists by ensuring that vehicles stay on the highway and not drive off a steep slope into dense trees and forest. Guardrails are not along a highway for aesthetics or convenience. Guardrails serve a purpose; they save lives.

The Contractor has stated that a changed condition has taken place. In fact, no changed condition occurred. Simply put, the Contractor attempted to perform its job so that it was economically advantageous to it, at the expense of safety to the public. While the Department strives to have all its projects produced at a cost savings to the public, it will not entertain sacrificing safety to do so.

A. Authority of the Engineer

Section 5.01 of the Standard Specifications sets forth the authority of the Department's engineer. Section 5.01 states in pertinent part:

> **"The Engineer shall decide all questions which may arise as to the interpretation of the plans and specifications, and he may alter, adjust and appraise same when necessary..."**

Before any work was commenced the Construction Engineer John Donohue informed Granger Lynch that the removal of eighteen (18) miles of guardrail for three (3) months was unacceptable and out of the question. Mr. Donohue informed the Contractor that along major highways, such as I-495, removal of the guardrail for prolonged periods of time was not done. It is interesting to note that the Department would have entertained removal of the guardrail for one night or two, but the Contractor was not interested.

The Department had informed the Contractor that because the safety runoff area between the travel lane and the unprotected 2:1 embankment would be less than the required 30 feet the guardrail could not be removed. As a counter measure, the Contractor proposed to

install barrels instead of the guardrail. This proposal was quickly rejected because the barrels were not only unlighted and unintended for nighttime use, but would also not stop an automobile crashing into them at a high rate of speed.

The Department further reminded the Contractor of Section 7.09 of the Standard Specifications. Section 7.09 states that:

> **"Where the new construction coincides with the present travelled way, the Contractor shall carry on his work in a manner acceptable to the Engineer so that a reasonably safe uninterrupted traffic flow is maintained through the project during the entire construction period over traffic lane patterns approved by the Engineer."**

The Contractor has stated that the barrels it intended to use as a replacement for the guardrail would not interrupt the steady flow of traffic. The Contractor fails to mention that the placement of the barrels would interfere with travel in the breakdown lane. The barrels could not be placed exactly where the guardrails were. Rather, they would have to be placed in the breakdown lane.

Also, the placement of barrels alongside a highway such as I-495 would create a slowdown in traffic. In a perfect world, motorists would tend to their driving. However, realistically, motorists would be concerned with the barrels. This, in turn, would inhibit their driving and create unsafe driving conditions.

There is also another difference between barrels and guardrail. That is their purpose. Barrels are used to cordon off and direct traffic. Guardrail is used to protect the safety of motorists. There is no question that placement of barrels would interrupt the steady flow of traffic. Also, as previously mentioned, the barrels suggested for use by the Contractor were not intended for nighttime use. This factor alone creates a safety hazard. The guardrail is intended to stop speeding vehicles from crashing off the road, a barrel cannot. In fact, a vehicle travelling at a high rate of speed that comes in contact with a barrel creates a dangerous missile capable of injuring

others. Barrels are used on a short-term basis, not for the length of time suggested by the Contractor.

B. Liability to the Public

An issue that the Contractor fails to recognize is the responsibility of the Department to the public. Specifically, the defect in the way provisions of M.G.L. c. 81 and 84. The Department is responsible for injuries that result from defects upon the road. A lack of guardrail to protect motorists is considered such a defect. In Karlin v. Massachusetts Turnpike Authority, 506 N.E. 2d 1149 (1987), the Court held that the Authority could be held liable for negligence in providing sufficient guardrailing (Exhibit #3). The Department attempts to provide safe passage for motorists and limit its potential liability. Removing guardrail for a three (3) month period would create a safety problem and raise the liability of the Department.

C. Ambiguity

Although the Contractor has never been allowed to remove guardrail along highways for an excessive period of time, it maintains that the contract specifications may be ambiguous. However, no ambiguity existed in the contract. The Contractor would have us believe that because the contract did not mention how long guardrail could be removed and not replaced for an extensive time period it was okay to do so. The Contractor's interpretation would have allowed removal of the guardrail from the date of notice to proceed (April 3, 1992) to the date of completion (September 24, 1993). The Contractor would have us believe that they could remove guardrail for eighteen (18) months. The contract may not speak to the length of time within which the guardrail is to be removed and replaced, but the Department assumes the Contractor to be a prudent contractor. In fact, the Contractor has performed work for the Department previously. Because the length of time to remove and replace guardrail was not mentioned in the contract does not give the Contractor the right to interpret the contract as it determines. It is one thing for a specification

to be ambiguous, it is another for the Contractor to interpret a specification for its own benefit. Bayou Land and Marine Contractors, Inc. v. United States, 24 Claims Court 764 (1991)

D. Past Practices

The Contractor claims that their proposal to remove guardrail for an extended period of time has been done before. A check of two (2) recent contracts, No.'s 92481 and 93359, reveals that in one case the Contractor removed and replaced the guardrail the same day (same subcontractor as in this case). In the other contract, the guardrail was replaced the next day.

II. WHETHER A CHANGED CONDITION OCCURRED LEADING TO INCREASED COSTS OF SWEEPING INTERSTATE 495 PRIOR TO PAVING OPERATIONS

Section 4.04 Changed Conditions of the Standard Specifications states in pertinent part:

> **"if, during the progress of the work the contractor or the awarding authority discovers that the actual subsurface latent physical conditions encountered at the site differ substantially from those...ordinarily encountered and generally recognized as inherent in work of the character provided... the contractor or the contracting authority may request an equitable adjustment in the contract price..."**

Section 4.04 states that a changed condition will result if a condition not ordinarily encountered and inherent in the work of the character provided is found. In the present circumstance, no such changed condition occurred.

As part of the scope of the work to be performed, the Contractor was to sweep/clean the roadway before applying the tack coat.

Standard Specifications Section 460.62 states that,

> **"The existing surface shall be cleaned of all foreign matter and loose material and shall be dry before the tack coat is placed."**

An integral component of Item 460.62 is the cleaning of the roadway before the tack coat is applied. The Contractor claims that they are entitled to increased costs pursuant to Section 7.17 of the

Standard Specifications. Section 7.17 states that the Party of the First Part (Department) is responsible for any damage to the roadway. Damage did not occur to I-495. I-495 was treated with sand and salt to allow for the safety of motorists driving in inclement weather. The Contractor was required to sweep the roadway before spreading the tack coat. If the Contractor can show that it was not obligated to sweep and clean I-495 before the tack coat was applied, an extra work order may possibly be justified. In this situation, however, the sweeping and cleaning of I-495 is a part of the scope of work the Contractor had to bid on. The sweeping and cleaning was contemplated and considered within the scope of the work by the Department and should have been by the Contractor.

FINDINGS:

I find that no changed condition occurred because the Department required the Contractor to remove only so much guardrail as it could replace in the same day.

I find that pursuant to 460.62 of the Standard Specifications, the Contractor is required to sweep the roadway surface before putting a tack coat down and is required to resweep the roadway after the winter shutdown.

RECOMMENDATION:

The Granger-Lynch Corporations' claims on Contract #92475 for increased cost to place gravel borrow due to Department's refusal to allow all 18 miles of guardrail removed and the cost sweep of foreign matter for $35,840.00 and $27,222.22 respectively should be denied.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: March 7, 1996

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **M. DeMatteo Construction Company**
CONTRACT #: **91357**
CITY/TOWN: **Harvard-Littleton-Boxborough-Acton**
CLAIMS: **(1) Unclassified excavation**
(2) Extra work

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, MARCH 13, 1996**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Bedingfield
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis

Acting Ch. Engineer Brokerick
J. Allegro, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
P. Donohue, DHD, District #3
S. Eidelman, DHD, District #4
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

M. DeMatteo Constr. Co.
200 Hancock Street
North Quincy, MA 02171

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **M. DeMATTEO CONSTRUCTION CO.**, 200 Hancock Street, No. Quincy, MA 02171, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, MARCH 13, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The M. DeMatteo Construction Company (the Contractor), aggrieved by the Department's failure to pay for the actual quantity of Item No. 120.1 - Unclassified Excavation - completed during the performance of the work on Contract #91357, appealed to the Board of Contract Appeals.

Contract #91357 (the Contract) was awarded October 10, 1990, Item #34. The Contract date is October 11, 1990. The original completion date was November 27, 1993. The Contract award price was $17,518,960.00.

Contract #91357 was for the reconstruction of Route 2 including seven (7) bridge deck replacements and four (4) bridge deck repairs.

The work done under this contract consisted of resurfacing and/or reconstructing portions of Route 2 from approximately 1000' west of Route 110 in Harvard easterly to Taylor Street in Acton and replacing the bridge decks of Bridge No. L-13-18, Route 2 over the MBTA/B&M Railroad, Bridge No. L-13-17, Route 2 over Foster Street, Bridge No. B-18-1, Route 2 over Littleton Road, Bridge No. A-2-29, Route 111 over Route 2 Eastbound, Bridge No. A-12-35, Arlington Street over Route 2 and Bridge No. H-9-14 carrying Oak Hill Road over Route 2. Also included were repairs to 4 bridges crossing Route 2. These bridges are Bridge No. L-13-15, Whitcomb Avenue over Route 2, Bridge No. H-9-11, Ayer Road (Route 110) over Route 2, Bridge No. H-9-12, Boxboro Road over Route 2 and Bridge No. H-9-13, Littleton Road over Route 2.

The roadway work included: clearing and grubbing, excavation, borrow and grading; paving with bituminous concrete; furnishing and installing granite edging, concrete median barrier, guardrail, and traffic signs; installing bituminous concrete berm; landscaping with plantable soil borrow and seed, reconstructing an existing drainage system; constructing temporary traffic control signal systems; applying pavement markings; and other appurtenances and incidental items.

The work on the seven (7) bridge deck replacements (L-13-18,

L-13-17, B-18-1, A-2-29, A-2-35, A-2-36 and H-9-14) included the removal of the existing decks as shown on the plans, protection of the existing utilities, removing railing, removing existing and erecting new structural steel framing, reconstruction of concrete decks, new metal bridge rails and protective screens, armored joints, cleaning and painting structural steel, paving the new decks with bituminous concrete surfaces, installing median railing, repairing masonry at the abutments, piers and walls, and other items as set forth in the Contract.

During the work on the four (4) bridge deck repairs (L-13-15, H-9-11, H-9-12, and H-9-13) the bridges had to be left open to traffic during construction. The work included the partial removal of the existing decks as shown on the plans, protection of the existing concrete decks, providing new metal bridge rails and protective screens and armored joints, cleaning and painting structural steel, paving the repaired decks with bituminous concrete surfaces, repairing masonry at the abutments, piers and walls, and other items as set forth in the contract.

All work done under this contract shall be in conformance with the Department of Public Works STANDARD SPECIFICATIONS FOR HIGHWAY AND BRIDGES dated 1988, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1981 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the American Standard fo
Nursery Stock, the Plans and these SPECIAL PROVISIONS.

A hearing was held on February 22, 1996. Present representing the parties at the hearing were:

Peter Milano	Chief Administrative Law Judge
T.L. Gustenhoven	M. DeMatteo Construction Co.
Wilfred Livramento	M. DeMatteo Construction Co.
Thomas Pyle	M. DeMatteo Construction Co.
Cosmo Fedele	MHD Finals Review Section

Entered as Exhibits were:

Exhibit #1.....	Contract #91357
Exhibit #2.....	Statement of Claim for Unclassified Excavation

There was a second claim filed for Extra Work Order #18 but the Contractor withdrew it at the time of the hearing.

FACTS, ISSUES AND GENERAL DISCUSSION OF THE CONTRACT:

The Contractor performed Unclassified Excavation in accordance with the Contract Documents during the progress of the work and was paid for the quantities of Unclassified Excavation on the partial estimates as the work was performed. After the estimates were submitted to the Department's Finals Review Section for their review, the Department deducted from the Final Estimate a quantity of 15,510 cubic yards of Item No. 120.1 - Unclassified Excavation, which was utilized as Plantable Soil Borrow (Item No. 751.2).

The Standard Specifications under Subsection 120.26 state that Unclassified Excavation "....shall consist of all excavation not provided for elsewhere in the Contract." There was no change to this description in the Special Provisions or any other part of the Contract Documents. Subsection 120.67 of the Standard Specifications states that the work under Unclassified Excavation "shall consist of the excavation, removal and satisfactory disposal in accordance with the relevant provisions of Section 120.60 of all materials listed under Section 120 necessary for the construction of the proposed work as shown on the Plans or as directed, except those materials for which payment is specified under other items of the Contract." (Emphasis added)

By definition of Unclassified Excavation, per the Contract Documents, the work under this item would include Topsoil Excavated and stacked (Subsection 120.24) which was "not provided for elsewhere in the Contract."

Subsection 120.81 - Basis of Payment, states under subparagraph 2 on page 64 that "Topsoil obtained in excavation and stacked for future use on the project will be paid for at the contract unit price for the item of Topsoil Excavated and Stacked (which price will include excavation for test pits required) but if such future use necessitates rehandling and spreading, payment will also be made at the Contract unit price for Topsoil Rehandled and Spread." There was no item for Topsoil Rehandled and Spread but there was an item for Plantable Soil Borrow - Item No. 751.2.

Plantable Soil Borrow, per Subsection 751.63, states in part; "....shall be used as specified in Subsection 751.61 except that it may be obtained outside the project limits." (Emphasis Added), (Subsection 751.61 specifies the work included under Loam Borrow, Plantable Soil Borrow, Topsoil Rehandled and Spread and Processed Planting Material.) Subsection 751.63 clearly indicates that Plantable Soil Borrow may also be obtained from inside the project limits and includes the work required under the item of Topsoil Rehandled and Spread. The Contract is clear in that the item of Plantable Soil Borrow replaced the item for Topsoil Rehandled and Spread.

The Contractor did, in fact, excavate and stock topsoil per the definition of this work in the Contract Documents (Subsection 120.24 and 120.81 subparagraph 2 on page 64). The Contractor subsequently excavated the previously stacked topsoil, hauled it, dumped it, spread it and otherwise performed the work specified under Section 751 of the Standard Specifications.

COMPUTATION OF DAMAGES:

The Contractor and the Department agree that the quantity of material excavated under Item No. 120.1 - Unclassified Excavation and subsequently rehandled and spread under Item 751.2 - Plantable Soil Borrow is 15,510 cubic yards. At the Contract Unit Price of

$1.00 per cubic yard, this amounts to the sum of $15,510.00 as claimed by the Contractor.

RECOMMENDATION:

It is respectfully recommended that the Contractor be paid for the 15,510 cubic yards of Unclassified Excavation at the Contract Unit Price of $1.00 per cubic yard, in the amount of $15,510.00.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: April 11, 1996

RE: Board of Contract Appeals
(PFN-600320)

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **J.S. Luiz III, Inc.**
CONTRACT #: **94159**
CITY/TOWN: **Swansea**
CLAIM: **Additional Cost in the amount of $8435.00**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, APRIL 17, 1996**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Bedingfield
Dep. Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Sullivan
Assoc. Comm. Dengenis

Chief Eng. Broderick
J. Allegro, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
B. McCourt, DHD, District #5
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

J.S. Luiz III, Inc.
12 Ventura Drive
North Dartmouth, MA 02747

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **J.S. LUIZ III, INC.**, 12 Ventura Drive, North, Dartmouth, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, APRIL 17, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

J.S. Luiz III, Inc. (the Contractor) aggrieved by the Department's demand that glazed blocks be used in lieu of split faced blocks creating an additional cost of $8435.00 on Contract #94159 (the Contract) appealed to the Board of Contract Appeals.

Contract #94159 was for the construction of a Sanitary Facility Complex in Swansea on Interstate I-95 East.

The work to be performed under this contract consisted of the following:

1. Furnish and install a sanitary building at the location listed. The building had to conform as closely as possible to size designated on drawings.

2. Furnish all labor, materials and equipment necessary to erect a clear span, straight vertical interior and exterior, architectural block wall building, as manufactured by approved manufacturers, on a reinforced concrete footing and a foot wall as shown on drawings.

3. Furnish and install all exterior doors, passage doors, windows, floors and all miscellaneous hardware necessary to complete the building as specified in the special provisions and plans.

4. The floor had to be pitched towards drains as indicated on floor plans and as required by applicable codes.

5. Heating, Ventilation and Plumbing systems, including all related accessories, had to be furnished by heating and plumbing contractors as shown in the drawings and as specified in the special provisions.

6. At the site the precise location, line and grade for construction of the shed was to be established by the engineer. The location was approximately staked out for bidding purposes.

7. Underground electrical service had to be provided in accordance with all local and state applicable codes, from existing utility pole within the limits of the rest area.

8. Furnish labor and materials for installation of sanitary system and discharge to new septic system at the location shown on drawings, or as otherwise required. Contractor had to obtain all required permits prior to beginning construction, submit plans as required and meet all state and local requirements for execution of such work.

9. Furnish labor and materials to install a new well at the location shown on drawings, or as otherwise required.

> Furnish all involved piping and all other required equipment. The work under this item had to comply with all local, state and federal requirements. Contractor to obtain all required permits, performed all involved tests prior to beginning any construction, and submit plans as required.

All relevant portions of the 1988 Standard Specifications for highways and bridges, including the Aug. 1991 supplement, the latest edition of the State Building Code and the special provisions applied to the work performed under this contract.

The Contract was bid in August 1993 and was awarded on May 11, 1994, Item #2. The Contract was dated May 18, 1994. The Contract award price totaled $159,000.00.

A hearing was held on February 6, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Deputy Chief Counsel
Bin Lee	Area Engineer, MHD
Stuart Wahl	Dist. #5 - Construction
Robert Struzik	Dist. #5 - Area Construction Eng.
Richard A. Karvonen	J.S. Luiz III, Inc.

Entered as exhibits were:

Exhibit #1.....Contract #94159
Exhibit #2.....Statement of Claim

Post hearing submissions were requested of the Contractor. All submissions are now in and a part of the file.

FACTS AND ISSUES PRESENTED:

The Contractor prepared its bid using filed sub bids of August 17, 1993 of which P.T. Rich was lowest responsible bidder for the masonry items.

The Contractor's subcontract to filed sub P.T. Rich was sent out on October 1, 1993, in anticipation of award from the Department. This project was then put on hold due to the state bonding issue.

The Contractor received on June 15, a notice dated June 10, 1994

of a preconstruction conference to be held on June 16, 1994.

The Contractor received on June 29, 1994 its notice to proceed dated July 18, 1994.

They contacted P.T. Rich subsequent to the preconstruction meeting by telephone to ask where his signed subcontract was. On June 27, 1994 P.T. Rich notified the Contractor that they would not sign the subcontract because the Department was requiring glazed CMU block as opposed to splitfaced CMU blocks.

The Contractor immediately asked direction from the district and received the Department's reply stating glazed blocks are to be used.

This project was actually starting on September 28, 1994 due to permitting delays with Swansea Boards. Also, the block delivery was approximately 10 weeks after approval.

The Contractor contends the plans and specifications are as follows:

1. Page 107, item 901.1 Para. 02B, states the principal work of this section includes, but may not be limited to, the following: 1. CMU Walls.

2. Page 109 Para B goes on to describe several types of CMU walls ie: Load bearing concrete masonry units, scored units & glazed block units, but the specifications did not direct them to where each of these units were to be used.

3. The plans however do specifically indicate, in the typical wall section, that split face concrete block a type of CMU is to be used as the exterior load bearing wall, that plain concrete masonry units are to be used as the interior walls, and further that glass block specified on page 110 Para. D is to be used for the window openings.

On August 11, 1994, the Department responded by letter stating:

> "This letter is in response to your request dated June 30, 1994 for clarification of the type of masonry block to be used on the subject project. Glazed blocks, as indicated in the Special Provisions of the contract, will be required.
>
> There is a discrepancy between the Special Provisions and the plans. The Special Provisions call for glazed block and the plans indicate split faced block. The 1988

> Standard Specifications for Highways and Bridges, on page 17 under section 5.04, Coordination of Special Provisions, Plans, Supplemental Specifications and Standard Specifications, states, 'Special Provisions shall govern over Supplemental Specifications, plans and Standard Specifications'."

P.T. Rich told the Department its bid did not include the glaze block and it would need another $12,000.00 to do so. The Department rejected this and P.T. Rich would not sign their subcontract. The general did the work itself and notified the Department it would file a claim for the added cost of the glaze block total $8435.00.

FINDINGS:

I find that there is no ambiguity in either the special provision or the plans. The special provision merely lists the material that might be required under Masonry Block, Item 901.01. The general then referred to the plans to see where glazed blocks and split face blocks were to be used. The plans only showed that split face CMU blocks were to be used. No reference in the plans provided for glazed block. The contractor's interpretation was reasonable and he should be compensated for the additional cost of the glazed blocks.

RECOMMENDATION:

J.S. Luiz III, Inc.'s claim on Contract #94159 for the additional cost to use glazed blocks as opposed to split faced CMU blocks should be approved in the amount of $8435.00.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: July 10, 1996

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **P. Gioioso & Sons, Inc.**
CONTRACT #: **91602**
CITY/TOWN: **Boston (Hyde Park)**
CLAIM: **Additional work in the amount of $8905.13.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, JULY 17, 1996**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Dengenis

Chief Eng. Broderick
E.Botterman, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
S. Eidelman, DHD, District #4
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

Gioioso & Sons, Inc.
58 Sprague Street
Hyde Park, MA 02136

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **P. GIOIOSO & SONS, INC.**, 58 Sprague Street, Hyde Park, MA 02136, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, JULY 17, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

P. Gioioso & Sons, Inc. (the Contractor) aggrieved by the Department's failure to pay $8905.13 on a claim on Contract #91602, appealed to the Board of Contract Appeals.

Contract #91602 (the Contract) was for the reconstruction of Hyde Park Avenue Bridge over Mother Brook.

The work under this contract consisted of the demolition and reconstruction of Bridge Number B-16-35 on Hyde Park Avenue, Boston spanning Mother Brook and the reconstruction of the approaches to the structure.

Work also included in this project consisted of installing cement concrete sidewalks; installing granite curb; installing 12" and 16" water mains; installing bridge railing; furnishing and installing pavement markings; installing street lighting conduit; and other incidental items of work listed in the proposal.

All work done under this contract had to be in conformance with the Department of Public Works STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the PLANS and these SPECIAL PROVISIONS.

The Contract was awarded May 8, 1991, Item #2. The original completion date was July 6, 1992. The Contract award price was $478,194.00.

A hearing was held on June 25, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Dean Kalavritinos	Asst. Chief Counsel
Thomas Eddlem	Boston Construction Office
Frank Gioioso	P. Gioioso & Sons
Mario Romania	P. Gioioso & Sons

Entered as Exhibits were:

Exhibit #1.....Contract #91602
Exhibit #2.....Statement of Claim

FACTS AND ISSUES OF LAW:

The Contractor had a meeting with the Boston Water and Sewer Commission (BWSC) and the resident engineer on July 19, 1991. At that meeting it was agreed to that the Contractor would construct two (2) valve manholes on the 16" water main running through the site. In addition, the Contractor constructed a one (1) valve manhole and relocated a 12" water main. This work was not shown on the contract drawings.

The Department has pursued BWSC to pay for this work, but they have not paid for it as of this date. The total amount for the work was $8905.13. The Department agrees that the Contractor should be paid. The BWSC was not a party to the Contract. The Standard Specifications for Highways and Bridges at 1.27 defines the Party of the First Part thusly:

> **"In contracts with the Department, the Party of the First Part shall be the Department."**

The Standard Specifications at 1.12 defines Contractor as:

> **"The Party of the Second Part to the Contract,...."**

The Department's contracts are bilateral agreements between the Department and the Contractor. Consequently, the Department is responsible for the cost of this additional work and admitted the same at the hearing.

FINDINGS:

I find that the Contractor did the additional work involved in this claim and the value of that work was $8905.13.

RECOMMENDATION:

P. Gioioso & Sons, Inc.'s claim on Contract #91602 for the construction of two new valve manholes on the 16" water main and a one valve manhole and relocating a portion of the 12" water main should be approved in the amount of $8905.13.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: July 25, 1996

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **M. DeMatteo Construction Co.**
CONTRACT #: **90003**
CITY/TOWN: **South Boston**
CLAIM: **Non-payment in the amount of $22,800.00.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, JULY 31, 1996**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Assoc. Comm. Eidelman
Assoc. Comm. Dengenis

Chief Eng. Broderick
E.Botterman, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
Alex Bardow, Br. Eng.
S.Eidelman, DHD, District #4
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

M. DeMatteo Constr. Co.
200 Hancock Street
No. Quincy, MA 02171

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **M. DeMATTEO CONSTRUCTION CO.**, 200 Hancock Street, No. Quincy 02171, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, JULY 31, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

M. DeMatteo Construction Co. (the Contractor) aggrieved by the Department's Finals Section reducing final payment on Items 740.0 -Field Office and 748 - Mobilization on Contract #90003 by a total of $22,800.00 appealed to the Board of Contract Appeals.

Contract #90003 (the Contract) was a bridge replacement job - West Fourth Street over MBTA, AMTRAK, Conrail and Foundry Street in South Boston.

The work under this Contract consisted of replacing the superstructure of Bridge No. B-16-126 (West Fourth Street) over the MBTA, AMTRAK, Conrail and Foundry Street in the City of Boston, including some approach and utility work and the installation of two 16 inch steel water mains for the City of Boston.

The bridge work was to be done in stage construction and included: superstructure removal; utility protection; installation of protective shielding; masonry abutment and pier reconstruction; capping of wingwalls; utility work; and slope pavement replacement.

The approach roadway work included: pavement reconstruction; excavation; grading; paving; removing, resetting, and replacing curbing and sidewalks; adjusting existing structures; and other work incidental to the satisfactory completion of this project.

The above bridge and approach work had to be staged in accordance with the Traffic Management Plan.

All work done under this Contract had to be in conformance with the Department of Public Works STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1973, the SUPPLEMENTAL SPECIFICATIONS dated June 19, 1985 the 1977 CONSTRUCTION STANDARDS, the 1978 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1981 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, the PLANS, and these SPECIAL PROVISIONS, also the B.W.S.C. SPECIAL PROVISIONS.

The Contract was awarded June 21, 1989, Item #2. The Contract

was dated June 28, 1989. The original completion date was July 27, 1991. The Contract award price was $4,111,492.00.

A hearing was held on June 25, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Dean Kalavritinos	Asst. Chief Counsel
Fred Gibson	MHD - Resident Engineer
Thomas Eddlem	MHD - Boston Construction
Thomas Gustenhoven	M. DeMatteo Construction
Thomas Pyle	M. DeMatteo Construction

Entered as Exhibits were:

Exhibit #1.....Contract #90003
Exhibit #2.....Statement of Claim

FACTS AND ISSUES OF LAW:

Item 740.0 - Field Office and Item 748 - Mobilization were reduced by 18% by the Department's Finals Section as a result of a letter from the Federal Highway Administration (FHWA) dated October 13, 1989. (Attachment I annexed hereto and made a part hereof). Basically the letter stated that 18% of the Contract value was dedicated to Boston Water and Sewer Commission (BWSC) Items and consequently BWSC should have paid for 18% of the trailer and the mobilization items.

The Special Provisions at pages 3 and 4 contained the following provisions:

> **WATER WORKS (For City of Boston)**
>
> **Certain work to be performed under the Contract will be for the installation of 16 inch water mains and related work to be paid for by the City of Boston. All items of work for this portion of the Contract are to be done in accordance with the relevant provisions of the City of Boston Water and Sewer Commission, (BWSC) Special Provisions included herein.**
>
> **The following items of work shall be used for water works construction only. These items are not to be used for any other roadway, bridge, drainage, or other utility work in this Contract. Locations for the water works installation is as shown on the construction plans or as directed by the Engineer.**

WATER WORKS ITEM LIST
(Paid by the City of Boston)

ITEM	141.01	BELOW GRADE EXCAVATION	CY
ITEM	141.02	OUTSIDE TRENCH EXCAVATION	CY
ITEM	144.01	ROCK EXCAVATION	CY
ITEM	153.01	BANK RUN GRAVEL	CY
ITEM	302.122	LAY 12 INCH DICL WATER PIPE	LF
ITEM	302.162	LAY 16 INCH DICL WATER PIPE	LF
ITEM	302.202	LAY 20 INCH DICL WATER PIPE	LF
ITEM	303.063	LAY 6 INCH DICL WATER PIPE - MJ	LF
ITEM	303.163	LAY 16 INCH DICL - MJ WATER PIPE	LF
ITEM	305.12	CLEAN AND CEMENT LINE 12 INCH PIPE	LF
ITEM	305.13	OBSTRUCTIONS	EA
ITEM	305.16	CLEAN AND CEMENT LINE 16 INCH PIPE	LF
ITEM	305.17	TELEVISION INSPECTION OF CEMENT LINED WATER PIPE	LF
ITEM	308.91	ADDITIONAL DICL FITTINGS	LB
ITEM	310.16	SET 16 INCH SINGLE END EXPANSION JOINT	EA
ITEM	310.161	SET 16 INCH DOUBLE END EXPANSION JOINT	EA
ITEM	325.122	LAY 12 INCH STEEL WATER PIPE	LF
ITEM	325.162	LAY 16 INCH STEEL WATER PIPE	LF
ITEM	325.202	LAY 20 INCH STEEL WATER PIPE	LF
ITEM	325.911	ADDITIONAL STEEL FITTINGS	LB
ITEM	327.	ABANDON AND CAP EXISTING BLOW-OFF	EA
ITEM	346.21	2 INCH TEMPORARY BY-PASS PIPE	LF
ITEM	346.41	4 INCH TEMPORARY BY-PASS PIPE	LF
ITEM	346.61	6 INCH TEMPORARY BY-PASS PIPE	LF
ITEM	349.121	SET 12 INCH GATE VALVE	EA
ITEM	356.161	SET 16 INCH BUTTERFLY VALVE	EA
ITEM	356.722	CHAMBER FOR B.V.	EA
ITEM	356.723	CHAMBER FOR PITOMETER TAP	EA
ITEM	358.11	RAISE WATER CASTING TO GRADE	EA
ITEM	363.21	2 INCH PITOMETER DRAIN	EA
ITEM	368.1	PITOMETER TAP	EA
ITEM	368.2	SET 6 INCH GATE VALVE	EA
ITEM	376.01	SET HYDRANT	EA
ITEM	378.01	1 INCH AUTOMATIC AIR RELEASE AND VACUUM VALVE	EA
ITEM	382.011	INSTALLATION OF NEW MBTA METERED CONNECTION	LS
ITEM	460.01	TEMPORARY PAVING	SY
ITEM	908.04	CONCRETE SLURRY	LS

The Boston Water and Sewer Commission shall have an engineer present while all work construction takes place.

If a conflict between the MDPW Standard Specifications and the BWSC Special Conditions relative to <u>installation procedure only</u> of the pipe and appurtenances should occur, the Contractor shall follow the BWSC Special Conditions.

Items 740 and 748 were never included in the items for BWSC. BWSC has not paid the 18% reduced from the Contractor in the Finals Section to either the Department or the Contractor.

The Department agrees that the Contractor should be paid. The BWSC was not a party to the Contract. The Standard Specifications for Highways and Bridges at 1.27 defines the Party of the First Part thusly:

"In contracts with the Department, the Party of the First Part shall be the Department."

The Standard Specifications at 1.12 defines Contractor as:

"The Party of the Second Part to the Contract,..."

The Department's contracts are bilateral agreements between the Department and the Contractor. Consequently, the Department is responsible for the cost of this additional work and admitted the same at the hearing.

FINDINGS:

I find that the Contractor did all the quantities of work involved in Items 740.0 - Field Trailer and Item 748 - Mobilization and should be paid an additional $22,800.00.

RECOMMENDATION:

M. DeMatteo Construction Co.'s claim on Contract #90003 for $4800.00 due on Item 740.0 - Field Office and $18,000.00 due on Item 748 - Mobilization should be approved in the total amount of $22,800.00.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: October 30, 1996

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **N.E.L. Corporation**
CONTRACT #: **93533**
CITY/TOWN: **Amesbury (I-495/Rte. 150)**
CLAIM: **Additional costs in the amount of $4281.07**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, NOVEMBER 6, 1996**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro
Assoc. Comm. Eidelman

Chief Eng. Broderick
E.Botterman, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
Alex Bardow, Bridge Eng.
S. Eidelman, DHD, District #4
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

N.E.L Corporation
1 Farm Lane, #101
Georgetown, MA 01833

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **N.E.L. CORPORATION**, 1 Farm Lane, #101, Georgetown, MA 01833, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, NOVEMBER 6, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

N.E.L. Corporation (the Contractor) is aggrieved by the Department's failure to pay $4281.07 on a claim on Contract #93533, appealed to the Board of Contract Appeals.

Contract #93533 (the Contract) was for bridge repairs at Interstate 495 over Route 150 in Amesbury.

Work under this contract involved the repairing and making safety modifications to Bridge No. A-7-23 in the Town of Amesbury.

The work included:

- Repairing the impact damaged structural steel beams under the westbound roadway.
- Removing the reinforced concrete coping barrier, the majority of deck in the first interior bays, the slab overhang at the fascias, the deck over the piers, and the diaphragm encasement also at the piers.
- The replacing of the existing bearings at the piers with new neoprene bearings.
- Repairing the reinforced concrete substructure.
- Placing a cast-in-place New Jersey barrier at the coping.
- Eliminating the existing roadway armored joint and replacing it with a concrete slab.
- Cleaning and painting the existing structural steel.
- Placing a roadway crack control joint at the abutments.

All work done under this contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, THE PLANS and the SPECIAL PROVISIONS.

The Contract was awarded May 12, 1993, Item #9. The Contract was

dated May 19, 1993. The original completion date was October 16, 1993. The Contract award price was $792,101.00.

Hearings were held on May 23, May 28, and June 3, 1994. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Dean Kalavritinos	Asst. Chief Counsel
David Comorford	CE III - Formerly with the Metals Control Section
Scott Richards	Resident Engineer
Mary Grieco	Metals Control Eng. - MHD
Kal Narayana	N.E.L. Corp.
Philip LaRoche	N.E.L. Corp.

Entered as Exhibits were:

Exhibit #1.....Contract #93533
Exhibit #2.....Statement of Claim

After the hearings, I requested post hearing submissions of both parties. The Department's submission is dated July 3, 1996. The Contractor at the hearing informed me that he was not going to make a submission. However, after receiving the Department's submission, Kal Narayana informed Department's counsel of his desire to submit a rebuttal. On September 18, 1996 I called the Contractor and spoke with Al Enos to inquire about his submission. He told me he would have Mr. Narayana contact me the next day. As of this writing I have not heard from Mr. Narayana.

FACTS AND ISSUES OF LAW:

This claim was a claim for heat straightening in the amount of $4281.07. The Contractor was limited to applying a stress of 20,000 psi to the steel. The Contractor in his procedure was to convert this to tons. The final result was that he could use a force no greater than 5 tons.

In the Contractor's first attempt at straightening the beams, the flanges of the beams in question were straightened and brought in to

tolerance. They were heated on the convex side and in accordance with the approved procedure. The problems arose when the webs were to be straightened.

The Contractor under Item 107.971 heat straightening was given a list of four companies approved by the Department to do this procedure. He selected Piasecki Steel Construction from Stuyresant, New York.

In late March 1994, after having successfully completed the straightening of the flanges, Piasecki needed to return to New York as soon as possible to start on other projects. Given this time constraint, Dave Comerford made a field decision to allow Piasecki to heat straighten the web without requiring Piasecki to submit a written procedure to heat straighten the web for Department approval. The Department had only approved a written procedure to straighten the flanges.

In any event, Dave Comerford, guided by the approved written procedure for straightening the flanges, gave the following verbal web heat straightening instructions to Piasecki: (1) use a larger heating pattern. (2) heat straighten the web from the convex side, (emphasis added) and (3) limit the mechanical force applied to the web to five (5) tons, the standard in New York state. The contract specifications do not state how many tons of mechanical force can be used to heat straighten the web since there are many factors to consider in determining the correct amount of mechanical force. Piasecki, the heat straightening expert, never performed the requisite calculations in order to determine how much mechanical force could be applied to the web during the heat straightening procedure. The contract specifications, however, state that "the straightening shall be accomplished with as little mechanical force as possible."

Piasecki disregarded Comerford's verbal web heat straightening instructions and heat straightened from the concave side, using a smaller heating area. Piasecki's approved, written procedure for

straightening the flanges clearly states that the convex side is to be heated. Apparently, Piasecki was concerned about possible damage to the jacks if they heat straightened from the convex side, as directed by Comerford.

During the course of the heat straightening, Piasecki submitted a sketch of this procedure. Piasecki applied three (3) tons of force during this first attempt, which was increased to five (5) tons upon heating. The web did not move. Comerford insisted that Piasecki heat from the convex side using a larger heat area. Comerford believed that Piasecki was not heating a large enough area of the beam. Scott Richards retorted that it was difficult to heat a larger area since the plate was in the way. Comerford reminded him that the Bridge Section had approved a smaller plate, therefore this should not have been an issue. Piasecki insisted that more force (a force greater than the Department-approved five (5) ton force) was required to straighten the web and that this was the main reason the web had not moved. As previously stated, however, Piasecki had not performed the requisite calculations needed to determine how much force could be used, that is how much stress the web could withstand. This is the main reason the Bridge Section maintained a conservative stance with regards to the application of mechanical force. Piasecki returned to New York, having failed to straighten the web.

In June 1994, Piasecki returned to the Boston area and remobilized to attempt the web heat straightening once more. At this point, Piasecki agreed to heat from the convex side and change the jacking system. To prevent damage to the jacks, Piasecki placed wet rags on the jacks to keep them cool. With a mechanical force of five (5) tons, the web did not move. Richards communicated this to Comerford who, in turn, allowed Piasecki to increase the force to a point where they got movement and no higher. At the point where the force was increased to eight (8) tons, the web moved and was successfully straightened.

FINDINGS.

I find that Piasecki, N.E.L.'s subcontractor, initially disregarded instructions given to it by Dave Comerford of the Department's Bridge Section and failed to perform the requisite calculations to determine the correct amount of mechanical force to be used to heat straighten the web. I find that the Department is not obligated to reimburse N.E.L. for costs incurred to remobilize and straighten the web in accordance with a procedure that had been recommended by the Department but not utilized during Piasecki's initial attempt to heat straighten the web.

RECOMMENDATION:

It is recommended that the N.E.L. Corporation's claim on Contract #93533 to heat straighten the web on Bridge No. A-7-23 in Amesbury in the amount of $4281.07 be denied.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: May 29, 1997

RE: Board of Contract Appeals
(PFN-015555)

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **P. Gioioso & Sons, Inc.**
CONTRACT #: **96211**
CITY/TOWN: **Medford (College Ave. & North Street Bridges)**
CLAIM: **Removal of granite masonry in the amount of $65,020.00.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, JUNE 4, 1997**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro
Assoc. Comm. Botterman

Assoc. Comm. Broz
Assoc. Comm. Blundo
Chief Eng. Broderick
D. Anderson, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
E. Botterman, DHD, Dist. #4
Alex Bardow, Br. Eng.
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

P. Gioioso & Sons, Inc.
50 Sprague Street
Hyde Park, MA 02136

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **P. GIOIOSO & SONS, INC.**, 50 Sprague Street, Hyde Park, MA 02136, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, JUNE 4, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

P. Gioioso & Sons, Inc. (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) failure to pay $65,020.00 which is compensation for the removal of 1625.5 cy. of granite masonry at a unit price of $40.00/cy. for Item 144 on Contract #96211 (the Contract), appealed to the Board of Contract Appeals.

The Contract was for the replacement of two bridges in Medford: College Avenue over the B & M Railroad and North Street over the B & M Railroad.

The work done under this Contract included the following: the removal and satisfactory disposal of the existing structure of Bridge Number M-12-12, College Avenue over New Hampshire Main Line, and construction of a new single span bridge composed of butted prestressed concrete box beams with concrete abutments; and the removal and satisfactory disposal of the existing structure of Bridge Number M-12-14, North Street over New Hampshire Main Line, and construction of a new two span bridge composed of prestressed butted concrete deck beams. The existing abutments, wingwalls and retaining walls along approach roadways at North Street were demolished to allow for construction of new abutments and wingwalls, while existing wingwalls at College Avenue were only partially demolished.

An existing 48-inch and 20-inch Massachusetts Water Resources Authority water mains and support structures at College Avenue were removed and replaced with new mains and support truss bridge.

A temporary pedestrian bridge was required at College Avenue.

The project involved roadway work on the College Avenue, Boston Avenue, North Street, Piggot Road, Walkling Court and Marshall Street approaches. The work included full depth roadway reconstruction, bituminous concrete pavement, concrete sidewalks, excavation, borrow, grading, granite curbing, drainage, field office, construction safety controls, and other incidental items of work as listed in the Contract.

The length of the project including the length of each bridge was

approximately 600 feet along College Avenue and 530 feet along North Street, respectively.

All work done under this contract had to be in conformance with the DEPARTMENT OF HIGHWAYS STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR
TRAFFIC SIGNALS AND HIGHWAY LIGHTING, THE PLANS AND THESE SPECIAL PROVISIONS.

Contract #96211 was awarded September 13, 1995, Item #11. It was dated September 25, 1995. The original completion date was October 5, 1996. The Contract award price was $3,631,810.00.

A hearing was held on April 17, 1997. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Dean Kalavritinos	Asst. Chief Counsel
Paul Maloy	Resident Engineer
Frank Gioioso	P. Gioioso & Sons
Joseph Gioioso	P. Gioioso & Sons

Entered as Exhibits were:

Exhibit #1.....	Contract #96211
Exhibit #2.....	Statement of Claim

A post hearing submission was requested of the Contractor to show various jobs where the same contract provisions existed and the Contractor was paid under Item #144. This submission was referred to Cosmo Fedele, MassHighway's Finals Engineer, for verification. Mr. Fedele concurs with my findings herein.

FACTS AND DISCUSSION OF LAW:

The Contractor filed this claim for additional compensation based on an alleged contract ambiguity relative to Item #115.1/115.2 and Item #144.

Items #115.1 and 115.2 state in part:

ITEM 115.2 DEMOLITION OF BRIDGE STRUCTURE LUMP SUM
BRIDGE NO. M-12-14

Work under this item shall include the removal and satisfactory disposal of the entire existing superstructure, abutments, and wingwalls as shown on the Plans in conformance with the relevant provisions of Section 112 of the Standard Specifications and the following: (emphasis added)

ITEM 115.1 DEMOLITION OF BRIDGE STRUCTURE LUMP SUM
BRIDGE NO. M-12-12

Work under this item shall include the removal and satisfactory disposal of the entire existing superstructure, abutments, and wingwalls, or portions thereof, as shown on the Plans in conformance with the relevant provisions of Section 112 of the Standard Specifications and the following: (emphasis added)

Item #144 states in part:

ITEM 144 CLASS B ROCK EXCAVATION CUBIC YARD

The work to be done under this Item shall conform to the relevant provisions of Section 140 of the Standard Specifications and shall include, the removal of boulders and ledge encountered during excavation and the removal of the granite masonry portion of abutments, as shown on the Plans, and as defined in Subsection 140.25 of the Standard Specifications. Any concrete which may be encountered and excavated not listed under another item shall be considered Class B Rock Excavation. (emphasis added)

The Contractor has been paid its lump sum bid price of Item 115. However, in its claim, the Contractor has asked to be paid its unit price ($40.00) for 1625.5 cy. under Item #144 for a total of $65,020.00.

It is a well-founded principle of law that contract terms which are plain and free from ambiguity must be interpreted in accordance with their ordinary and usual sense. Edward R. Sage Company v. Foley, 421 N.E. 2d 460 (1981). However, to establish whether the plain and ordinary meaning of contract language will govern the agreement itself, courts must establish whether ambiguity is present. Ambiguity is defined as "an uncertainty of meaning in the terms of a written contract, a wanting of clearness or definiteness; something

difficult to comprehend or distinguish; and of doubtful language." Tribe, Government Contracts, Vol 1, c. 2 §10. Stated another way, a provision is ambiguous if it is reasonably susceptible to two or more different interpretations, each of which is found to be consistent with the contract language. Id. at 2.10(1). The uncertainty of meaning, however, must be both substantial and reasonable. Id. at 2.10(1). Thus, contract language is ambiguous if there is an inherent substantial and reasonable uncertainty of meaning, and if the language is reasonably susceptible to two or more different meanings.

In this case, there is no question that the contract language is ambiguous with respect to what is paid under Item 115 and Item 144 supra.

Given the discrepancy cited, there is no question that the contract language at issue is ambiguous. The sole question, therefore, is how the ambiguity now ought to be resolved.

When faced with what are determined to be an ambiguous contract provision, courts must apply certain rules to resolve the ambiguities. These rules, as will be discussed later, are applicable to government and other public contracts as well as to private contracts. School Committee of Boston v. Board of Education, 363 Mass. 20, 292 N.E.2d 33B (1973); Zoppo v. Comm., 353 Mass. 401, 232 N.E. 2d 346 (1967). The Zoppo case further states the generally accepted rule at 405 "Where words or other manifestations of intentions bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from...(which) they proceed (the Commonwealth)... ."

Where an ambiguity in the contract language is found to exist, the courts will first try to resolve that ambiguity by determining the intent of the parties. Fay, Spofford & Thorndike v. Massachusetts Port Authority, 7 Mass. App. 336, 387 N.E. 2d 206 (1979). ("Common sense and the probable intent of the parties are guides to a court's construction of a written instrument").

Since it is rarely possible to discern the actual intent of the parties, the courts rely upon a so called "objective test." This involves interpreting the language of the contract in the way it would be interpreted by a reasonably intelligent person familiar with all the facts and circumstances surrounding contract formation, Corbetta Construction Co. v. United States, 198 Ct. Cl. 712, 461 F.2d 1330 (1972), stating at 623 that the crucial question is "what plaintiff would have understood as a reasonable construction contractor," not what the drafter of the contract terms subjectively intended..."

To this end the courts look at two sources of information. First, they consider the contract document as a whole, United States v. Essley, 284 F.2d 518 (10th) Cir. 1960).

When the ambiguity cannot be resolved by reference to the contract document as a whole, then an examination is made of the circumstances attending the transaction such as the conduct of the parties, trade customs, usages, etc., United States v. Bethlehem Steel Co., 205 U.S. 105 (1907).

Since the ultimate goal in construing an agreement is to determine the intention of the parties, when attempting to resolve the ambiguity, courts must look to the main purpose of the contract. This is best achieved by viewing the agreement in its entirety and by construing provisions with reference to one another, where possible. Taunton Municipal Lighting Plant v. Quincy Oil Inc. 503F. Supp. 235 (Mass. 1980). Indeed, even where certain language viewed alone more readily suggests something else, construction which comports with the agreement as a whole is preferred. These principals are demonstrated in a number of Massachusetts cases, e.g. Shaw & Sons, Inc. v. Rugo, Inc., 343 Mass. 635 (1982), Hosmer v. Commonwealth, 302 Mass. 495 (1939).

In this instance, unfortunately, resort to the contract documents as a whole will not resolve the aforementioned ambiguity. Very little contained in the documents is of relevance or use in such an inquiry.

Moreover, in this case, resort to §5.04 of the Standard Specifications to resolve the direct conflict in the contract language is not appropriate.[1] An order of precedence clause such as is contained in §5.04 will not be applied automatically where, as here, there are obvious conflicts or errors, Franchi Construction Co. v. United States, 609 F.2d 984 (1979).

This claim resolves itself around the actions of MassHighway and the inaction of the Contractor. It is well settled that where one of the contracting parties, either expressly or by its actions, clearly makes known to the other party its interpretation of a particular term of the contract and the other party remains silent, that interpretation will be binding on the parties. This is true whether the interpretation is made known prior to award or during performance. The rule applies with particular force, however, where the interpretation and acquiescence take place before the contract is executed. Perry and Wallis Inc. v. United States, 192 Ct. Cl. 310, 427 F.2d 722 (1970).

As the U.S. Court of Claims noted in the Perry and Wallis case, supra, "A party who willingly and without protest enters into a contract with knowledge of the other party's interpretation of it is bound by such interpretation and cannot later claim that it thought something else was meant." 427 F.2d at 725.

In the present matter, the Contractor submitted a post hearing submission showing three projects with similar specs in which the removal of granite masonry abutments was paid under Item 144, Class "B" Rock Excavation.

The submission was sent to finals for verification and Mr. Fedele, who has 46 years of review of our specs, concurred with the Contractor that we had exhibited a past practice that we would pay under Item 144

[1] In relevant part §504 of the Standard Specifications provides: "Special provisions shall govern over Standard Specifications, Supplemental Specifications, and Plans."

when a conflict existed between that pay item and the lump sum items in 115. (see Perry and Wallis case supra).

FINDINGS:

1. I find that there was an ambiguity in Contract #96211 between bid items 115 and 144.

2. I find that there was enough previous information for the Contractor to believe he would be paid under Item 144 and his interpretation of the Contract was reasonable under the circumstances.

RECOMMENDATION:

The appeal of P. Gioioso & Sons on Contract #96211 for additional compensation under Item 144, 1625.5 cy. at $40.00/cy. should be approved in the amount of $65,020.00.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: October 1, 1997

RE: Board of Contract Appeals
(PFN-600242)

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **P. Caliacco Corporation**
CONTRACT #: **95107**
CITY/TOWN: **Attleboro**
CLAIM: **Dispute on fine grading in the amount of $1801.80.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, OCTOBER 8, 1997**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro

Assoc. Comm. Botterman
Assoc. Comm. Broz
Assoc. Comm. Blundo
Chief Eng. Broderick
D.Anderson, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
B. McCourt, DHD, District #5
Alex Bardow, Br. Eng.
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

P. Caliacco Corporation
405 VFW Drive
Rockland, MA 02370

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **P. CALIACCO CORPORATION**, 405 VFW Drive, Rockland, MA 02370, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, OCTOBER 8, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

P. Caliacco Corporation (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) failure to pay $1801.80 for fine grading on Item 170 on Contract #95107 (the Contract) appealed to the Board of Contract Appeals.

The work done on this Contract was a bridge replacement job in Attleboro - Thatcher Street over the Ten Mile River, Bridge No. A-16-13.

The work included, but was not limited to, the removal of the existing superstructure and substructure and furnishing and installing precast concrete box culverts, reinforced concrete wingwalls, drainage, sidewalks and guardrail.

The work also included furnishing and installing signing and pavement, installation of granite curbing and other incidental items as shown on the plans or listed in the Contract.

All work done under this Contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING. The PLANS and these SPECIAL PROVISIONS.

Contract #95107 was awarded August 24, 1994, Item #8. It was dated September 9, 1994. The original completion date was July 8, 1995. The Contract bid price was $478,244.40.

A hearing was held on September 25, 1997. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Dep. Chief Counsel
Kevin Cassidy	Dist. #5 - Area Constr. Eng.
Steven Mellor	Dist. #5 - Area Constr. Eng.
Cosmo Fedele	MHD - Finals
Charles Verrocchi	MHD - Finals
Kyle Ainsley	Caliacco

Entered as Exhibits were:

Exhibit #1 ..... Contract #95107
Exhibit #2 ..... Statement of Claim

FACTS:

The P. Caliacco Corporation was notified by the Resident Engineer that the gravel subbase item for the roadway was being eliminated from the Contract. They were further directed to fine grade and compact the subgrade 8" above the original proposed elevation for the roadway.

The original proposed subbase on this project was made up of an 8" layer of gravel and 4" layer of dense graded crushed stone. The 8" gravel was eliminated from the roadway subbase thus reducing the subgrade layer to 4" of dense graded crushed stone. The Standard Specifications for Highways and Bridges, Section 1.00, defines the subgrade as the plane at the bottom of the subbase.

The district paid the Contractor 2772 sy. of fine grading at $.65/sy from a total of 1801.80. The finals section removed the fine grading because the cost of fine grading was in the gravel item. As a result of removing the $1807.80 paid for fine grading, the Contractor received a final estate showing an overpayment of $1192.21.

At this point in the Hearing, Deputy Chief Counsel David Mullen offered to settle the matter for the amount of the overpayment of $1192.21. The Contractor agreed to this figure.

FINDINGS:

I find that the agreement to settle this claim for $1192.21 between the parties to be fair and equitable in view of the fact that the fine grading was ordered by the district. I adopt the amount agreed to, $1192.21, as a part of these findings.

RECOMMENDATION:

It is respectfully recommended that the claim of P. Caliacco Corporation on Contract #95107 for fine grading in the amount of $1801.80 should be approved in the lesser amount of $1192.21.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: November 6, 1997

RE: Board of Contract Appeals

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **P.A. Landers, Inc.**
CONTRACT #: **93607**
CITY/TOWN: **Eastham/Wellfleet (Bike Path)**
CLAIM: **Additional compensation in the amount of $36,800.00.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, NOVEMBER 12, 1997**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro

Assoc. Comm. Botterman
Assoc. Comm. Broz
Assoc. Comm. Blundo
Chief Eng. Broderick
D.Anderson, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
B. McCourt, DHD, District #5
Alex Bardow, Bridge Eng.
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.

Dennis E. Harrington, Esq.
21 McGrath Highway
Suite 301
Quincy, MA 02169

P.A. Landers, Inc.
24 Factory Pond Road
Hanover, MA 02339

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **DENNIS E. HARRINGTON, ESQ.**, 21 McGrath Highway, Suite 301, Quincy, MA 02169, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, NOVEMBER 12, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

P. A. Landers, Inc. (the Contractor) aggrieved by the Massachusetts Highway Department's (MassHighway) failure to pay $36,800.00 due to a proprietary specification on the module block which caused the Contractor to pay an unjustly high amount to procure this product on Contract #93607 (the Contract), appealed to the Board of Contract Appeals.

The work done on this Contract was for the construction of the Cape Cod Bike Trail Extension from Eastham to Wellfleet.

The work done under this Contract consisted of constructing a bikeway, underpass and parking areas within the limits of the project as shown on the locus, plans and specifications included in the Contract or designated by the Engineer. The work included the preservation from injury or defacement of all vegetation and objects designed by the Engineer to remain.

All work done under this contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, THE PLANS and these SPECIAL PROVISIONS.

Contract #93607 was awarded June 9, 1993, Item #2. It was dated July 22, 1993. The original completion date was September 30, 1994. The Contract bid price was $1,085,621.29.

A hearing was held on June 10, 1997. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Dean Kalavritinos	Asst. Chief Counsel
Bin Lee	Area Construction Eng.-Boston
John Pettis	Geotechnical Section
Gary Higgins	Resident Engineer
Robert Fierra	Asst. Construction Eng.-Dist. 5
Dennis Harrington	Attorney for Landers
Joseph Kerrissey	Landers
Thomas Irving	Landers

Enclosed as Exhibits were:

Exhibit #1	Contract #93607
Exhibit #2	Statement of Claim
Exhibit #3	Specifications on retaining wall
Exhibit #4	Extra Work Order #8 (8 pages)
Exhibit #5	Letter of 6/2/94 to P.A. Landers from Bernard McCourt DHD District 5, plus attachments
Exhibit #6	Fax transmittal from Doublewal Corp. to Joseph Kerrissey dated 8/19/94
Exhibit #7	Sheet 21 of 25 of Plans

Post hearing submissions were requested by myself of both counsels. The submission date of June 30, 1997 was extended by agreement of counsels to July 10, 1997. Attorney for the Contractor submitted on that date. MassHighway counsel requested an extension which I granted. As of this date no submission was made by MassHighway.

FACTS AND ISSUES PRESENTED:

The Contract included a Line Item (995.012) for a Culvert Structure with a LUMP SUM BID. The work consisted of the construction of the complete culvert structure, including precast reinforced concrete box culvert, cast-in-place reinforced concrete headwalls, and precast reinforced concrete retaining walls. This portion of the work was shown on sheets 18-21 of the Plans.

In August 1994, MassHighway issued a revision to the contract drawings which reorganized the culvert structure in order to accommodate the actual soil conditions encountered on-site. At that time, portions of the Pre-Cast Reinforced Concrete Block Retaining Wall were deleted.

An Extra Work Order (EWO #8) was approved for the composite effect of the alterations to the structure taking into account the use of additional Cast-in-Place Concrete Wall and decreased quantity of Pre-Cast Wall in altered locations. Credit for the reduction in the quantity of the Precast Modular Concrete Block Wall was given in this

Extra Work Order based on the cost of the use of DoubleWal[1] because it was the product of choice by the lead agency (DEM). DEM actually designed this project under a contract with Keyes Associates.

The Contractor submitted three difference products under this specification over a period of time from August 1993 through November 1994. One manufacturer offered two difference "bin-wall" products in an attempt to supply an acceptable material.

The review of submittals for two products which resulted in a denial of approval for those products was made after consultation by MassHighway with the referring agency (DEM) and its original design consultant, Keyes Associates. MassHighway did determine that the "Re-Tension Walls", by The Reinforced Earth Company, was "satisfactory" but "since this wall has no prior track record in this state, he (the Bridge Engineer) prefers the use of the `doublewal'."

"We prefer the "Doublewal" design because of its track record with MassHighway over the last 15 years. This is the first time that the Bridge Section has reviewed the reinforced earth "Re-Tension" wall system. We find the drawings and calculations satisfactory. The final product, however, will depend mainly upon the quality of construction and the degree of supervision, especially for the cast-in-place portion of the wall."

The Contractor also submitted drawings on an "Evergreen Wall" which was also rejected.

M.G.L. c. 30 § 39(M) (the bid statute for horizontal construction) provides at section (b) the following:

> (b) Specifications for such contracts, and specifications for contracts awarded pursuant to the provisions of said sections forty-four A to forty-four L of said chapter one hundred and forty-nine shall be written to provide for full competition for each item of material to be furnished under the contract; except, however, that said specifications

[1] Various spellings are used in the Exhibits and are thus reflected in this Memorandum. The corporate name on the manufacturer's correspondence appears as "DOUBLEWAL CORPORATION" although some product literature refers to "Double-Wall". An attempt has been made to maintain the spelling used in the individual Exhibits mentioned even at the expense of momentary confusion as to the spelling.

> may be otherwise written for sound reasons in the public interest stated in writing in the public records of the awarding authority or promptly given in writing by the awarding authority to anyone making a written request therefor, in either instance such writing to be prepared after reasonable investigation. Every such contract shall provide that an item equal to that named or described in the said specifications may be furnished; and an item shall be considered equal to the item so named or described if (1) it is at least equal in quality, durability, appearance, strength and design, (2) it will perform at least equally the function imposed by the general design for the public work being contracted for or the material being purchased, and (3) it conforms substantially, even with deviations, to the detailed requirements for the item in the said specifications. For each item of material the specifications shall provide for either a minimum of three named brands of material or a description of material which can be met by a minimum of three manufacturers or producers, and for the equal of any one of said named or described materials.

C. 30, § 39M(b), known as the "proprietary specification" provision of the competitive bidding statutes, disallows the use of a sole source for materials, unless the awarding authority can make a showing that there are "sound reasons in the public interest" for identifying only one particular manufacturer who can meet the awarding authority's specification. To avoid having a proprietary specification, c. 30, § 39M(b) directs the awarding authority to follow one of two alternatives: it shall either (1) identify brands by name, or (2) provide a generic description of the necessary product, as long as three manufacturers can meet the specified requirement. In either case, the awarding authority also must provide that bidders can supply an item which is "the equal" to any named or described products.

C. 30 § 39M(b) requires that specifications be written to provide for full competition for each item of material to be furnished. The exception to this rule is that a proprietary specification may be written "for sound reasons in the public interest stated in writing in the public records of the awarding authority or promptly given in writing by the awarding authority to anyone making a written request, therefor, in either instance such writing to be prepared after reasonable investigation."

Structurally both the "Evergreen Wall" and the "Re-Tension Wall" would perform equally to the Doublewal. However, properties of the Doublewal are really impossible to equal. Consequently M.G.L. c. 30 § 39M(b) required a written statement by MassHighway that the Doublewal was in the public interest. No such written statement was ever filed by MassHighway. The provisions of M.G.L. c. 30 § 39M(b) were not met. A proprietary specification was written and no material was available which was the equal of Doublewal.

I have spoken with the former expediter of this project. When he received the specification from DEM he recognized immediately that the specification for Item 995.012 was proprietary. He tried to create a generic specification, but DEM still insisted on only the Doublewal. Bridge section also was reluctant to approve an "or equal" because of their familiarity with Doublewal.

As further evidence that the specification was proprietary see exhibit #6 (a copy of which is attached hereto and made a part hereof) dated 8/19/94 from Bill Brown of Doublewal to the Contractor which states in part: "Frankly, I am especially surprised to hear of any problem at all, since the package was comprised essentially of the same sheets as the contract drawings, originally prepared by us, with the addition of PE seals, submitted for record, as shown in Paragraph 5, P. 36 of the job specification." (emphasis added)

FINDINGS:

I find that Item 995.012 CULVERT STRUCTURE was a proprietary specification.

I find that neither the Department of Environmental Management nor MassHighway issued a written statement that showed sound reasons in the public interest why such a specification should be used.

I find that because of the propriety specification the Contractor is entitled to damages which should be measured from the highest quote per square foot received by the Contractor, i.e. 14.50 per square foot as opposed to Doublewal's price of 24.76 per square foot.

I find that the Contractor should be compensated for the additional cost be paid of the Doublewal at $10.26 per square foot times the 3268.28 square feet which equals $33,532.55.

RECOMMENDATION:

The appeal of P.A. Landers, Inc. on Contract #93607 for failure to pay $36,800.00 due to a proprietary specification on Item No. 995.012 should be approved in the lesser amount of $33,532.55.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: November 21, 1997

RE: Board of Contract Appeals
(PFN-005403)

The attached is a copy of my report and recommendation on the claim of:

CONTRACTOR: **The Cianbro Corporation (L & C Flashing Barricades, Inc., subcontractor)**
CONTRACT #: **94067**
CITY/TOWN: **Beverly/Salem**
CLAIM: **Alleged ambiguous specification in the amount of $5280.00.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, NOVEMBER 26, 1997**, for action of the Massachusetts Highway Commission acting as the Board of Contract Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

PM/jd
Attachment
cc:
Comm. Sullivan
Dep. Comm. Kostro

Assoc. Comm. Botterman
Assoc. Comm. Broz
Assoc. Comm. Blundo
Chief Eng. Broderick
D.Anderson, Dep.Ch.Eng.,Constr.
Secretary's Office
Ned Corcoran, Ch. Counsel
E.Botterman, DHD, District #4
Cosmo Fedele, Fin. Rev. Eng.
Frank Garvey, Fisc. Mgmt.
Alex Bardow, Br. Eng.

Cianbro Corp.
Hunnewell Square
P.O. Box 1000
Pittsfield, ME 04967

L. & C. Flashing
Barricades, Inc.
480 Neponset Street
Canton, MA 02021

NOTIFICATION OF THE FILING AND PRESENTATION OF THE REPORT

This is to certify that a copy of this recommendation was sent by ordinary mail to **CIANBRO CORP.**, Hunnewell Square, P.O. Box 1000, Pittsfield, Maine 04967, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, NOVEMBER 26, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The Cianbro Corporation (the Contractor) on behalf of its approved subcontractor L & C Flashing Barricades, Inc. (L & C) filed a claim due to the Massachusetts Highway Department's (MassHighway) failure to pay $5280.00 due to an alleged ambiguous specification on Contract #94067 (the Contract).

The work done on this Contract was for the construction of a new fixed span bridge over the Danvers River between Beverly and Salem.

The work consisted of the construction of a fixed span Bridge No. B-11-4+S-1-12 over the Danvers River between the Cities of Salem and Beverly. The existing opening-span bridge was demolished. A portion of the Bridge Street Bypass in Salem was constructed to a location approximately 50 feet south of Thorndike Street. A connector roadway was constructed from the new bridge to Bridge Street in Salem. In Beverly, portions of the following streets were reconstructed: Cabot Street, Rantoul Street, Congress Street, Front Street, Water Street, Summit Avenue and Cox Street.

The work included mobilization, clearing, demolition, earthwork, grading, drainage, utility relocations, retaining walls, traffic signal systems, paving, curbing, guard rail, sidewalk, lighting, signing, pavement markings, fencing, landscaping, and other related highway and bridge work as indicated on the plans and as directed by the Engineer. Furthermore, the work included maintenance of traffic during construction, maintenance of vehicular and pedestrian access to abutting properties and, unless otherwise directed by the Engineer, uninterrupted and acceptable utility service.

All work done under this Contract shall be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAY AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 19912, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968 STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND

HIGHWAY LIGHTING, THE PLANS and these SPECIAL PROVISIONS.

Contract #94067 was awarded June 23, 1993, Item #67. It was dated June 28, 1993. The original completion date was November 16, 1996. The extended completion date is September 1, 1997. The District is presently entertaining a second extended completion date as of this writing according to the area construction supervisor, Paul Monahan. The original bid price was #33,492,790.00.

A hearing was held on September 25, 1997. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Mullen	Dep. Chief Counsel
Tharryn Smith	Cianbro Corp.
Michael Murphy	L & C Flashing
Glenn Roy	L & C Flashing

Entered as Exhibits were:

Exhibit #1	Contract #94067
Exhibit #2	Statement of Claim
Exhibit #3	Miscellaneous documents

FACTS AND ISSUES OF LAW:

The Contractor through its subcontractor (L & C) alleges that the plans and specifications were ambiguous

During the bidding phase of this project, a section of Sheet 53 of the Plans was forwarded by L & C to Walpar, Inc. Engineering Fabrication to price OD7 with the shown signs, 46 square feet. To design and price any structure, the design engineer must have certain information, being soil conditions, wind load, etc.

Sheet 53 was sent to the fabricator after reviewing sheets 56 and 57 which L & C claims eliminated the signs OD7A and OD7B along with Addendum #9, Page 85 of the Special Provisions, Item 840.107-Supports for Overhead Guide Sign (OD-7) Steel. In late 1994, the Contractor requested shop drawings for OD7. L & C requested information from the Contractor, i.e., span length, elevations, etc. L & C also wanted to confirm panel sizes. At that time, the Contractor notified L & C of

MassHighway's desire to design for future signs, not the ones shown or referred to in Addendum #9.

MassHighway contends that on page 56 of the contract drawings, Note #2 says, "The OD-7 sign support structure shall be furnished and installed (without the OD-7A and OD-7B panels)". This note was right beside the scale drawing of the OD-7 overhead sign support structure which drawing depicted sign OD-7A as being 15'-6" x 8'-0" and sign OD-7B as being 14'-0" x 11'-6".

All of the other drawings on this page showed overhead supports and the corresponding signs with a large "X" crossing out the complete system and also a large "NIC" (not in contract) accompanying same. However, the drawing for the OD-7 sign support structure only had the "X" crossing out the individual sign panels and also the "NIC" was within the limits of each drawn sign. It is a well-founded principle of law that contract terms which are plain and free from ambiguity must be interpreted in accordance with their ordinary and usual sense. Edward R. Sage Company v. Foley, 421 N.E. 2d 460 (1981). However, to establish whether the plain and ordinary meaning of contract language will govern the agreement itself, courts must establish whether ambiguity is present. Ambiguity is defined as "an uncertainty of meaning in the terms of a written contract, a wanting of clearness or definiteness; something difficult to compehend or distinguish; and of doubtful language." Tribe, Government Contracts, Vol 1, c. 2 §10. Stated another way, a provision is ambiguous if it is reasonably susceptible to two or more different interpretations, each of which is found to be consistent with the contract language. Id. at 2.10(1). The uncertainty of meaning, however, must be both substantial and reasonable. Id. at 2.10(1). Thus, contract language is ambiguous if there is an inherent substantial and reasonable uncertainty of meaning, and if the language is reasonably susceptible to two or more different meanings.

L & C claims to have bid this item based on the "Interim condition"

sheet #53, which depicts 2 construction signs 4' x 4' being mounted to overhead support. If this were the case, the support should be included under the safety signing for construction operations, item #852.

L & C sent their fabricator, Walpar, Inc., page 53 from the Contract drawings. Page 53 is the "Sign and Pavement Markings plan for the Interim Condition." Although page 53 shows the OD-7 structure, it makes no mention of the sign support dimensions. However, page 56 of the contract drawings, note #2 states that "the OD-7 sign support structure shall be furnished and installed (without the OD-7A and OD-7B Panels)." This note is right beside the scale drawing of the OD-7 overhead sign support structure which drawing depicts sign OD-7B as being 15'-6" x 8'-0" and sign OD-7B as being 14'-0" x 11'-6".

FINDINGS

I find that the specifications for the OD-7 signs were not ambiguous.

RECOMMENDATION:

It is respectfully requested that the claim of Cianbro Corporation on behalf of its approved subcontractor, L & C Flashing Barricades, Inc., in the amount of $5280.00 due to an alleged ambiguous specification, should be denied.

Respectfully submitted.

Peter Milano
Chief Administrative Law Judge

INTRODUCTION:

N.E.L. Corporation (the Contractor) on behalf of its fabricator, Precise Fabricating Corporation (Precise) alleged to be aggrieved by Massachusetts Highway Department's (MassHighway) denial of a claim for additional cost in the amount of $26,033.29 due to MassHighway's request that the bridge rails be cambered on Contract #95080 (the Contract), appealed to the Board of Contract Appeals.

This Contract was for the reconstruction of three bridges, Kingsbury Street, Weston Road and Crest Road over the MBTA, Amtrak and Conrail, in the Town of Wellesley.

The work done under this Contract consisted of furnishing all necessary labor, materials, and equipment to reconstruct approximately 390 feet of Kingsbury Street including the reconstruction of Bridge No. W-13-8 carrying Kingsbury Street over the MBTA, AMTRAK and Contrail tracks; to reconstruct and widen approximately 440 feet of Weston Road, including the replacement of Bridge No. W-13-10 carrying Weston Road over the MBTA, AMTRAK and Conrail railroad tracks with a new structure; to reconstruct approximately 250 feet of Crest Road, including the complete replacement of the superstructure of Bridge No. W-13-9 carrying Crest Road over the MBTA, AMTRAK and Conrail tracks and making modifications to portions of the substructure.

Work relating to Kingsbury Street and Weston Road included construction and removal of a temporary pedestrian bridge with handicap access ramps, pavement reconstruction; construction of cement concrete sidewqlks, granite curbs, transition curb for wheelchair ramps, new traffic signing and roadway pavement markings, and other miscellaneous improvements in the areas of Weston Road and Kingsbury Street.

The work relating to Crest Road included the demolition and removal of the existing superstructure, a portion of the existing substructure, and construction of a new single span prestressed concrete box beam superstructure for Bridge No. W-13-9, Crest Road over MBTA, AMTRAK & Conrail, in the Town of Wellesley.

The work on Crest Road included but was not limited to the following:

1. Design and Construction of a temporary pedestrian/utility bride with handicap access ramps.
2. Relocation of utilities as required.
3. Removal of existing superstructure.
4. Partial demolition of upper portion of abutments.
5. Drill & grout dowels.
6. Construction of proposed abutment caps.
7. Construction of new approach slabs.
8. Construction of new precast prestressed concrete box beam superstructure.
9. Construction of a new bituminous wearing surface, concrete sidewalks, utility bays and steel bridge railing with protective screens.
10. Removal of the temporary pedestrian/utility bridge and handicap access ramps.

The work also included reconstructing roadways and sidewalks, removing and resetting existing steel highway guard, constructing retaining walls with guard rail and chain link fence as shown on plans, changing the type of drainage structure, installing new catch basin, relocating water main and related work, and other incidental items as listed in the proposal.

All work done under this contract had to be in conformance with the Massachusetts Highway Department STANDARD SPECIFICATIONS FOR HIGHWAYS AND BRIDGES dated 1988, the SUPPLEMENTAL SPECIFICATIONS dated August 7, 1991, the 1977 CONSTRUCTION STANDARDS, the 1988 MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES, the 1990 STANDARD DRAWINGS FOR SIGNS AND SUPPORTS, the 1968

STANDARD DRAWINGS FOR TRAFFIC SIGNALS AND HIGHWAY LIGHTING, THE PLANS and these SPECIAL PROVISIONS.

Contract #95080 was awarded August 17, 1994, Item #10. It was dated September 6, 1994. The original completion date was November 23, 1996. The bid price was $2,796,132.00.

A hearing was held on November 9, 1999. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Kathleen Pendergast	Deputy Chief Counsel
Mary Greco	MHD – Bridge
Edmund Newton	MHD – Bridge
Gregory Moakley	N.E.L.
Frank Davis	Precise Fabricating

Entered as exhibits were:

Exhibit #1 …….	Contract #95080
Exhibit #2 …….	Statement of Claim
Exhibit #3 …….	Memo to me from Alex Bardow, Bridge Eng., dated 8/17/99
Exhibit #4 …….	Memo from Alex Bardow to William McCabe, Construction Eng. dated 7/31/96
Exhibit #5 …….	Letter from Chief Engineer Broderick to Sherman Eidelman, dated 9/30/96
Exhibit #6 …….	Frank Davis' hand written notes of conversations with MHD personnel.

FACTS AND ISSUES PRESENTED:

MassHighway requested of the Contractor and Precise that the steel bridge rails on these bridges be cambered to match the bridge profile. Precise claims that this requirement to camber the bridge rails had not been a standard of MassHighway and that there would be added cost to incorporate this camber requirement in the bridge rail.

The Contract drawings show a constant dimension of 15 inches from the centerline of the bottom rail to the top of the sidewalk. Because this bridge has a tight vertical curve, the 15 inch dimension could not be held if the rail was fabricated in chords instead of cambering. In

addition, Section 975.62 of the Standard Specifications state that "…..Longitudinal members shall follow the grade of the coping……..Where required on curves the rails shall be accurately formed to the required radius." To give Precise some relief, MassHighway allowed them to measure the chord over four panel points instead of five. MassHighway also allowed a tolerance of ± ½" on the 15 inch dimension between the centerline of the bottom rail and the top of the sidewalk. If this requirement could not be met, the rails would have to be cambered to a smooth curve. Altering the method of measuring the bridge rail chords and giving a tolerance of ± ½" was as much relief from the contract drawings as could be supported.

The 15" dimension was not put on the drawings arbitrarily but is in accordance with AASHTO requirements. (Adopted by AASHTO in 1992, with 1993 Interims.)Ultimately, MassHighway allowed the Contractor to cord Bridges W-13-8 and W-13-9 because the bridge section determined that these bridge rails would not be out of tolerance of ± ½". However, the additional detailing was necessary to make this determination. On the other hand, on Bridge W-13-10, cambering of the bridge rail was required. The Contractor and Precise argue historical precedence, i. e., historically, MassHighway allowed Contractor to tie four chords together to bridge the rail into tolerance.

I have problems with "Historical" arguments. The Standard Specifications at Subsection 1.11 defines the Contract as:

> "The written agreement executed between the Party of the First Part and the Contractor setting forth the obligations of the Parties thereunder, including, but not limited to, the performance of the work, the furnishing of labor and materials, and the basis of payment.
>
> The Contract includes the Notice to Contractors, proposal, contract form and contract bond, specifications, supplemental specification, special provisions, general and detailed plans, any extra work orders and agreements that are required to complete the

> construction of the work in an acceptable manner, including authorized extensions thereof, all of which constitute one instrument." (emphasis added)

The Contract drawings show a constant dimension of 15 inches from the centerline of the bottom rail to the top of the sidewalk. Because this bridge has a tight vertical curve, the 15 inch dimension could not be held if the rail was fabricated in chords instead of cambering. In addition, Section 975.62 of the Standard Specifications state that "…..Longitudinal members shall follow the grade of the coping……..Where required on curves the rails shall be accurately formed to the required radius." To give Precise some relief, MassHighway allowed them to measure the chord over four panel points instead of five. MassHighway also allowed a tolerance of ± ½" on the 15 inch dimension between the centerline of the bottom rail and the top of the sidewalk. If this requirement could not be met, the rails would have to be cambered to a smooth curve. Altering the method of measuring the bridge rail chords and giving a tolerance of ± ½" was as much relief from the contract drawings as could be supported.

The 15" dimension was not put on the drawings arbitrarily but is in accordance with AASHTO requirements. (Adopted by AASHTO in 1992, with 1993 Interims.

Furthermore, the Special Provisions for Items 995.01 and 995.02 states for S3-PL2 Bridge Railing and S2-PL2 Bridge Railing that "work under these headings shall conform to the relevant provisions of Section 960 and 975 and as amended. (emphasis added)

A reasonably prudent contractor has to interpret the whole contract which is defined in Subsection l.11 above

FINDINGS:

I find that the Contractor's claim that historically MassHighway allowed a fabricator to tie a certain number of chords together to bring a rail in tolerance not supported by the Contract language and plans.

RECOMMENDATION:

N.E.L. Corporation's claim filed on behalf of its fabricator, Precise Fabricating Corporation on Contract #95080 for $26,033.29, due to MassHighway's request that the bridge rails be brought into tolerance, should be denied.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge