OFFICE
OF
THE ADMINISTRATIVE LAW JUDGE

PRE-2000
SELECTED DECISIONS/RULINGS

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APPENDIX OF DECISIONS/RULINGS

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APPENDIX A-1

DECISIONS/RULINGS

Debarment Hearings (M.G.L. c. 29, §29F)

REPORT AND RECOMMENDATION

MASSACHUSETTS HIGHWAY DEPARTMENT
OFFICE OF THE COMMISSIONER

In the Matter of	)
AGM Marine Contractors, Inc.	)

BACKGROUND AND PROCEDURAL HISTORY
(Joint Stipulation)

1. On Friday, June 28, 2002, John Mikutowicz ("Mikutowicz"), the Sole Stockholder, Officer, and Director of AGM Marine Contractors, Inc. ("AGM") was found guilty by a jury in the United States District Court for the District of Massachusetts of ten counts of an indictment charging him with conspiring to defraud the United States pursuant to 18 USC, §371 together with nine counts involving the filing of false statements on tax returns and tax evasion on 26 USC, §§7201 and 7206 (Exs. 15 and 16).

2. These charges did not arise out of AGM's performance of work on any public or private construction project but four counts did relate to the reporting requirements of AGM. The conviction primarily related to Mikutowicz' participation in an alleged offshore deferred compensation plan promoted by out-of-state individuals whose organization was known as Tower Associates.

3. On Monday, September 30, 2002, Mikutowicz was sentenced to a term of confinement of one year and one day, a fine of $50,000, a special assessment of $1,000 and supervised release of two years (Ex. 14, pages 15-16). Restitution was also required (Ex. 14, pages 15-16).

4. On September 13, 2002, James Scanlon, Secretary of the Executive Office of Transportation and Construction, appointed John Cogliano, Acting Commissioner of the MHD, as his designee for the debarment proceeding of AGM (Ex. 3A). On September 30, 2002, Commissioner Cogliano appointed Peter Milano, Chief Administrative Law Judge, to serve as hearing officer and commence a hearing into the debarment of AGM (Ex. 3B).

5. On September 13, 2002, the Massachusetts Highway Department ("MHD") issued a notice pursuant to M.G.L. c. 29, §29F stating that it intended to debar AGM from bidding on public works project for the Commonwealth of Massachusetts on the basis of the conviction of Mikutowicz (Ex. 1).

6. On September 13, 2002, MHD also issued a Notice of Suspension pursuant to M.G.L. c. 29, §29F whereby it immediately suspended AGM from bidding and performing construction work for the Commonwealth of Massachusetts (Ex. 2).

7. On September 17, 2002, AGM appealed the Notice of Intent to Debar and Notice of Suspension both dated September 13, 2002. AGM requested a hearing pursuant to M.G.L. c. 29, §29F and M.G.L. c. 30A (Ex. 3).

8. A hearing before the Chief Administrative Law Judge began on Monday, October 21, 2002 and continued on Wednesday, October 23, 2002. The attendance list for each of these hearings is attached hereto and comprises Addendum 1.

9. MHD and AGM presented evidence by way of exhibits. A list of such exhibits is found in Addendum 2. In addition, AGM also presented testimony from six witnesses who are identified in Addendum 3.

10. Three additional exhibits were subsequently added to the exhibits by joint stipulation of MHD and AGM which consisted of Exhibits 17A and B, 18 and 19. These exhibits consisted of the resignations of Jonah Mikutowicz and Suzanne Geoffrion as Officers

and Directors of AGM (Exs. 17A and B). Exhibit 18 is the Consent of the Directors of AGM accepting the resignation of Jonah Mikutowicz and Suzanne Geoffrion together with the certified certificate of the Change of Officers and Directors as filed with the Secretary of State for the Commonwealth of Massachusetts (Ex. 19).

ISSUE PRESENTED

The issue presented at the hearing is whether the conviction of Mikutowicz establishes a lack of business integrity or business honesty, which seriously and directly affects AGM's present responsibility as a public contractor and warrants a debarment pursuant to M.G.L. c. 29, §29F. To support a finding of debarment, there must be sufficient evidence before me that AGM does not have the necessary business integrity as a public contractor, which seriously and directly affects its present responsibility as a public contractor.

FINDINGS OF FACTS

The Offenses Relationship to Business Integrity of a Public Contractor

11. There was no evidence that the offenses for which Mikutowicz was convicted bore any relationship to the performance of AGM as a public contractor.

12. There has been no evidence presented whatsoever that AGM lacks the necessary integrity or responsibility so as to preclude it from serving as a public construction contractor. The only "evidence" is the "presumption" which arises from the conviction of its prior Stockholder, Officer and Director of tax evasion. This is only a presumption and there has been no further evidence to support any allegation of misconduct whatsoever on AGM's part.

13. I also note that AGM, through its counsel, brought the circumstances of Mikutowicz' indictment to the attention of MHD prior to any conviction. AGM fully cooperated

with supplying any information required by MHD in its determination as to whether to suspend AGM pending the trial of Mikutowicz.

14. The Honorable Rya Zobel was the Presiding Judge at the three-week trial of Mikutowicz in the U.S. District Court for the District of Massachusetts. Judge Zobel was required to make findings and statements as to the offenses and conduct of Mikutowicz as part of the sentencing process.

15. As the Trial Judge for the three-week trial involving Mikutowicz, Judge Rya Zobel is in the best position to determine the facts and circumstances surrounding the offenses. Thus, findings and statements made by her are of significant relevance to this proceeding as they relate to the conduct and character of Mikutowicz who at the time was the Sole Stockholder, Officer and Director of AGM.

16. Judge Zobel's findings, which are particularly significant, are as follows:

a. Mikutowicz did not intend to deprive the Government of the tax which he wrongfully failed to pay. He perceived that this was a deferred compensation arrangement which is how it was "sold to him by the Tower people" (Ex. 14, age 4, lines 15-21).

b. The conduct of the prior accountants for Mikutowicz and AGM was also questionable. Judge Zobel felt that they missed "what they should have seen at various times". She also questioned whether they should have given different advice and taken some action (Ex. 14, pages 4- 5, lines 22 to 3).

c. Most significantly, the Trial Judge expressly found that Mikutowicz is "an honest, reliable and responsible person". (Ex. 13, page 5, lines 4-10).

AGM'S CHANGE IN MANAGEMENT AND ADOPTION OF A COMPLIANCE PROGRAM

17. AGM implemented certain measures including two management restructurings and a Compliance Program, which demonstrates to me that AGM's intent, to change any questionable past practices is bona fide.

18. The initial management restructuring proposed by AGM had Jonah Mikutowicz as a Vice President and Director. Jonah is the son of John Mikutowicz. Likewise, Suzanne Geoffrion was proposed as a Director, Clerk and Treasurer of AGM. Suzanne is the wife of John Mikutowicz. Resignations were subsequently provided so that no individual will be an Officer or Director of AGM who is related to Mikutowicz.

19. The current management restructuring that is in place is evidenced by the Change in Officers and Directors on file with the Massachusetts Secretary of State's Office (Ex. 19). William Lovely is the President, Treasurer and Clerk of AGM. Lovely will also serve as a Director. Lovely has never been an Officer or Director of AGM. Previously, Mikutowicz was the Sole Officer and Director of AGM at the time that the offenses occurred. Mikutowicz has resigned and no longer is an Officer or Director of AGM (Ex. 5C).

20. The AGM Board of Directors now consists of William Lovely as the inside Director and John Merchant and Charles Schaub, Jr. as the outside Directors (Exs. 4, 5A and B and 19). The current management structure removes any individual as an Officer or Director who is related to Mikutowicz (Exs. 17A and B, 18 and 19). This management restructuring clearly appears to be a bona fide change in management.

21. William Lovely, the new President of AGM has a demonstrated history of construction and management experience. He has been involved in construction since 1987, after his graduation with a degree in civil engineering from Pennsylvania State University. He

has worked for Perini Corporation, Walsh Construction of Illinois, a design engineer, as well as AGM (Ex. 6; Testimony of William Lovely). His projects with AGM include serving as the project manager for the MacMillan Pier project in Provincetown. This was the largest project which AGM has ever undertaken, with an initial contract value in excess of $15 million. The project has been completed under budget and ahead of time for which AGM has been commended (Ex. 11M). Likewise, Lovely also was the project manager for the construction of new piers at the US Coast Guard station in Provincetown, Massachusetts in 1996 for which AGM received a written commendation which particularly noted the contributions of William Lovely (Ex. 11E; Testimony of William Lovely). The bonding company has also acknowledged Lovely's competence and capability and has indicated that it will continue to support AGM with bonding (Testimony of George Powers).

22. As previously noted, AGM has also adopted a Board of Directors, which consists of two outside Directors. John Merchant is a CPA with the Masters Degree in Taxation and Finance from Bentley College. He has performed work as a CPA for construction clients for over 30 years. He is familiar with MHD pre-qualification and financial reporting practices. He is also knowledgeable as to the fiduciary relationships for a director together with his responsibilities as a Director. (*Testimony of John Merchant; Ex. 7A*).

23. The other outside Director will be Charles E. Schaub, Jr. Schaub is a partner in Hinckley, Allen & Snyder and has been practicing in construction for approximately 28 years. He is familiar with MHD's practices and procedures and has appeared regularly in this forum during his practice (Ex. 7B).

24. AGM has also engaged the accounting firm of Darmody, Merlino & Co. as its independent accountants. Darmody, Merlino is a firm of approximately 36 accountants, which spend a majority of their time in the representation of construction entities. Their clients consist

in part of Modern Continental Construction Co., Inc., Jay Cashman, Inc., M. DeMatteo Construction Company, ET&L Construction, together with a roster of approximately 100 other construction companies. (*Ex. 8; Testimony of Dennis Barbo*).

25. Dennis Barbo, a partner of Darmody, Merlino will be the lead accountant for AGM. Barbo has been employed by Darmody, Merlino since 1977 and is a Certified Public Accountant. He spends approximately 90% of his time in the representation of construction companies. (*Ex. 9; Testimony of Dennis Barbo*).

26. In December 2001, Darmody, Merlino was contacted about its interest in the representation of AGM. Schaub explained the circumstances pertaining to the prosecution of Mikutowicz by the United States for the tax matters together with the circumstances as to the need to replace the accountants for AGM. Before accepting the engagement, Darmody, Merlino undertook a due diligence to determine the reputation and integrity of AGM. They were in contact with representatives of the surety used by AGM inasmuch as they were also familiar with the surety representatives through their involvement with other construction clients. Likewise, they also made inquiries of competitors of AGM in order to ascertain the reputation and integrity of AGM and Mikutowicz. They received positive recommendations and subsequently accepted the engagement. (*Testimony of Dennis Barbo*).

27. Darmody, Merlino subsequently performed the audit for 2001 and found that the financial systems utilized by AGM were extremely good and that all internal systems and checks were appropriate, proper and maintained very well. Likewise, they determined that the AGM personnel responsible for the maintenance of financial records were thorough and competent and made sound accounting decisions. Darmody, Merlino was subsequently able to provide an unqualified opinion for the audited statement for AGM for the year 2001. (*Testimony of Dennis Barbo*).

28. Darmody, Merlino also determined that returns previously filed by the former accountant were incorrect and subsequently prepared and filed amended returns for the years 1998, 1999 and 2000. This resulted in additional taxes being paid. (*Testimony of Dennis Barbo*).

29. AGM also implemented a Compliance Program, which has extensive controls and procedures designed to see that AGM together with all its employees establish and maintain practices and procedures to promote ethical behavior of employees and to prevent and detect any unlawful conduct. (*Testimony of William Lovely*). To further this policy, AGM has adopted a Compliance Manual, which defines the program and provides for training of all employees as to the expectations of the company with respect to the actions of each individual employee (Exs. 5B and 10). Significant facets of this policy are to educate employees as to: limitations on political contributions, donations and charitable contributions; false claims and false statements; conflicts of interest; EEO affirmative action and immigration matters; environmental and product safety; health, environmental laws and regulations including OSHA and substance abuse; anti-trust compliance; and safeguarding company information. The program also establishes a Compliance Officer at AGM who will be responsible for implementing this program and providing the training to the employees together with other requirements of the program, which are designed to ensure that it is properly implemented, maintained and understood by all employees (Ex. 10).

IMPACT OF DEBARMENT ON AGM'S EMPLOYEES, THE PUBLIC TREASURY, AND PUBLIC CONSTRUCTION

Impact on AGM's Employees

30. For the past several years, the predominant nature of AGM's work has been the performance of public construction. Public construction projects have accounted for 95% of the revenues of AGM. As a result, AGM's employees are paid prevailing wages and receive health and pension benefits. (*Testimony of William Lovely and Mark Curtice*).

31. Virtually all of AGM's employees have families and are located on Cape Cod. The majority of employees have chosen to work for AGM in order to maintain their residence on Cape Cod and enjoy the benefits of being paid prevailing wages. (*Testimony of William Lovely and Mark Curtice*).

32. AGM's debarment would result in the probable loss of many jobs together with benefits. There is insufficient private work available by which AGM would be able to maintain its current workforce. (*Testimony of William Lovely).*

33. Mark Curtice, an AGM employee of ten years testified in this matter. Mark is unaware of any other employers within District Five of MHD which could provide comparable employment to him such as he is now receiving from AGM. Curtice is a longtime resident of Cape Cod as is his wife. Curtice has worked previously on Cape Cod and is familiar with the lack of other similar paying jobs in the event that he was laid off by AGM. If he was unable to continue his employment at AGM, he would have to seek employment in the Boston area in order to maintain his current wage, which would result in absences of an extended period from the home. (*Testimony of Mark Curtice*).

34. Lovely also acknowledged in his testimony that if AGM was debarred, he would then have to seek other employment. Lovely was previously an employee of AGM's from 1994

to 1997. He left for a "larger contractor" for three years. He returned to AGM in 2001 inasmuch as he and his wife decided that they wanted to raise their three children on Cape Cod where they would not have to move from project to project as required by the larger construction companies. There is no other employment available for Lovely on Cape Cod which would utilize his expertise and provide financial compensation such as he currently receives from AGM.

35. Evidence in the form of letters were also introduced from other employees of AGM attesting to their work experiences at AGM and the potential difficulties in securing other employment in the Cape Cod area at comparable wages to that provided by AGM (Exs. 11Q, R and T).

36. The statements by the employees as to the potential impacts and difficulty in finding further work of a comparable nature are also corroborated by Thomas Mullen, Director of the Department of Public Works, for the Town of Barnstable (Ex. 11N). He notes that should AGM not be available, "many families supported through employment in AGM or their subcontractors, all of whom pay taxes and receive salaries and benefits not easily obtained in the Cape Cod economy" (Ex. 34).

37. Employees of AGM also noted the stability of the work environment provided by AGM and the difficulty in obtaining comparable work on Cape Cod. They were all appreciative that AGM also maintained its employees on the payroll when work was "slow". (*Testimony of Mark Curtice and William Lovely*).

IMPACT ON PUBLIC CONSTRUCTION

38. There are several components to the impact on public construction should a company be debarred. The first analysis requires a review of the impact on the competitive bidding. The second aspect has to be the impact on the work as it is performed. The public

clearly benefits when a construction company performs the work on time and on budget while producing a superior work product.

39. To that end, there was evidence that AGM has been performing public construction work for approximately 25 years. It has worked for many public entities including the MHD, the Department of Environmental Management, the US Army Corps of Engineers, the US Coast Guard, the Woods Hole Martha's Vineyard and Nantucket Steamship Authority, many municipalities and towns in Massachusetts and throughout coastal New England. (*Testimony of William Lovely and Ex. 12*).

40. Since 1991, it has performed almost 300 construction projects, the majority of which were public construction projects (Ex. 12). It has performed over $77 million in projects including over $9.5 million in MHD projects. It has performed significant work for public agencies such as the Army Corps of Engineers and the US Coast Guard (Ex. 12).

41. AGM has never defaulted on a project. In its 25 years of performing construction work, it has been involved in one lawsuit with an owner. The only lawsuit involved a differing site condition claim, which was filed against the Town of Scitutate relating to a dredging project. The matter was subsequently settled before trial. AGM has never been sued by a subcontractor or material supplier. It has never been subjected to any other governmental investigations as to its performance on public construction. (*Testimony of William Lovely*).

42. AGM has received numerous commendations for its work on public construction projects. In 1999, AGM was designated as the Contractor of the Year by the Civil Engineering Unit - Providence in the Marine Construction category by the USCG. This award was based on the recommendation of five members of the construction and contracting branches of the US Coast Guard from the Civil Engineering Unit in Providence, which is responsible for the New England area (Ex. 11B). AGM has also received other commendations from the US Coast Guard

as well as the ACOE for its outstanding performance on public construction (Exs. 11A, E, F, G, H and L).

43. In addition, AGM throughout this period has also received numerous awards and commendations from other public entities such as the Town of Provincetown, Town of Barnstable and Town of Orleans (Exs. 11I, J, M and N).

44. In addition, Steven Sayers, the General Counsel for the Woods Hole Martha's Vineyard Nantucket Steamship Authority ("Steamship Authority) testified at this hearing. He noted that AGM has done numerous contracts for the Steamship Authority at all five of its terminals. In each instance, the engineering and construction services group of the Steamship Authority was highly satisfied with the work of AGM. They found AGM's workmanship was excellent and their ability to perform projects on time was also commendable. Likewise, there were never significant issues with AGM on any project for the Steamship Authority. (*Testimony of Steven Sayers*).

45. Thus, the evidence as presented by public officials and public entities through the form of documentary commendations, recommendations and project evaluations, together with the testimony of Steven Sayers establishes that AGM is an excellent contractor who delivers quality projects on a timely basis in a professional and non-controversial manner. Public construction would be negatively impacted by the debarment of AGM, resulting in the loss of a long-term contractor with an excellent history of timely and quality work.

46. As to the other component of public construction which is the impact on public bidding and competition, the schedule of contracts performed by AGM from 1991 to 2001 must be addressed (Ex. 12). As previously noted, AGM has performed in excess of $77 million worth of construction within this period, the majority of which is public construction. Separate schedules for MHD, US Coast Guard and ACOE indicates projects with a value in excess of $21

million. The Provincetown Pier project, which is scheduled for completion in December 2002, in and of itself, is $16 million. In each public project, AGM was the low bidder so as to entitle it to an award of the contract. As a result, with AGM's participation in the public construction process, substantial amounts were saved by the public, representing the differential between the AGM's bid and that of the next lowest bidder. Thus, removal of AGM from the public construction process would result in the needless expenditure of additional funds for the same scope of work on those projects for which AGM could be expected to be a competitive bidder. Steve Sayers from the Steamship Authority expressly noted that on their projects, they get few bidders and that the loss of AGM as a bidder would be a clear detriment. (*Testimony of William Lovely, Steven Sayers, and Exs. 11N and 12*).

47. William Lovely also noted that in a recent project for which AGM could not submit a bid due to the suspension, the Town of Bourne had only one bidder for a bridge project. The bid was over 100% higher than the engineers' estimate. AGM would have bid that project had it been permitted to do so.

48. Thomas Mullen, the Director of Public Works for the Town of Barnstable also acknowledges in his letter dated August 29, 2002 (Ex. 11N), the importance of maintaining AGM as an active contractor. He notes "when doing business with AGM there are no budget overruns, foul-ups, complaints or delays. The job is done right, on budget and on time, every time" (Ex. 11N).

49. I also find that it is noteworthy that AGM was recently awarded a private construction contract for the installation of a test tower supported by piles in Nantucket Sound, which is a precursor to a windmill project for the generating of electricity. This project is highly visible and has been the subject of much local and national media attention. The test tower is designed to determine the feasibility of the installation for a windmill farm to generate electricity

on Nantucket Sound. AGM was selected as the general contractor with full knowledge of the circumstances surrounding John Mikutowicz' conviction. The contract was executed after the conviction. AGM, which was not the lowest bidder, was selected due to its excellent reputation and ability to perform difficult projects. The owners recognized that they could not afford to have any "problems" associated with this highly visible construction project. (*Testimony of William Lovely*).

MITIGATING OR AGGREVATING FACTS AS TO THE OFFENSES

50. Mikutowicz will also make full restitution for any losses as a result of the offenses including restitution of the taxes together with payment of all other sanctions resulting from the proceedings against Mikutowicz (Ex. 14, pages 15 and 16).

51. The lack of evidence as to AGM's lack of integrity was also noted by Steve Sayers, General Counsel of the Steamship Authority, who testified in this manner. Sayers is responsible for determination as to whether to allow AGM to work on a Steamship Authority project. Sayers is familiar with Mikutowicz and the circumstances surrounding his conviction. Sayers has reviewed the Judge Zobel's findings and respects them. He is also aware of the steps taken by AGM to restructure and adopt a compliance program and has found that Mikutowicz' circumstances as he understands them would not disqualify AGM as a bidder. (*Testimony of Steven Sayers*).

RULINGS OF LAW

1. The Massachusetts debarment statute, M.G.L. c. 29, §29F, requires that I take into consideration all mitigating facts and circumstances in fashioning my recommendation as to whether AGM should be debarred. M.G.L. c. 29, §29F(g). Should I recommend that a

debarment be warranted, I must make specific findings that there is sufficient evidence to support the recommendation of debarment and that debarment for the period specified, "is required to protect the integrity of the public contracting process." M.G.L. c. 29, §29F(c)(ii).

2. The conviction of Mikutowicz does not per se require the imposition of debarment of AGM. I do find, however, that such conviction provides a cause for imposing debarment under M.G.L. c. 29F(c)(1)(ii) as an offense which indicates a lack of business integrity or business honesty. I must now determine if that fact alone is sufficient to warrant a recommendation of debarment, or, that additional mitigating facts and circumstances are present which overcome that indicating and require a finding that there is no need for debarment to protect the public contracting process.

3. Based on the conviction of Mikutowicz, any of the following could be inferred: (1) that AGM lacks the requisite honesty and integrity of a public contractor, (2) AGM is presently not a responsible contractor, or (3) that a debarment of AGM is necessary to protect the public contracting process. Sufficient evidence must, however, be presented to demonstrate that any one of these inferences is reasonable and logical. Roemer v. Hoffman, 419 F.Supp. 130 (D.C.C. 1976). Further, any one of these inferences that "may arise from a showing of [sufficient] evidence must be weighed against any mitigating circumstances or countervailing evidence offered by the contractor." Proposed Suspension of Mainelli (Hugo R.) et al., Fin. Asst. Pgm. D.O.T.C.A.B. Docket No. 2 (July 22, 1985) at 53; Roemer, supra; M.G.L. c. 29, §29F(g).

4. It is within the Secretary's, or his designee's discretionary authority as conferred upon it by M.G.L. c. 29, §29F to determine that AGM should not be debarred provided that this decision is based upon substantial evidence. M.G.L. c. 29, §29F(e); Fioravanti v. State Racing Commission, 6 Mass. App. 299 (1978) ("In determining whether the [agency's] findings are

based on substantial evidence, the court must give due weight to the [agency's] expertise and to the discretionary authority conferred upon it by the Legislature").

5. In the present case, I found the evidence in the record to be inadequate and insufficient to support an inference that: (1) AGM is presently a non-responsible contractor, (2) AGM lacks the requisite honesty and integrity of a public contractor, or (3) a debarment is necessary to protect the public contracting process. I find that AGM has offered persuasive evidence to indicate that it is in fact a presently responsible contractor and it possesses the requisite honesty and integrity required of a public contractor and that a debarment is not necessary to protect the integrity of the public contracting process.

The Integrity of the Public Contracting Process

6. I am particularly persuaded by the findings and statements made by Judge Zobel at the disposition hearing in establishing the integrity of AGM. Judge Zobel's statements to the effect that John Mikutowicz is honest, reliable and responsible and never intended to deprive the United States of the tax revenues is compelling evidence that must be given significant weight. Accordingly, as there is not a scintilla of evidence to otherwise implicate AGM, and where the principal individual is found by the Trial Judge to be "honest, reliable, and responsible", it is impermissible to presume or infer that AGM could in anyway be deemed to lack the business integrity so as to require its debarment. The testimony of Steven Sayers, General Counsel to the Steamship Authority, together with the letters from public agencies indicating their high regard for AGM and their acknowledgement of AGM as having business integrity as a public contractor leads to the conclusion that the public contracting process is not at risk if AGM continues to participate on public contracts.

7. I also base this finding in part on the finding of fact that the offenses had nothing to do with the public construction process and that AGM has changed its management structure to remove Mikutowicz as an Officer and Director. I also based this finding on the compliance program that AGM has implemented together with the addition of an outside Board of Directors, and new accountants familiar with public construction projects.

Debarment must serve a Remedial Purpose

8. Debarment is not intended to serve as a punishment to a contractor, but, rather to serve a remedial measure of protecting the integrity of the public contracting process M.G.L. c. 29, §29. Unlike a punishment, which is retaliatory for past acts, "a debarment is designed to insure the integrity of government contracts in the immediate present and into the future." Shane Meat Co., Inc. v. United States Department of Defense, 800 F.2d 334, 338 (3rd Cir. 1986).

9. Debarment must be viewed, therefore, on a case-by-case basis, to assure that any measures taken are solely to protect the public interest and not as sanction that can only be characterized as retaliatory; M.G.L. c. 29, §29F; Burke v. United States Environmental Protection Agency, 127 F.Supp.2d 235, 238 (D. D.C. 2001). Massachusetts' debarment statute is similar to its federal debarment counterpart, 49 C.F.R. Part 29, in that debarments are considered "serious action[s] which shall be used only in the public interest and for the ['s] protection and not for purpose of punishment." 49 C.F.R. §29 115(b).

10. Likewise, the public construction process would be further impacted as to the actual performance of the work. Not only would the public pay more as the result of the loss of an otherwise qualified competitor but AGM has been shown to be a highly competent and qualified contractor who has received numerous commendations for the quality and timely performance of its work. Thus, the public would be ill served by having projects performed by

contractors who are paid more and do not maintain the same attention to detail for quality and timely performance as AGM. It is compelling that AGM has received recommendations and commendations from numerous public entities including the Army Corps of Engineers, US Coast Guard, Town of Provincetown and Town of Barnstable for its performance of public projects. It clearly would not be in the public interest to remove such a competent contractor from the public construction practice.

11. The federal debarment counterpart in 48 C.F.R. Chapter 1, Par 9 set forth ten factors to be considered in a debarment inquiry. I have considered each of these factors in making the determination as to whether debarment is required. Significantly, I note that a review of these factors also supports a finding that AGM not be debarred.

Removal of Cause for Debarment

12. I find that the fact that Mikutowicz was found guilty of charges which do not arise out of AGM's involvement in public contracts, does not mean that AGM's further participation in public contracts would injure the Commonwealth, as there are sufficient controls in place to remove the likelihood of such events occurring again. This includes the resignations of Mikutowicz, the implementation of an extensive and comprehensive Compliance Program, the appointment of new auditors familiar with public construction, together with experienced outside Directors. When these steps are balanced against the harm that would be caused to the public treasury by debarring AGM, I find that these measures provide "for an efficient means of preserving the integrity of the public purse" and protecting the integrity of public contracting. See Haverhill Manor, Inv. C. Commissioner of Pub. Welf., 368 Mass. 15, 21 (1975) (an offset procedure may provide an efficient means to preserve the integrity of the public purse even before the judicial review of the legality of the assessment), cert. Denied, 423 U.S. 929 (1976);

Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng., supra (contractor was deemed presently responsible despite its nolo plea).

13. The debarment of AGM would, in effect, subject it to a sanction overwhelmingly disproportionate to the damages [it] has caused and the benefits to the government, thus transforming the penalty into an impermissible criminal punishment. Hudson v. United States, 522 U.S. 93, 99-100 (1997); United States v. Hatfield, 108 F.3d 67, 69(4th Cir. 1997). In balancing the actions of Mikutowicz and AGM against the remedial measures and mitigating factors, I find that AGM does not present a realistic and articulable threat of harm to the government's interest and debarment would be unreasonable and an excessive punishment. Silverman v. United States Department of Defense, 817 F.Supp.2d 846, 848-49 (S.D.CA 1993).

AGM Lacked Evil Intent

14. As noted previously in the Findings of Facts and the Conclusions of Law, Judge Zobel's statements and findings as to John Mikutowicz' honesty, reliability, and responsibility together with the acknowledgement that he testified honestly as to his belief that he was utilizing a tax shelter program cannot be used as the basis to infer an evil intent to AGM. While Mikutowicz was found guilty by a jury, AGM was not. With the previously noted statements by the Trial Judge, one cannot presume that AGM lacked the integrity to perform public construction since it was found that the very individual which was the cause of the problem was found to be honest, reliable and responsible.

CONCLUSION

1. It is my finding that it is not necessary to debar AGM to protect the integrity of the public contracting process or to prevent the likelihood of similar conduct from developing in the future that gave rise to the charges contained within the indictment.

2. AGM has undertaken a change of management structure, including the appointment of highly experienced outside Directors together with new highly experienced auditors. AGM is a different company from the point of view of structure, management and expertise of accountants from that which was in place from 1992 to 1998.

3. The Compliance Program is comprehensive and I find that the commitment by the management of the company as well as the outside Directors and auditors is bona fide and the likelihood of the occurrence of a violation in the future is negligible.

4. AGM as it exists today, is a responsible contractor.

RECOMMENDATION

AGM should not be debarred and the suspension must be terminated because there is no evidence that a debarment or suspension is required to protect the integrity of public contracting process.

Respectfully submitted,

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Peter Milano
Chief Administrative Law Judge

February 20, 1996

R. Robert Popeo
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo
One Financial Center
Boston, MA 02111

Re: Debarment of Sealcoating, Inc.

Dear Mr. Popeo:

Pursuant to M.G.L. c. 30A § 11(7), this letter and the attached report of Peter Milano, Chief Administrative Law Judge for the Massachusetts Highway Department, which report and recommendation I adopt and incorporate herein, constitutes my proposed decision to not debar Sealcoating, Inc. pursuant to M.G.L. c. 29 § 29(F). You are hereby afforded a thirty-day period to file objections and to present arguments in writing to my decision. At the end of the thirty-day period, if no written objections are forwarded to my attention, this matter will be final. Any objection will be reviewed and final decision made within 15 days of receipt of any objections.

If you have any questions regarding this matter, you may contact Judge Milano at (617)973-7890.

Sincerely,

Laurinda T. Bedingfield
Commissioner

Enc.

MASSACHUSETTS HIGHWAY DEPARTMENT

OFFICE OF THE COMMISSIONER

In the Matter of	)
Sealcoating, Inc.	)

Background and Procedural History

(Joint Stipulation)

1. On October 12, 1995 Sealcoating, Inc. ("Sealcoating") and the United States Justice Department ("United States") entered into an agreement whereby Sealcoating agreed to plead guilty to an indictment charging it with one count of conspiring to defraud the United States Government under 18 U.S.C. § 371 and three false statement counts under 18 U.S.C. § 1001 (Exhibit 4).

2. These charges arose out of Sealcoating's alleged performance of the work of a Disadvantaged Business Enterprise ("DBE") firm on three FAA funded airport projects and one FHWA funded road project (Exhibit 4). Sealcoating is a non-DBE firm specializing in pavement maintenance.

3. The United States stipulated and agreed that it suffered no pecuniary damage or actual loss as result of Sealcoating's violations, and, as a result, the Court did not require that Sealcoating pay restitution to the United States (Exhibit 4).

4. The Justice Department and Sealcoating agreed that the Justice Department would not recommend or take any position regarding debarment of Sealcoating (Exhibit 4).

5. The only sanction imposed on Sealcoating was a $150,000 fine. No probation was ordered (Exhibit 4).

6. Further, the United States dismissed all charges against Richard Singleton, who was the President, Treasurer and owner of Sealcoating during the period when these violations are said to have occurred. No agent of the corporation was found guilty or plead guilty to any violations (Exhibit 4).

7. On December 13, 1995, the Massachusetts Highway Department ("the Department") issued a notice pursuant to M.G.L. c. 29 § 29F that it intended to debar Sealcoating from bidding on public work projects for the Commonwealth of Massachusetts on the basis of Sealcoating's plea of guilty to the four count indictment (Exhibit 1).

8. Within 14 days, in accordance with M.G.L. c. 29 § 29F, Sealcoating requested a hearing to afford Sealcoating the opportunity to present any mitigating factors regarding the proposed debarment (Exhibits 2 and 3).

9. A hearing before the Chief Administrative Law Judge began on January 10, 1996, and continued on January 17, 1996, January 24, 1996 and January 29, 1996. Various individuals and party representatives were present as set forth in Addendum one (1).

10. The Department and Sealcoating presented evidence by way of exhibits as set forth in Addendum two (2). Sealcoating presented testimony from eleven (11) witnesses who are identified in Addendum three (3).

11. In addition, following the hearing by joint Stipulation of the Department and Sealcoating, two more documents were offered into the record as exhibit number 31 and 32. Exhibit 31 is the Administrative Agreement ("Agreement") between the Department and Sealcoating setting forth the conditions by which Sealcoating must meet to continue to perform work for the Department. Exhibit 32 is a letter of support from the National Association of Minority Contractors, dated January 31, 1996.

ISSUE PRESENTED

The issue presented at the hearing is whether there exists sufficient and adequate mitigating facts and circumstances to recommend that Sealcoating not be debarred or suspended (hereinafter collectively referred to as "debarment"), including a corporate restructuring, implementation of a Corrective Action Program, the impact of debarment on competition, Sealcoating's employees and the public treasury, and the nature and circumstances surrounding the offenses to which Sealcoating plead guilty. Or said another way, is there sufficient evidence before me to support a finding that a debarment is necessary to protect the integrity of the public contracting process?

FINDINGS OF FACT

Sealcoating's Change in Management and Adoption of Corrective Action Program

Sealcoating has taken certain remedial measures including a massive management restructuring and corporate Corrective Action Program, unprecedented in the history of the Department, which

demonstrates to me that its desire to change past practices is bona fide.

The management restructuring is in place as evidenced by the change in officers and directors on file with the Secretary of State's Office. Paul Stark is the President and General Manager of Sealcoating. Paul Stark was not an employee of Sealcoating until 1993, after the time the offenses which gave rise to the indictments are said to have occurred (1988-1992) (Exhibits 19B, 29, 29A, 30; TR 1/17:93). Richard Singleton was the President, Treasurer, and a member of the Board of Directors at the time the offenses are alleged to have occurred, i.e., 1988-1992. Mr. Singleton is no longer an officer or director of Sealcoating. This management change was implemented even though the United States dismissed all charges against Mr. Singleton (Exhibits 19B, 29A, 30; TR 1/17:93). The Sealcoating Board of Directors consists of Paul Stark and Elizabeth Wuori as the inside directors and Cordell Parvin as an outside director. Each director has an equal vote (TR 1/17:112). Sealcoating has voluntarily changed its management structure, and did not wait until a debarment decision was made. The Sealcoating management restructuring appears to be a bona fide change in management (Exhibits 19B, 29, 29A and 30; TR 1/19:97).

Sealcoating has also implemented a Corrective Action Program which has both internal and external controls. As part of its Corrective Action Program, Sealcoating's Board of Directors adopted a corporate action that: (1) appoints an outside Director to be on the Board of Directors, (2) creates a Ombudsman position, (3) establishes a DBE Audit Committee of the Board of Directors to oversee the Corrective Action Program, (4) designates a corporate employee to serve as a DBE Compliance Officer and (5) institutes other remedial

and internal controls regarding DBE practices and reports which must be filed with the Department (Exhibit 19B).

Sealcoating has entered an administrative agreement ("Agreement") with the Department to separately enforce as a matter of contract law the Corrective Action Program. The Agreement, which is to be in force for three (3) years, sets forth not only the new management positions in the Corrective Action Program above, but also an extensive system of reporting both internally and to the Department regarding compliance with the Agreement, and provides the Department with the ability to audit compliance with the Agreement and to revoke this Agreement upon the occurrence of certain conditions. Mr. Parvin as Ombudsman, is required to report any complaint of non-compliance and the results of any investigation of non-compliance to Mass Highway. In addition, Mr. Williams' monthly compliance reports and Mr. Parvin's reports as Chairman of the DBE Audit Committee will be made available to the Department. The Agreement is tantamount to a three-year probationary period pursuant to which Sealcoating will be supervised by its own DBE monitors and by the Department's Civil Rights Office. The Agreement was approved by the Commissioners of the Department on January 31, 1996, subject to my recommendation. The Department has determined that the terms of the Agreement provides adequate assurance that the interests of the Commonwealth will be sufficiently protected to preclude the necessity of the debarment of Sealcoating (Exhibit 31).

Significantly, the National Association of Minority Contractors of Massachusetts has indicated in a letter to the Commissioner that it "supports the implementation of the Corrective Action Plan and the Agreement [between] Sealcoating" and the Department (TR 1/17:191; Exhibit 32).

The persons who will be most involved in the implementation of the Corrective Action Plan and the Administrative Agreement are:

1)Paul Stark, President and General Manager of Sealcoating, and member of DBE Audit Committee;

2)Steven Kindregan, DBE Compliance Officer for Sealcoating;

3)Cordell Parvin, Outside Director of the Sealcoating Board of Directors, Chairman of the DBE Audit Committee, and Ombudsman; and

4)Walter E. Williams & Associates, an outside DBE consultant to Sealcoating.

Mr. Parvin and Mr. Williams have met with Mr. Stark and Mr. Kindregan and other key management people at Sealcoating regarding the Corrective Action Program (Exhibits 19B, 30 and 31; TR 1/17:94-97; 157-59; 181; 186).

Mr. Parvin is a member of the law firm of Parvin, Wilson & Barnett in Richmond, Virginia. Cordell Parvin is a nationally recognized expert in the area of DBE regulations. Mr. Parvin has conducted workshops on DBE issues in twenty different states, including Massachusetts. He has written a book entitled "The Disadvantaged Business Enterprise Program." He has taught DBE compliance programs together with Federal Highway Administration officials, has conducted workshops and seminars for state highway officials, has contracted with various state DOTs regarding DBE issues, has served on numerous panels with members of the Federal Highway Administration, has drafted numerous compliance programs for contractor associations and for individual contractors across the country, and has testified before Congress on the subject of DBE issues (Exhibits 16 and 16A; TR 1/10:89-94).

Mr. Parvin has executed a written agreement with Sealcoating setting forth his responsibilities as a member of the Sealcoating's Board of Directors and as Ombudsman. This is the first occasion in twenty-five years of practice that Mr. Parvin has accepted the role of an outside director of any company. As an outside director he will monitor Sealcoating's compliance with the Corrective Action Program. As Chairman of the DBE Audit Committee, Mr. Parvin, along with Mr. Stark, will oversee at the Board level Sealcoating's compliance with the necessary DBE requirements on Sealcoating jobs. In his additional role as Ombudsman, Mr. Parvin will receive complaints and investigate suspected violations of the Corrective Action Program and report to the Board of Directors and the Department findings of his investigations (Exhibits 19B, 19C, 29, 29A, 30; 31; TR 1/10:137-140; TR 1/17:146-147).

I find that Mr. Parvin is going to be an independent director and will "call them as he sees them" and will be an effective monitor of Sealcoating's Corrective Action Program (TR 1/17:146, 148).

Steve Kindregan is Sealcoating's DBE Compliance Officer. Mr. Kindregan was hired as a Sealcoating's employee in the Spring of 1995. The DBE Compliance Officer is specifically charged with the responsibility of: 1) implementing an Affirmative Action Program, 2) preparing all DBE Forms and 3) ensuring that Sealcoating meets its DBE requirements on public contracts (Exhibits 19B, 30; TR 1/17:93).

Walter Williams & Associates has executed a consulting agreement to assist Sealcoating in the implementation of its Corrective Action Program. Walter Williams & Associates provides services in the area of contract compliance for DBE, minority business enterprise ("MBE") and women business enterprise ("WBE"). Walter Williams & Associates is eminently qualified by background, training and experience to assist Sealcoating in the areas of contract compliance, affirmative action and equal employment opportunity. Mr. Williams served as Chairman of the Commonwealth of Massachusetts MBE Oversight Committee which has responsibility for overseeing programs for MBEs. He has served as a Director of the Contractors Association of Boston (CAB), a minority contractors association, from 1991 to 1993, where part of his responsibilities was to do DBE contract compliance monitoring for the Department under a consulting agreement with CAB. He has served as a consultant to the Massachusetts Bay Transportation Authority for a period of eight years, also doing DBE contract compliance. He drafted the Executive Order for both the City of Boston and the Commonwealth of Massachusetts dealing with DBE set asides for goods and services on construction and procurement contracts. As a member of the Boston Employment Commission, he has reviewed the performance of various construction projects in the downtown area to make sure they were complying with agreements negotiated with the Boston Housing Authority regarding the percentages of participation of minorities and women. He has helped private companies with DBE compliance issues, including drafting equal employment and affirmative action policies. He has performed this service for approximately fifteen to eighteen firms, including such prominent contractors as J.M. Cashman, Inc. He was Vice-President of the National Association of Minority Contractors which has some 4,000 members nationwide, and has testified both in Congress and at the State

House regarding the DBE issues (Exhibits 16, 19B, 19D and 30; TR 1/17:114-150).

Mr. Williams started working with Sealcoating in October 1995. Mr. Williams has toured the Sealcoating facility. Mr. Williams has met with the President and General Manager, Paul Stark, and the DBE Compliance Officer, Steven Kindregan (TR 1/17:157-160). Mr. Williams' major responsibilities in the Corrective Action Plan will be to: 1) review and revise the company's affirmative action policy; 2) develop standard DBE operating procedures manual; 3) develop a stronger liaison with minority and women business enterprise, trade associations for DBE outreach; 4) identify DBE firms that have the capabilities of performing work for Sealcoating; 5) implement a technical assistance programs for DBE firms; 6) develop management information systems regarding DBE performance on Sealcoating jobs; and 7) conduct regular training sessions with Sealcoating management, including foreman, and 8) prepare monthly DBE compliance reports which will be available to Mass Highway or any other awarding authorities Sealcoating is contracting with where there is a DBE requirement (TR 1/17:160-181). Mr. Williams will also work closely with Sealcoating's DBE Compliance Officer. Mr. Kindregan and Mr. Williams will jointly prepare the monthly compliance reports for submission to the DBE Audit Committee. Mr. Williams is satisfied that Mr. Kindregan has the qualifications and experience to serve in the capacity of a DBE compliance officer and also that Mr. Kindregan has embraced the spirit and intent of the DBE Corrective Action Program (TR 1/17:182-183).

Mr. Williams will develop a manual of standard operating procedures for Sealcoating to follow regarding future DBE compliance. This standard operating procedures manual will set forth the necessary

steps to ensure that Sealcoating meets its DBE and affirmative action requirements contained in any public contract, and provide a set of internal controls to prevent and detect any non-compliance of DBE requirements on state contracts (TR 1/17:169-170).

Mr. Williams will also develop a management information system for Sealcoating whereby the DBE Compliance Officer can perform a desk review regarding the DBE requirements on a particular project. This management information system will monitor the company's performance in each of the affirmative action categories (TR 1/17:164;166-168). The management information system will contain the standard DBE contract provisions of the awarding authorities Sealcoating does business with. As such, Sealcoating will have a clear understanding as to how each awarding authority interprets the DBE regulation as it applies to their contracts (TR 1/17:174;178). I find that this system will provide further assurances that Sealcoating will meet its DBE requirements on each contract.

Mr. Walter Williams will focus on the daily compliance and monitoring of affirmative action and the DBE program on each particular project and work with Sealcoating's DBE compliance officer. Mr Parvin will focus primarily on oversight and policy of the company as it relates to DBE and affirmative action issues, but will also be involved on the "front end" of Sealcoating's compliance (TR 1/10:145-48; TR 1/17:185).

I find that the components of a successful compliance program include: strong policies within the company, making sure the company's management shares a common objective regarding DBE compliance, being pro-active in communicating with the awarding authorities regarding compliance issues, monitoring DBE compliance,

and reviewing DBE compliance upon the completion of a contract to ensure that the DBE program has been furthered (TR 1/10:132-137). I further find that Sealcoating's Corrective Action Plan has all of these components.

Sealcoating has made a commitment to implement internal programs to increase minority and female participation on Sealcoating's construction workforce (currently 15%) and administrative staff. In addition, Sealcoating with the assistance of Walter Williams & Associates is seeking to increase its business with DBE vendors, i.e., office supplies, computer equipment, etc. While these kinds of actions are not mandated, they are within the spirit of such programs (Exhibits 19B and 31; TR 1/17:158; 164-165; 171).

Mr. Parvin and Mr. Williams each testified that in their extensive experience Sealcoating's Corrective Action Plan is the most comprehensive plan either of them has encountered (TR 1/10:139, 148-149; TR 1/17:188,189) and will be effective in preventing any future violations (TR 1/10:148). I find that Sealcoating's management is fully committed to the Corrective Action Program and compliance with the DBE requirements.

Impact of Debarment on Sealcoating's Employees, the Public Treasury, and Competitive Bidding Process if Sealcoating is Debarred

Impact on Sealcoating Employees

Sealcoating's debarment would result in the loss of jobs and benefits to Sealcoating's 60-80 union employees. Sealcoating has a collective bargaining agreement through Construction Industries of Massachusetts with several local unions, including Local 133, Local 609 and Local 22 (TR 1/17:87; 1/24;9;13-14).

Sealcoating employs between 60-80 union workers from various local unions during its nine (9) - ten (10) months season. Sealcoating has trained 40-45 union workers in various forms of pavement maintenance and surface treatment, including crack sealing, microsurfacing and slurry seal treatment (Exhibits 24-26; TR 1/17:87; TR 1/24:14; 23; 25-26).

Sealcoating has an excellent reputation for honoring the terms of its collective bargaining agreement and for paying union benefits in a timely fashion. Sealcoating has not been a delinquent contributor to any of the funds. The Business Manager for the Massachusetts District Council heralded Sealcoating as one of the "Cadillac" companies in the industry for honoring the terms of its collective bargaining agreement (Exhibits 24-26; TR 1/24:11).

In particular, these 60-80 employees would face a significant hardship if Sealcoating was debarred as they would lose their jobs and union benefits which they and their families rely on. These benefits include health and welfare benefits, including dental and catastrophic illness coverage, an annuity plan, a pension plan,

and a legal aid plan. The economic impact on these employees and their families would be disastrous (Exhibits 24-27 TR 1/17:87; TR 1/24:13-14; 26-27; 54; TR 1/29:7).

Sealcoating has submitted letters from various union representatives regarding the impact of any debarment on Sealcoating's employees, the relevant portions of which are as follows:

a)"Sealcoating, Inc. [employees] upward of sixty (60) members of the Laborers Union in Massachusetts. . . Debarring Sealcoating would severely impact on at least sixty innocent individuals with families, mortgages and a stable work environment." Joseph P. Pavone, Jr., Field Representative, Massachusetts Laborers District Council.

b)"Employers like Sealcoating, Inc. are hard to find and harder to lose. They pay their bills and produce a good product. They pay area standard wages and provide top flight fringe benefits for their employees. Sealcoating, Inc.'s debarment would mean loss of scores of good jobs. Economic dislocation would surely follow for all the laborers and their families." Paul J. McNally, Business Manager, Massachusetts Laborers District Council.

c)"For Sealcoating to be disbarred from doing state work would be a disaster to these workers and their families for wages, health insurance, pension and annuity. The punishment would be more on the employees than on the employer." Tom Chirillo, Business Manager, Laborers International Union of North America.

(Exhibits 24, 25, and 26).

Several union employees testified that they and their families rely heavily on these benefits. Mr. Robert Goodick, a Sealcoating foreman operating a Ralumac machine, testified that his

wife is pregnant with their second child and the health and welfare benefits provided by Sealcoating are crucial to him and his family. Similarly, Sharon Marshall, a Sealcoating construction worker and single mother with two children, testified that she and her children would be lost without her benefits. Mr. Earl Henry, a minority employee of Sealcoating, testified that he feared that his wife's medication and required doctor's care would be cut off if he was laid off because Sealcoating was debarred (TR 1/24:37-38; 52-54; 1/29:7).

Most of Sealcoating's employees would not be readily employable given: 1) the specialized nature of their work, 2) retraining in general construction trades which would be required and 3) that there is no other union contractor who performs the specialized work in the geographic region where these employees reside. Further, many of these employees for most of their careers have worked only for Sealcoating, and as such they were trained by Sealcoating and have a limited background in general construction (TR 1/24:20;26;37-38;54; TR 1/29:5;7;11;14). Once the existing benefits are no longer available, these employees and their families will have no choice but to look to public welfare for support. I find that debarment of Sealcoating would have a detrimental effect on the public treasury.

Sealcoating also has a 15% minority workforce which would be impacted by a debarment (TR 1/17:158). Earl Henry, an African-American yard foreman who has been employed by Sealcoating for eighteen years, and Alex Echeverria, a crew foreman and native of Guatemala who has been employed by Sealcoating for fifteen years testified at the hearing. Mr. Henry and Mr. Echeverria testified that they have been treated with dignity and respect by Sealcoating and have not been discriminated against in their employment and that their

position in the company has always been based upon performance and not race. Mr. Echeverria testified of one instance in which Sealcoating rearranged his employment duties to accommodate the fact that he no longer had a driver's license due to an alcohol related offense. Sealcoating allowed him to keep his position as a foreman. Both Mr. Henry and Mr. Echeverria testified that it would be very hard for them to find similar employment at the same wage scale if they were laid off due to a debarment (TR 1/29:5-16).

Sealcoating's non-union employees, which number approximately ten employees, also are dependent upon their employment with Sealcoating for their income and benefits they receive (Exhibit 28).

Impact on the Competitive Bidding Process

Sealcoating is viewed as one of the premier contractors for pavement maintenance in the New England area for crack filling, slurry seal and microsurfacing. Each of these processes requires specialized equipment and training. Allstate in Sunderland, Massachusetts, for instance, is the only other company besides Sealcoating which has the equipment to perform microsurfacing. Paul McNally, Business Manager for the Massachusetts District Labor Council, testified that in the New England area Sealcoating is the only union employer skilled in performing all of the pavement maintenance specialties of crack filling, slurry seal and microsurfacing. There is a non-union contractor, Crack-Sealing, Inc., which performs crack filling, but not slurry seal or microsurfacing. Sealcoating is often the only contractor to bid on specialized pavement maintenance work (Exhibit 18; TR 1/17:19-21;29,84,89;TR 1/24:19-20;36,42;1/29:14).

Microsurfacing is a modified form of slurry seal which is used in high speed highways and sets in approximately ten minutes (TR 1/17:78, 90). The use of microsurfacing also has important safety considerations (TR 1/17:78). That is because microsurfacing provides a skid resistant surface (TR 1/17:79). Many municipalities make use of Sealcoating's microsurfacing process (TR 1/17:64).

Given the specialized nature of pavement maintenance process and equipment, the work requires very experienced and qualified foremen to perform the work and specialized and costly equipment. For example, microsurfacing equipment costs about $500,000. These factors contribute to the limited number of available contractors in this trade (TR 1/17:20-21,82).

Mr. Gerald Russo, Airfield Construction Engineer at Massachusetts Port Authority ("Massport"), testified to the difficulty in obtaining bids on the emergency pavement maintenance work at Logan International Airport. Sealcoating has the pavement maintenance contract at Logan International Airport. Sealcoating maintenance contract with Massport requires Sealcoating to be on call 24-hour a day for emergency pavement maintenance at Logan Airport (TR 1/17:29-30). According to Mr. Russo, Massport has advertised for pavement maintenance work at Logan International Airport throughout Massachusetts and New England. The fact that there has been a lack of bidders for Logan's pavement maintenance work indicates to Mr. Russo that other contractors had not felt they were qualified to handle the complexity of the work (TR 1/17:29-30, 58, 59). In the past, Massport purchased its own equipment and unsuccessfully tried to perform the emergency work itself. Ultimately, Massport determined it did not have the manpower or the expertise to perform this complex work (TR 1/17:31-32). According to Mr. Russo, Sealcoating has come to be known

as the "standard" for pavement maintenance at airports (TR 1/17:20,58). Because of the demanding nature of the work, Mr. Russo believes he would have great difficulty finding another contractor to bid this work if Sealcoating were debarred and would significantly impact on the ability to conduct runway maintenance operations (TR 1/17:30). With the advent of the Logan 2000 project there will be considerably more construction and more emergencies in Mr. Russo's opinion regarding pavement maintenance at Logan Airport (TR 1/17:65).

Because Sealcoating's work is often done on airport runways with live aircraft landing and changing wind conditions, important public safety considerations must be taken into account as well (TR 1/17:16,21-22). Mr. Russo testified that a 747 jet may weigh up to 400 tons and is landing at 160 to 180 miles an hour. It is important to have a pavement that is flat and stable to allow a safe landing. If the runway is not flat and stable, that will decrease the ability of an aircraft to brake in time to come to a complete safe stop (TR 1/17:33-35). Another problem that raises a significant safety issue is loose crack filling debris getting into an aircraft's engine. This loose debris from cracks that are not filled properly could cause tremendous damage to a plane's engine. If foreign objects or debris were to get in the turbine of a smaller plane, it could bring the plane down (TR 1/17:33-36).

Several letters that were marked into evidence refer to the specialized nature of the work that Sealcoating performs and the impact of a debarment on the ability to maintain the quality of construction and maintenance of our public roads, bridges, and airports. I cite some of the relevant portions from those letters:

a)"We are a union company and are required by contract to hire union subcontractors. Sealcoating's

absence from the industry would have a great effect on me and bidding jobs. I do not have the name of another union company available that would perform to the same standards that I expect to receive from them." William Cowig, Vice President/General Manager, Bardon Trimount.

b)"There are very few companies that perform a highly specialized work done by Sealcoating, Inc. . . . Sealcoating's absence from the industry would be sorely missed by all of those who take pride in the quality and workmanship on our public roads and bridges, and wish to see the best companies available to serve the industry." Roger J. MacDonald, President, Massachusetts Aggregate & Asphalt Pavement Association.

c)"The highly specialized work performed by Sealcoating must be done as a milestone event. . . Sealcoating's absence from the industry would hinder my ability to supply a high quality cost effective project." William C. Dawes, Lawrence Lynch Corp.

d)"The work they perform is specialized work in which there are not many qualified companies to perform the work." Leo P. Picard. Jr., President, Tilcon Capaldi, Inc.

e)"Since there are very few companies that do this specialized work done by Sealcoating, Inc., their absence from the industry would create a void for those who take pride in the quality construction and maintenance of our public roads and bridges." Steven M. Brox, Brox Industries, Inc.

f)"It is of particular importance to me that Sealcoating, Inc. continue to operate without undue restrictions because of the specialized work they perform, and the competitive prices we are able to receive from them at bid time. I am of the opinion that the absence of Sealcoating, Inc. would be detrimental and a step backward for our profession." Richard A. Defelice, Roads Corporation.

g)"Sealcoating is one of the premier companies in our industry. . . The thought of not being able to rely on Sealcoating and their absence from the heavy highway industry is painful." Steven A. Frick, McCourt Construction Company.

(Exhibit 18).

I find that there are a limited number of qualified firms in the pavement maintenance category in which Sealcoating operates, especially for the microsurfacing and slurry seal process, and the absence of Sealcoating from the market due to debarment could adversely affect competitive prices, and, could result in fewer or no qualified bidders for this specialized work, which could either result in a deferral of badly needed repairs on municipal or state roadways and airports, or a much more costly process of reconstruction of these road surfaces (Exhibit 28; TR 1/17:84;86-89; 1/24:19;44-46). I also find that there are safety considerations which are very important to awarding authorities, particularly airports, and that the elimination of the company which is the "standard" for airport pavement maintenance could pose a public safety risk.

Sealcoating's Contribution to the Industry

Sealcoating has introduced several innovations to the industry in the area of pavement maintenance, including introducing cost efficient pavement techniques to various public agencies such as the Department and Massport. Some of the innovative cost-efficient techniques include the introduction of acoustical cement, which prolongs the life of crack filling and saw, cut and seal process. Another contribution includes rewriting Blue Book specifications for various pavement maintenance items (TR 1/17:77-80; TR 1/17:36-39).

Sealcoating's willingness to introduce innovations which produce cost savings and a more long lasting road surface, and its reputation for providing excellent quality of work, has caused Sealcoating to receive the highest praise from its fellow contractors and public authorities (Exhibit 18, 18A and 18B).

Admitted into evidence were letters attesting to Sealcoating's leadership role in the industry:

a)"Sealcoating has always assumed a leadership role in the association, actively advocating for steady and predictable statewide program to build and maintain the state's transportation infrastructure." John M. Pourbaix, Jr., Executive Director, Construction Industries of Massachusetts.

b)"As an Institute engineer, I rely on my observations that the entire highway industry relies very heavily on the few specialists like [Sealcoating] that are willing to contribute money, time and effort to promote quality pavements." Robert H. Joubert, District Engineer, New England State District for the Asphalt Institutes (AI).

c)"Sealcoating has been a leader in pavement rehabilitation using conventional methods as well as introducing innovative methods over the years." Jack Murphy, Vice President, McCourt Construction Company.

(Exhibit 18).

Various public agencies, including Massport, the Department of the Air Force, and several prime contractors and municipalities, have submitted letters to the administrative hearing, which have been admitted into evidence, attesting to Sealcoating's quality as a contractor, that the company possesses the basic business integrity

to continue as a public contractor, and the impact on the industry as a result of the debarment of Sealcoating (Exhibit 18 and 18A).

The Mitigating or Aggravating Nature of the Offense

The underlying offenses dealt with whether the particular DBE firm, which was alleged to have conspired with Sealcoating, actually performed a commercially useful function on the four projects in question pursuant to 49 C.F.R. § 23.47(d). While it is not within my discretion to make findings as to a criminal matter as to which Sealcoating pled guilty, it is within the purview of this hearing, however, to determine whether there are any aggravating or mitigating circumstances surrounding these offenses, particularly whether Sealcoating acted with evil intent.

49 C.F.R. § 23(d)(1) and (a)(2) specifically allow a DBE firm to subcontract to a non-DBE as long as the amount of subcontracting is consistent with local industry practice and other relevant factors.

The FAA Manual which is in evidence places no limitation on what and how much a DBE could subcontract out to a non-DBE (Exhibit 11; TR 1/17:24-28;154-155).

Under the federal DOT DBE program, a program recipient is allowed to count the total dollar value of the contract awarded to the DBE provided that the DBE is duly certified. For counting purposes, there is no limitation on how much work can be subcontracted out so long as the DBE performs a "commercially useful function" (Exhibits 6, 9 and 11; TR 1/10:119;128-130).

Under the federal regulation, the recipient of the funds determines whether the DBE firm has performed a commercially useful function based upon the amount of work subcontracted by the DBE firm, local industry practices, and other relevant factors. 49 C.F.R. § 23.47(d).

Mr. Singleton testified that he tried to familiarize himself with the legal requirements of the DBE regulation and tried to attend seminars and to talk to people in the industry, and that he got advice from various contractors, attorneys, project engineers, and awarding authorities as to what was required (TR 1/17:72-73). With regard to the four contracts that became subject of the federal proceeding, Mr. Singleton further testified that all of Sealcoating's certified payrolls and the daily reports from the projects showing Sealcoating's performance of certain items of the DBE's work would have been forwarded to the FAA or FHWA (TR 1/17:73-75, Exhibit 12-15). Mr. Singleton testified that it was his belief at the time of these projects that if an eligible DBE firm contracted or subcontracted a portion of the work to Sealcoating, a non-DBE, even if it was a significant amount of work requiring specialized knowledge of equipment, it was permissible under the applicable DBE regulations. Further, Mr. Singleton testified that he did not believe at the time that he was violating any law (TR 1/17:71-76).

In all of these projects, the prime contractor had subcontracted to the DBE contractor in question the specialized pavement maintenance work, such as slurry seal, saw control joints, joint sealing and crack sealing. On three of the four projects, the DBE firm then subcontracted to Sealcoating to perform some of the specialized work specified in the DBE firm's subcontract. On the Lawrence Airport project, Sealcoating was the prime contractor and

entered into a subcontract with the DBE firm to perform certain pavement maintenance work (Exhibits 12-15; TR 1/17:99-101).

Gerald J. Russo, the Airfield Construction Engineer for Logan Airport, testified extensively regarding local industry practice in the use of DBEs on federally funded airport projects. Three of the four counts in the indictment related to FAA funded airport projects in New England, specifically, Martha's Vineyard Airport, Concord (New Hamsphire) Municipal Airport, and Lawrence (Mass) Municipal Airport. In addition to working for Massport since 1990, Mr. Russo was the Director of Operation for the Massachusetts Aeronautics Commission, which included overseeing all of the FAA rules and regulations for municipal airports, and from 1969 to 1985, he was the Chief Airport Engineer for Edwards & Kelsey, which acted as the chief consultant for many airports in Massachusetts. Overall, Mr. Russo has supervised construction projects at twenty-eight airports in Massachusetts and another fifteen to twenty throughout the country. In his various capacities, Mr. Russo has been responsible for coordinating the rules of the FAA, including the DBE regulations, as they pertain to airports. He is familiar with the FAA Compliance Manual for DBE Enterprises (TR 1/17:11-20).

Mr. Russo testified that pavement maintenance on airport runways is capital intensive rather than labor intensive (TR 1/17:21) and that there has been difficulty in finding qualified and available DBE firms to do pavement maintenance in airport runway construction (TR 1/17:19). Mr. Russo testified that based on his extensive experience, it was acceptable for a DBE firm to subcontract out pavement maintenance to a non-DBE firm when it required specialized equipment or specialized knowledge because the DBE firms did not have the equipment or the manpower (TR 1/17:25-26). There was no

limitation to Mr. Russo's knowledge in the FAA Manual on the amount of subcontracting an eligible DBE could subcontract to a non-DBE (TR 1/17:27). As far as he knows, the FAA always accepted the amount of the sub-subcontracting counted towards the total dollar value of the DBE goal on the job (TR 1/17:27). It was local industry practice at airports for a DBE firm to sub out anywhere from 50 to 100% of the work to a non-DBE (TR 1/17:42) due to the lack of DBE subcontractors or DBE contractors in the pavement maintenance area possessing the kind of specialized equipment (TR 1/17:43). The FAA, and airport and consulting engineering firm have allowed the DBE to proceed in this manner (TR 1/17:48).

Based on the exhibits submitted at the hearing, the awarding authorities on the four projects appear to have been aware that Sealcoating was performing work which had been subcontracted to the DBE firm. Further, the recipients did credit the full amounts of the DBE firm's subcontract towards the projects' DBE goal, including the portion of work that the DBE firm had subcontracted out to Sealcoating. None of the awarding authorities on the four projects made a determination that the DBE firm had not performed a commercially useful function, except as to the first three days of work on the Rhode Island project, and as to that project, the awarding authority ultimately counted the full amount of the work that the DBE firm had subcontracted to Sealcoating towards the project's DBE goal (Exhibits 12-15; TR 1/10:112-13;116;118-119).

On the three airport jobs, each of the awarding authorities retained a consulting engineer to be responsible for the implementation and monitoring of the DBE requirement on those jobs. The daily reports of the projects prepared by the project engineers -- the "eyes and ears" of the recipients -- reflect the work being

performed by Sealcoating and the DBE firm. Photographs from the Rhode Island project show that Sealcoating employees wore their own uniforms with Sealcoating's insignia and used their own equipment and trucks which also had the Sealcoating's insignia on it out. The project records were submitted to the grantor agencies, FAA and FHWA. On all four jobs, Sealcoating submitted certified payroll records accurately indicating Sealcoating workforce (Exhibits 12-15A; TR 1/10:109-10;112-13;120-27; TR 1/17:73-74).

Since the period, i.e., 1988-1992, which the circumstances occurred that gave rise to the indictment, the nature of Sealcoating's business has changed. Most significantly is that its bridge division which was started in 1993 makes up about 50% of its revenues and it is anticipated that that percentage will increase to 70%. Unlike in the pavement maintenance work, there are several items of work that can be subbed out to subcontractors, and as such there are more opportunities for DBEs. (TR 1/17:91-92).

Since 1992, Sealcoating has made it a practice not to be a second tier subcontractor to a DBE subcontractor.

RULINGS OF LAW

The Massachusetts debarment statute, G.L. c. 29 § 29F, requires that I take into consideration all mitigating facts and circumstances in fashioning my recommendation as to whether Sealcoating should be debarred. G.L. c. 29 § 29F(g). Should I recommend that a debarment is warranted, I must make specific findings that there is sufficient evidence to support the recommendation of debarment and that debarment for the period specified "is required to protect the integrity of the public contracting process." G.L. c. 29 §29F(c)(ii).

Sealcoating's guilty plea does not per se require the imposition of debarment of Sealcoating. I do find, however, that Sealcoating's guilty plea to three false statements and one count of conspiracy which arose out of Sealcoating's work on four public contracts provides a cause for imposing debarment under G.L. c. 29F(c)(l)(i) or G.L. c. 29F(c)(l)(ii). I must now determine if that fact alone is sufficient to warrant a recommendation of debarment, or, that additional mitigating facts and circumstances are present which warrant a finding that there is no need for debarment to protect the public contracting process.

Based on Sealcoating's guilty plea, any one of the following facts could possibly be inferred: 1) that Sealcoating lacks the requisite honesty and integrity of a public contractor, 2) Sealcoating is presently not a responsible contractor, or 3) that a debarment of Sealcoating is necessary to protect the public contracting process. There must, however, be a showing of sufficient evidence that any one of these inferences is reasonable and logical. Roemer v. Hoffman, 419 F.Supp. 130 (D.C.C. 1976).
Further, any one of these inferences that "may arise from a showing of [sufficient] evidence must be weighed against any mitigating circumstances or countervailing evidence offered by the contractor." Proposed Suspension of Mainelli (Hugo R.) et al., Fin. Asst. Pgm. D.O.T.C.A.B. Docket No. 2 (July 22, 1985) at 53; Roemer, supra; G.L. c. 29 § 29F(g).

It is within the Secretary's, or his designee's, discretionary authority as conferred upon it by G.L. c. 29 § 29F to determine that Sealcoating should not be debarred provided that this decision is based upon substantial evidence. G.L. c. 29 §29F(e);

Fioravanti v. State Racing Commission, 6 Mass. App. 299 (1978) ("In determining whether the [agency's] findings are based on substantial evidence, the court must give due weight to the [agency's] expertise and to the discretionary authority conferred upon it by the Legislature").

In the present case, I have found the evidence in the record to be inadequate and insufficient to support an inference that: 1) Sealcoating is presently a nonresponsible contractor, 2) Sealcoating lacks the requisite honesty and integrity of a public contractor or 3) a debarment is necessary to protect public contracting process. I find that Sealcoating has offered persuasive evidence to indicate that it is in fact a presently responsible contractor and it possesses the requisite honesty and integrity required of a public contractor and that a debarment is not necessary to protect the integrity of the public contracting process. To the extent that Sealcoating's guilty plea arises out of its actions with regards to its relationship with a particular DBE, I cannot find that Sealcoating's continued presence in public contracting impacts the DBE program such that the integrity of public contracting is jeopardized. Further, I find that Sealcoating has offered compelling evidence that there are mitigating facts and circumstances which weigh against imposing a debarment. These facts and circumstances are discussed further below.

The Integrity of the Public Contracting Process

Despite Sealcoating's guilty plea, various public agencies and public contractors have submitted letters indicating that they regard Sealcoating and its employees as being highly ethical and possessing the requisite business integrity to be a public contractor. I find that the integrity of the public contracting process is not at risk if Sealcoating continues to participate on public contracts. I base this finding on several facts. Namely, since 1992 Sealcoating has ceased subcontracting from DBEs -- the very practice that caused it to be indicted --. Further, since 1992, Sealcoating has continued to enter into contracts with the Department, and other agencies and municipalities of the Commonwealth and there is no evidence from which I can find that Sealcoating has engaged in any violation of any applicable DBE regulation since 1992.

I also base this finding in part on my findings of fact that Sealcoating has changed it management structure to remove Mr. Singleton as an officer and director of Sealcoating, who was President and Treasurer at the time the events are said to have occurred. Finally, I base this finding on the Corrective Action Plan that Sealcoating has implemented, as well as the fact that these programs are contractually mandated as a result of the Agreement between the Department and Sealcoating. These programs and the Agreement minimize any risk to the public contracting process. In fact, if implemented according to the terms of the Agreement, opportunities for DBE firms in the pavement maintenance specialty should increase. I find it important that the National Association of Minority Contractors has indicated that it fully supports the Corrective Action Plan and Administrative Agreement.

Debarment Must Serve a Remedial Purpose

Debarment is not intended to serve as a punishment to a contractor, but, rather to serve a remedial measure of protecting the integrity of the public contracting process G.L. c. 29F § 29. It is well settled that civil sanction which serves no remedial purpose other than punishment may subject the contractor to double jeopardy. As the United States Supreme Court explained:

> Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serve the goals of punishment. Those goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence [citation omitted]. Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives" [citations omitted]. From these premises, it follows that a civil sanction that cannot be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand.
>
> United States v. Halper, 490 U.S. 435, 448 (1989).

Debarment must be viewed, therefore, on a case by case basis, to assure that the contractor is not being subject to a sanction that can only be characterized as retaliatory and thus subjecting the contractor to double jeopardy. United States v. Halper, 490 U.S. 435, 448 (1989); G.L. c. 29 § 29F. Massachusetts debarment statute, is similar to its federal debarment counterpart, 49 C.F.R. Part 29, in that debarments are considered "serious action[s] which shall be used only in the public interest and for the [Government's] protection and not for purpose of punishment." 49 C.F.R. § 29 115 (b).

In some instances, "where debarment would purge government programs of corrupt influence and prevent improper dissipation of funds, removal of persons whose participation in these programs is detrimental to public purposes is remedial by definition." U.S. v.

Bizzell, 921 F.2d 263, 267 (10th Cir. 1990). I find that continued contracting with Sealcoating would not be detrimental to the public interest given: 1) the nature of the offense, 2) that the United States suffered no pecuniary damage or actual loss as a result of Sealcoating's violations on the four federally funded projects and, 3) the remedial steps which Sealcoating has taken, such as the corporate restructuring and the implementation of the Corrective Action Program and the Administrative Agreement with the Department, remove effectively the threat of these violations occurring again. In light of the restructuring of management, the Corrective Action Plan, the Administrative Agreement with the Department and the adverse impact on Sealcoating's employees, I do not find there to be any remedial purposes to be served by debarring Sealcoating. Therefore, the only purpose for imposing debarment would be to punish Sealcoating. Sealcoating has ceased the subcontracting with DBE contractors and has successfully continued to contract with the Commonwealth and its political subdivisions without harming the public contracting process. See Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng., 534 F.Supp. 1139 (D.C. 1982) (to sustain a debarment some threat to government interests arising from contracting with the debarred contractor must be found; debarring a contractor could not be imposed for further punishment after the contractor entered a nolo plea), rev'd on other grounds, 714 F.2d 163 (1983).

The Impact on Sealcoating's Employees

Debarring Sealcoating would have serious economic impact on the company's employees. I am troubled by the punitive effect of debarring Sealcoating on the employees of Sealcoating. I take judicial notice of basic facts of economic life with respect to the consequences of the Commonwealth's action in debarring a contractor

from participating in public contractors. Gonzales v. Freeman, 334 F.2d 570 (U.S. App. D.C. 1964) (the size and prominence of the contractor, the ratio of government business to non-government business, his ability to serve other business as substitute for government business are all factors that may be taken in account). As one court stated:

> The starting point for determining whether a person should be debarred must be the statement of Chief Justice Burger when he was a judge for U.S. Court of Appeals for the District of Columbia Circuit:
>
> Disqualification from bidding or contracting direct the powers and prestige of government at a particular person and ... may have a serious economic impact on that person (Gonzalez v. Freeman, 334 F.2d 570, 578 (D.C. App. 1964).
>
> The decision-maker must take great care, then to be certain that his decision is a correct one.
>
> Roemer v. Hoffman, 419 F.Supp. 130, 131 (U.S.D.C. 1976)

Here, between sixty (60) and eighty (80) of Sealcoating's union employees face the likelihood of losing their employment and benefits if Sealcoating were debarred as Sealcoating would be forced to terminate many of these employees. The specialized nature and training of these employees, and the fact that Sealcoating is the only union pavement maintenance contractor in this geographical area would cause many of these employees economic hardship as they would not be readily employable. The impact on these employees is more fully discussed in my findings of fact.

Sealcoating's Change of Management

Just as debarment may be removed by a showing of a bona fide change of management or the elimination of the cause for which the debarment was imposed, G.L. c. 29 § 29F(g), these same grounds may be taken into consideration in determining whether to debar Sealcoating, G.L. 29 § 29 F(g). In my findings of facts, I have found that Sealcoating's change in management is bona fide and that the current management is fully committed to carrying out the Corrective Action Program.

The Effect on Public Contracting Process

Debarring Sealcoating would be detrimental to the public interest because of the impact that debarring Sealcoating will have on the competitive bidding process. The effect on competition if Sealcoating is debarred is a circumstance that must be taken in account. James J. Welch & Co. v. Deputy Commissioner of Capital Plans & Operations, 387 Mass. 662 (1982) (one purpose of competitive bidding statutes is to ensure that the awarding authority obtain the lowest price among responsible contractors); G.L. 29 § 29F(g). Sealcoating's pavement maintenance business is highly specialized and technical, particularly the microsurfacing and slurry seal processes. I find that if Sealcoating were debarred this would result in a substantial loss of competition in the pavement maintenance specialty, particularly in the very specialized pavement specialties of microsurfacing and slurry seal. The lessening of competition will substantially increase the risk of harm to the competitive bidding process in the form of higher prices to awarding authorities for these items of work during any period of debarment. Despite the existence of other pavement maintenance contractors, evidence showed that

sometimes Sealcoating is the only contractor to bid on a particular pavement maintenance contract. If Sealcoating was debarred there is a substantial risk that an awarding authority would be unable to obtain bids from a sufficient number of qualified pavement maintenance firms, and would have to defer repairing its infrastructure or rely on a more costly solution.

> "The public interest in maximizing free and open competition may not be served by debarment or suspension of firms convicted [ ] because such debarments might unduly limit -- the number of potential bidders in a market." Peter Kiewit Sons' Co. v. U.S. Army Corps. of Eng., 534 F.Supp. 1139, 1147 (1982) (the value of the contractor as a competitor for government contracts was significant as represented by the difference of money between its low bids and the second low bidders), rev'd on other grounds, 714 F.2d 163 (1983).

The evidence before me indicates that there are a limited number of pavement maintenance contractors in the New England area which are capable and qualified to bid in the various pavement maintenance specialties, and, in some cases Sealcoating is the only bidder. If Sealcoating were debarred, this would unduly limit the number of potential bidders for pavement maintenance on public jobs in the Commonwealth.

Removal of the Cause for Debarment

I find that the mere fact that Sealcoating entered a guilty plea to charges arising out of Sealcoating's involvement in the DBE program on four public contracts does not mean that Sealcoating's future participation in public contracts would injure the Commonwealth, as there are sufficient controls in place to remove the likelihood of these events occurring again. This includes Sealcoating's implementation of an extensive and comprehensive Corrective Action Plan, which Sealcoating is separately required to carry out under the Agreement with the Department. When these

controls are balanced against the harm that would be caused to the public treasury by debarring Sealcoating, I find that these measures provide "for an efficient means of preserving the integrity of the public purse" and protecting the integrity of public contracting. See Haverill Manor, Inc. v. Commissioner of Pub. Welf., 368 Mass. 15, 21 (1975) (an offset procedure may provide an efficient means to preserve the integrity of the public purse even before the judicial review of the legality of the assessment), cert. denied, 423 U.S. 929 (1976); Peter Kiewit Sons' Co. v. U.S. Army Corps. of Eng., supra (contractor was deemed presently responsible despite its nolo plea).

This is the "rare case" where the debarment of Sealcoating would subject it 'to a sanction overwhelmingly disproportionate to the damages [it] has caused". U.S. v. Halper, supra. Debarring Sealcoating "bears no rational relation to the goal of compensating the government for its loss". The United States suffered no actual or pecuniary loss as a result of the violations.

The DBE Regulation, 49 C.F.R. Part 23

While the regulation is not clear as to how much the DBE can subcontract out to a non DBE and still perform a commercially useful function, it is clear that a DBE can subcontract out some portion of its contract to a non-DBE and at the same time perform a commercially useful function. The relevant provision of the regulation states as follows:

> (d)(1) a Recipient or contractor may count toward his MBE goals only expenditures to MBEs that perform a commercially useful function in the work of a contract. An MBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing, and supervising the work involved. To determine whether an MBE is performing a commercially useful function, the Recipient or contractor shall evaluate the amount of work

> subcontracted, industry practices and other relevant factors.
>
> (2) Consistent with normal industry practices, an MBE may enter into subcontracts. If an MBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices the MBE shall be presumed not be performing a commercially useful function. The MBE may present evidence to rebut this presumption to the Recipient. The Recipient's decision on the rebuttal of this presumption is subject to review by the department.
>
> 49 C.F.R. § 23.47.

The regulation specifically allows a DBE to subcontract out some of the work so long as the DBE retains a "distinct element of the work and carr[ies] out its responsibilities by actually performing, managing and supervising the work involved." 49 C.F.R. § 23.47(d)(1). The amount subcontracted must be consistent with local industry practice and other relevant factors. 49 C.F.R. § 23.47(d)(1) and (d)2.

As to each of the four projects, I find that each recipient counted the full amount of the DBE contract toward the DBE goal, including the work performed by Sealcoating. As discussed below, I find that the recipients' knowledge of Sealcoating's performance of work of the DBE significant in terms of whether Sealcoating acted with evil intent with regards to these four projects.

The only decision I have been able to locate specifically addressing the parameters of "commercially useful function" is Proposed Suspension of Mainelli (Hugo R.) et al., 12 D.O.T.C.A.B. (July 22, 1985) 1985 WL 17691. There, the administrative judge readily explained the provisions of the regulation and the discretion of the Recipient:

> It is thus clear from the above regulatory provisions that the States and general contractors are made the implementing actors... in a case where a certificated MBE/DBE joint venture has entered into a subcontract, the State must initially make a

> determination as to whether the amount of work subcontracted constitutes a commercially useful function in light of "industry practice and other relevant factors."
>
> Apparent from this regulatory provision is the fact that even though a certified MBE/DBE firm or joint venture may subcontract a significantly greater portion of the work under the contract than would be expected on the basis of normal industry practice, that fact alone does not require a determination by the Recipient State that the MBE/DBE is not performing a commercially useful function, but raises only a rebuttable presumption that the MBE/DBE is not. Accordingly, a State may, under such circumstances, conclude on the basis of industry practice and the amorphous criteria of "other relevant factors" that the MBE/DBE has satisfied the regulatory test for performing a commercially useful function, despite the fact that a disproportionate portion of the work has been subcontracted out. Inherent in that determination also is the State's or prime contractor's discretion to determine the extent to which the particular MBE's/DBE's participation will count toward the State's or contractor's MBE/DBE goal.
>
> 12 D.O.T.C.A.B. (July 22, 1985) 1985 WL 17691 at 40. (emphasis added).

In this case the evidence indicates that each of the recipients, with knowledge of Sealcoating's work, determined to give DBE credit for the work the DBE firm subcontracted out to Sealcoating. See Mainelli, supra (recipient's awareness of MBE's limited resources must have been reflected in its determination that it was performing a commercially useful function); Appeals of TIME Contractors, J.V., 87-1 D.O.T.B.C.A. (CCH) P19, 582, 1987 D.O.T.B.C.A. Lexis 64 (knowing that MBE lacked experience to build bridges, the FHWA must have realized that the job would be disastrous and that the MBE would seek management assistance from elsewhere).

Inasmuch as it was industry practice to allow a DBE to subcontract out a substantial portion of its work to a non-DBE, I find that, Sealcoating's interpretation of the regulation was not unreasonable.

Sealcoating Lacked Evil Intent

As a matter of law, the required intent to violate the regulation cannot be shown where the regulation is vague and susceptible to varying interpretations. James v. United States, 366 U.S. 213 (1961) (as a matter of law, wilfulness cannot be shown where there was an uncertain state of the law); United States v. Critzer, 498 F.2d 1160, 1162 (4th Cir. 1974) ("even if she [defendant] consulted the law and sought to guide herself accordingly, she could have no certainty as to what the law required"). In fact, the USDOT recognizes that "Recipients and other participants [contractors, subcontractors and sub-subcontractors] in the program may have misunderstood or misinterpreted portions of the regulation." 57 Fed. Red. 58288.

Further, it is axiomatic that a statute is unconstitutional when "it fixes no immutable standard of guilt, but leaves such standard to the variant views of different courts and juries which may be called to enforce it..." United States v. Cohen, 255 U.S. 81, 84 (1921). United States v. Powell, 423 U.S. 87, 92-93 (1975).

Without further guidance, the prohibition in 49 C.F.R. § 23.47(d)(2) that a DBE firm not subcontract "a significantly greater portion of work of the contract than would be expected on the basis of normal industry practices" is certainly not a bright line. In short, this regulation "proscribes no comprehensible course of conduct at all." United States v. Powell, 423 U.S. at 92. Moreover, this regulation has been criticized by the USDOT, the General Accounting Office and other Governmental agencies as to the lack of consistent interpretations of this regulation. In addition, Mr. Singleton appears to be sincere in his testimony that he sought all available

guidance as to these regulations and that Sealcoating was not intentionally violating the law. United States v. Critzer, supra, (defendant cannot be guilty of willfully evading a law which is so uncertain that even co-ordinate branches of the U.S. Government reach plausibly directly opposing conclusions).

CONCLUSION

1. It is my finding that it is not necessary to debar Sealcoating to protect the integrity of the public contracting process or to prevent the likelihood of similar conduct from developing in the future that gave rise to the charges contained within the indictment.

2. Sealcoating has undertaken a change of management structure, including bringing on outside DBE monitors, bringing on an Ombudsman, bringing on a nationally recognized figure as a member of the Board of Directors so that not only has the cause of the violation been eliminated, but the likelihood of recurrence has been eliminated as well. Sealcoating is a different company from the point of view of structure, management, and education about the DBE requirements that existed back in 1988 through 1992 when the violations occurred.

3. The Corrective Action Plan is comprehensive and I find that the commitment by the management of the company as well as the outside DBE consultants is bona fide and the likelihood of the occurrence of a violation in the future is negligible assuming that the terms of the Corrective Action Plan are carried forth as set forth in the Agreement.

4. Sealcoating as it exists today, and as it has existed since 1992, is a responsible contractor that has none of the attributes that led to the investigation and indictment, and is in the position of being

a model contractor from the point of view of its commitment to affirmative action and DBE compliance programs.

RECOMMENDATION

Sealcoating should not be debarred or suspended because there is not sufficient evidence a debarment or suspension is required to protect the integrity of public contracting process.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

Dated: February 20, 1996

APPENDIX B-1

DECISIONS/RULINGS

Appeals of Prequalification Determinations

COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS HIGHWAY DEPARTMENT

SUFFOLK, ss BOARD OF PREQUALIFICATION APPEAL

INTRODUCTION:

The appeal of Bartlett Consolidated (Bartlett) came as a result of action taken by the Massachusetts Highway Department's Prequalification Committee. On June 28, 2000, the committee suspended Bartlett's prequalification status. This action was in response to a memo from Steven O'Donnell, District Highway Director for District #4. In that memo, Mr. O'Donnell stated that Bartlett had refused to respond to at least eight (8) emergencies when called by MassHighway personnel.

On December 30, 1999, Bartlett Consolidated was contacted to respond to an emergency guardrail repair in Tewksbury Route 495 at ramp to Route 38. Bartlett Consolidated stated they would make repair to guardrail and had a representative on site (Paul Kehoe). Approximately one (1) hour after giving Bartlett Consolidated the repair, they declined the job to take an emergency in District 3.

On January 7, 2000 at 3:50 A. M., the district tried to contact Ryan Bartlett and Paul Kehoe via nextel phone and emergency pager. There was no response. At 4:48 A.M. the job went to the next contractor.

On February 5, 2000, Bartlett Consolidated was contacted to respond to Methuen, Route 93SB for a damaged attenuator, Ryan Bartlett refused to respond.

On February 11, 2000 at 9:30 A.M., Bartlett Consolidated was contacted for an emergency on Route 128SB in Burlington. Bartlett was unable to respond due to a funeral that was being attended by their employees.

On February 26, 2000, a representative from Bartlett Consolidated was contacted at approximately 12:15 A.M. to respond to a guardrail repair. Bartlett Consolidated informed MassHighway that they would respond. A representative (Paul Kehoe) was on site and at 1:15 A.M. Bartlett informed MassHighway that they were unwilling to perform the needed repair.

On April 11, 2000 at 9:00 A.M., a representative from Bartlett Consolidated (Paul Kehoe) was contacted to respond to a truck rollover that involved guardrail damage. A representative was on site at 9:30 A.M. At 12:01 P.M., Bartlett was directed to start the repair at which time MassHighway was informed Bartlett would not be performing the requested repair.

On May 22, 2000, representatives from Bartlett Consolidated (Paul Kehoe, Bob Smith) were contacted and had an on site meeting in regards to emergency repairs on a median barrier. At 12:01 P.M., Bartlett agreed to make the needed repairs after the evening commute, 7:00 P.M. At 4:00 P.M., MassHighway contacted Bartlett Consolidated to confirm the forthcoming repair at which time Bartlett stated they would not be responding for two (2) or three (3) days.

On June 6, 2000 at 3:10 P.M., Bartlett Consolidated was contacted to respond to an emergency guardrail repair on Route 129 in the City of Lynn. Ryan Bartlett refused the call, but said his company was willing to respond the next morning.

As a result of the Committee's action, Bartlett requested a meeting with the Committee so that it could present its position on these eight emergencies. On July 6, 2000, the committee then reaffirmed its suspension. The period of suspension was for 45 days retroactive to June 28, 2000.

Bartlett appealed this decision pursuant to M.G.L. c. 29 § 8(B). By letter dated July 17, 2000, I was designated by the Commissioner's Office to hold a hearing and report my recommendation to the Prequalification Appeal Board.

> M.G.L. c. 29 § 8 (B) affords a contractor an administrative appeal. The statute provides: "Such hearings shall be deemed to be an adjudicatory proceeding, and any bidder or prospective bidder who is aggrieved by the decision shall have a right to judicial review under the applicable provisions of said chapter thirty A" (emphasis added).

A hearing was held on July 25, 2000. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Isaac Machado	Deputy Chief Counsel
David O'Brien	MHD
John Hayden	MHD
James Flaherty	MHD
Lynn Brendemuehe	Counsel's Office
Aldo Bartlett	Bartlett
Ryan Bartlett	Bartlett

Entered as Exhibits were:

Exhibit #1A ……..	Letter dated June 28, 2000 to Aldo Bartlett from David O'Brien suspending Bartlett's Prequal.
Exhibit #1B ……..	Letter dated July 10, 2000 to Aldo Bartlett from David O'Brien notifying Bartlett that their Prequal has been suspended for 45 days retroactive to June 28.
Exhibit #2 ……..	Letter to Peter Milano from Deputy Commissioner John Cogliano designating me as Hearing Officer for Bartlett's appeal.
Exhibit #3 ……..	S.O.P. for the Accident Recovery Program.
Exhibit #4 ……..	MHD's Prequalification Regulation 720 CMR 5:00
Exhibit #5 ……..	Bartlett's submission to Peter Milano dated July 25, 2000.
Exhibit #6 ……..	Memo to Gordon Broz from Steven O'Donnell dated June 12, 2000.

The suspension of Bartlett's prequal for the offenses listed above seems appropriate. However, the issue before me is whether or not Bartlett has addressed those problems sufficiently to be considered a responsible contractor.

Bartlett submitted an emergency response policy (see Exhibit #5) and emergency response contact forms. These forms have been sent to all five districts. I believe that they are policies that will generate prompt response when called for an emergency by MassHighway.

FINDINGS:

I find that continued calling of Bartlett for emergency responses would not be detrimental to the public interest given the remedial steps which Bartlett has taken, such as the corporate restructuring and the implementation of the Emergency Response Policy. I do not find there to be any remedial purposes to be served by continuing the suspension of its prequal. Therefore, the only purpose for imposing the full 45 days would be to punish Bartlett. See Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng., 534 F. Supp. 1139 (D.C. 1982) (to sustain a debarment some threat to government interests arising from contracting with the debarred contractor must be found; debarring a contractor could not be imposed for further punishment after the contractor entered a nolo plea), (emphasis added).

RECOMMENDATION:

Bartlett Consolidated, Inc.'s prequalification with the Massachusetts Highway Department should be restored.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Chief Administrative Law Judge

DATE: June 12, 1997

RE: Prequalification Appeals Board

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

CONTRACTOR: **MIG Corporation**
APPEAL: **Certification No. M-152-3**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, JUNE 25, 1997**, for action of the Massachusetts Highway Commission acting as the Prequalification Appeals Board.

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
Chief Counsel Corcoran
Dep. Chief Counsel Driscoll
Secretary's Office
Mike McGrath, Constr.Contr.Eng.

Paul Losordo, Esq.
21 McGrath Highway
Suite 302
Quincy, MA 02169

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 **PAUL LOSORDO, ESQUIRE**, 21 McGrath Highway, Suite 302, Quincy, MA 02169 notifying them this report and recommendation will be presented to the Prequalification Appeals Board along with any written objections to this report as provided by M.G.L. c. 30A at its meeting of **WEDNESDAY, JUNE 25, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The MIG Corporation (MIG), aggrieved by the Massachusetts Highway Department's (MassHighway) Prequalification Committee's single contract limit for Prequalification Certification No. M-152-3, appealed to the MassHighway's Prequalification Appeal Board.

Prequalification of contractors for Public Works contracts is set out at Massachusetts General Laws (M.G.L.) c.29, §.8B, which is entitled "Bidders on work other than building construction or repairs; statements; qualifications for classes of work; hearings" C.29, §.8B provides in part; "Said department or commission shall limit the bid proposals to be furnished to a prospective bidder to such bidders as are determined by the commissioner to have the classification and capacity rating to perform the work required." (emphasis added)

Pursuant to c.29, §.8B MassHighway promulgated regulations regarding prequalification of contractors for MassHighway. See 720 Code of Massachusetts Regulations (CMR) 5.00 entitled "Prequalification of Contractors and Prospective Bidders for Statewide Engineering Field Survey Services."

M.G.L. c. 29, §.8B provides that any contractor aggrieved by MassHighway's Prequalification Committee's determination may request an appeal hearing. C.29, §.8B provides in relevant part:

> Any prospective bidder who is aggrieved byany decision or determination of theprequalification committee or the commissionerwhich affects his right to bid may file a new application for qualification at any time or within fifteen days after receiving notice of such decision the applicant may request in writing a hearing before an appeal board to reconsider his application or qualifications. The appeal board in the department of highways shall consist of the commissioner, the associate commissioners, and the chief engineer of highways, or their designees[1] ...
>
> Any bidder or prospective bidder who so requests shall be granted a hearing by such appeal board at which he may

[1] The appeal board in the Department of Highways designated the Chief Administrative Law Judge to conduct the appeal hearing and to issue a "tentative decision" for this appeal.

> submit any and all additional information or evidence bearing upon his finances, current bonding capacity, experience, or other which may be relevant thereto... Such hearing shall be deemed to be an adjudicatory proceeding, and any bidder or prospective bidder who is aggrieved by the decision of the appeal board shall have a right to judicial review under the applicable provisions of said chapter thirty A[2]

Prequalification Certification No. M-152-3 was dated April 28, 1997. MIG requested an appeal hearing on May 1, 1997, which met the 15 day time period of M.G.L. c.29, §.8B. (See above).

720 CMR 5.07 (3) "Review of Prequalification Committee Decision for Construction Contractors" provides in part:

> **(3) Formal Hearing.** A request for a formal hearing before the Prequalification Appeal Board shall be filed in writing, by certified mail. The Prequalification Appeal Board, or its designee, shall conduct a hearing without delay and render a decision. The decision or determination of the Prequalification Committee shall remain in effect until the Prequalification Appeal Board renders a decision in writing on the appeal. The decision of the Prequalification Appeal Board shall be final and binding, subject to the right of the Contractor to a judicial review under the applicable provisions of M.G.L. c. 30A.

A hearing on the appeal of MIG's Prequalification Certificate was held on May 19, 1997.

Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Paul Losordo	Attorney for MIG
Don Voghel	MIG Corporation
Michael Cusack	Bonding Agent for MIG
William McCabe	Construction Engineer, MHD
David Anderson	Deputy Ch. Eng., Construction, MHD
Michael McGrath	Construction Contracts Eng., MHD

[2] Pursuant to M.G.L. c. 30A, the Executive Office for Administration and Finance promulgated Regulation 801 CMR 1.00 et seq. "Standard Adjudicatory Rules of Practice and Procedure". 801 CMR 1.00 et seq. apply to this appeal.

Entered as Exhibits at the hearing were:

Exhibit #1..... Appeal request of MIG, dated May 1, 1997
Exhibit #2..... Series of Resumes of MIG personnel
Exhibit #3..... Inventory of equipment owned by MIG

My office has received post hearing submissions from both counsels. The submitted briefs contain Proposed Findings of Facts and legal memoranda.

FACTS AND ISSUES PRESENTED:

In May 1995, MIG Corporation filed its first application for bid eligibility with MassHighway. The application was reviewed by the Committee; a group of Engineers deemed qualified and duly appointed by the Commissioner pursuant to the provisions of M.G.L. c.29 §.8b and subject to 720 CMR 6.00 et sec. MIG was a relatively new construction company, formed in 1991, that had little or no prior construction experience in Massachusetts. MIG's experience was in the State of Connecticut, where the largest single highway construction contract performed was for $520,000.00. MIG successfully completed a $910,000.00 utility project as well.

In reaching its decision in 1995 and in subsequent reviews, the Committee considered MIG's prior construction experience, together with other important factors such as management structure, financial statements, and equipment inventory. Based upon there considerations, the Committee established an initial bid eligibility limit of $750,000.00 for each of three project type categories. The three categories MIG applied for: highway construction, bridge construction, and demolition; were all approved by the Committee.

Six months later, in December 1995, MIG applied for approval to bid upon three more categories of work: sewer and water, utilities, and marine construction. The Committee reviewed the application and granted its approval for all three categories, setting $750,000.00 bid

eligibility limits on each.

One month later, in January 1996, MIG applied for a waiver of the single contract limit on bridge construction, in order to be eligible to bid on a particular project. The Committee did grant the waiver up to a $1,000,000.00 limit. Four months later, during its annual review of MIG, the Committee decided to make the temporary $1,000,000.00 waiver limit, the new established bid limit for bridges. MIG was seeking a higher limit at this annual review, but was told by the Committee that a higher limit would only be considered after favorable interim reports were received on current projects.

Two months later, in July 1996, after a June meeting with MIG and the receipt of some favorable interim construction status reports, MIG's single contract bridge construction limit was doubled, by raising it from $1,000,000.00 up to $2,000,000.00.

Four months later, in November 1996, after receipt of some favorable interim reports on the Wrentham/Foxboro F-6-2 bridge project under Contract #96108, MIG's single contract limit was raised once again. This was the third increase in just a ten month period. The Committee raised the bridge construction, single contract limit from $2,000,000.00 to $3,000,000.00. Thus, the limit had been increased 400% in less than one year.

Five months later, in April 1997, as the spring construction season was commencing, MIG applied for another increase of its single contract limit. MIG was seeking a 150% increase to its limit, which would then match the limit set by its private bonding company. The request was for a $4,500,00.00 increase of its current limit up to $7,500,000.00. This request was considered by the Committee and rejected. The Committee pointed out that MIG had not performed any additional large bridge projects since the Wrentham bridge project, which project was the basis of the earlier $1,000,000.00 increase. According to MIG, it was the largest project ($2,400,000.00) that it claimed to have fully performed.

MIG's present bond limits are $15,000,000.00 aggregate and $7,500,000.00 single contract limit. Prequalification Certificate No. M-152-3 dated April 28, 1997 qualified MIG in seven classes of work: Bridge Construction, Demolition, Highway Construction, Highway Maintenance, Marine Construction, Sewer & Water, and Utilities. Certificate No. M-152-3 sets single contract limits of $3,000,000.00 for Bridge Construction and $750,000.00 for all other classes with an overall aggregate of $15,000,000.00.

M.G.L. c.29 §.8B directs the Commissioner of Highways to prequalify all prospective bidders through a prequalification committee consisting of engineering personnel of MassHighway. It also authorizes the Commissioner to promulgate regulations, governing the prequalification process. The second paragraph of M.G.L. c.29 §.8B provides:

> Based on information received and available and on past performance of the prospective bidder on work of a similar nature, each such commissioner, acting through a prequalification committee consisting of engineering personnel of said department or commission, respectively, to be appointed by him, shall determine the class and aggregate amount of work that a prospective bidder is qualified to perform, and shall limit a proposed bidder to such class and aggregate amount of work as he may be qualified to perform. Said aggregate amount of work shall not be less than the amount of the bidder's current bonding capacity, as verified to the commissioner's satisfaction, by a surety company incorporated pursuant to section one hundred and five of chapter one hundred and seventy-five, or authorized to do business in the commonwealth under section one hundred and six of said chapter one hundred and seventy-five, and satisfactory to the commissioner. Said department or commission shall limit the bid proposals to be furnished to a prospective bidder to such bidders as are determined by its commissioner to have the classification and capacity rating to perform the work required. (emphasis provided)

Pursuant to the underlined portion of paragraph 2, of M.G.L. c.29 §.8B (supra) the commissioner promulgated 720 CMR 5.03 (3) which states:

> **(3) Single Contract Limit.** The Prequalification may establish a Single Contract Limit for Contractor in any

> classes of work for which the Contractor has been Prequalified. A Single Contract Limit may be established, if, in the opinion of the Prequalification Committee, the Contractor does not have adequate experience, responsibility, competency, or equipment necessary to undertake an individual contract valued at the Contractor's Single Bonding Capacity within that class of work. In establishing Single Contract Limits, the Prequalification Committee shall consider, but shall not be limited to considering, the Contractor's competency and responsibility, the amount and condition of its equipment, the experience of its principal or key personnel, its history of payment to subcontractors and material suppliers, and previous work experience. (emphasis added)

As part of MassHighway's post hearing submission, its counsel included resumes of all the members and alternate members of the prequalification committee. The members of the committee have impressive college backgrounds as well as years of field experience in engineering. One member has four degrees and is a thesis paper short of his PhD. Their judgement cannot be questioned.

FINDINGS:

I find that MassHighway's method of determining the single contract limit of a company for prequalification purposes must be rationally linked to the intent of M.G.L. c. 29, § 8B and applicable regulations.

I find that it is within MassHighway's Prequalification Committee's discretion and engineering judgement to consider which information of contractors to consider for establishing single contract limits.

I find that the decision of MassHighway's Prequalification Committee on Certification No. M-152-3 was reasonable and should be upheld.

RECOMMENDATION:

The appeal of MIG Corporation should be denied.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS HIGHWAY DEPARTMENT

SUFFOLK, SS BOARD OF PREQUALIFICATION APPEALS

In Re: KIEWIT CONSTRUCTION COMPANY	)

I. INTRODUCTION

On May 10, 1999 the Prequalification Committee of the Massachusetts Highway Department ("MHD") notified Kiewit Construction Company ("Kiewit") that Kiewit's right to bid MHD contracts had been placed "on hold." The Department's stated reason for that action was "the inordinate amount of time it is taking to complete" Kiewit's work on MHD Contract No. 95214, New Bedford/Fairhaven Bridge, Reconstruction of Route 6 over Acushnet River (the "New Bedford Bridge" or the "Project"). As demonstrated during a June 21, 1999 hearing before this Board of Prequalification Appeals, however, there is no basis for that action by the Prequalification Committee.

As shown during the hearing, Kiewit performed its work on the Project in a satisfactory manner, and re-opened the bridge on-schedule in April of 1996. Since that date, Kiewit has been engaged solely on a "time and materials" basis, under written MHD time extensions, all as a result of MHD design changes. Although the project itself is now three years beyond its original schedule and 50% over budget, those overruns were shown to have resulted from MHD design errors and changes. While MassHighway presented evidence of frustration about those cost and time overruns, the MassHighway was unable to demonstrate any basis for the conclusion that

Kiewit was responsible for those problems. Kiewit had no design responsibility for the bridge; its responsibility was simply to construct the bridge as designed by the MHD.

The evidence presented by Kiewit, on the other hand, clearly demonstrated that the time and cost overruns were caused by MassHighway and its engineers. Specifically, Kiewit demonstrated (1) that it had substantially completed its work and demobilized in 1996, (2) that since that time it has been engaged solely on extra work, (3) that the extra work consisted of MHD directed changes required due to design defects for which the MassHighway was responsible, (4) that Kiewit has received change orders paying for all of that extra work, (5) that MHD has repeatedly extended the contract time in order to allow Kiewit to perform this extra work, and has repeatedly stated in writing that the delays are not Kiewit's responsibility, (6) that none of the events complained of in the May 5th E-mail which precipitated this bid suspension were Kiewit's fault and (7) that other than vague complaints about Kiewit's responsiveness after Kiewit had completed its work and demobilized, there was no evidence of nonperformance by Kiewit, and certainly none which would justify suspension.

The evidence presented therefore provides no support for the allegation that Kiewit's work was unsatisfactory, and certainly no support for a conclusion that Kiewit's work was sufficiently unsatisfactory to justify suspension of its bidding rights. The suspension of Kiewit's bidding rights must therefore be vacated.

II. EVIDENCE PRESENTED BY MHD

A. TESTIMONY OF DAVID ANDERSON

Mr. David Anderson, MHD Deputy Chief Engineer and Chairman of the MHD Prequalification Committee, testified about the decision of the Committee to place Kiewit's bidding rights on hold, including the process by which that decision was made, the amount of

investigation performed by the Committee and the information used by the Committee in making that determination.

In that testimony, Mr. Anderson stated that the decision to place Kiewit's bidding rights on hold was based upon information received from the MHD District Office overseeing the New Bedford Bridge Project, and was prompted by a May 5, 1999 e-mail from MHD's Mr. Bernard McCourt. Mr. Anderson also stated that the decision was based upon historical concerns about the contractor's lack of attention to the Project, concern regarding a December, 1999 completion date, and the Department's belief that "strong action" was necessary to assure completion of the Project by October 31, 1999. Mr. Anderson could not, however, point to any one instance of negligence or bad conduct to justify the suspension of bidding rights, but instead relied upon Kiewit's "attitudinal behavior" in connection with MHD's extra work requests and directives. (Transcript at p.19-20.)

Mr. Anderson then authenticated a series of documents, marked as Exhibits 6 through 13, plus two documents not marked as exhibits. He explained that those documents demonstrated Kiewit's failure to properly attend to its duties on the project. Anderson noted, however, that none of those documents were used by the Committee in making the prequalification suspension decision, which was instead based upon general knowledge and understanding of the progress of the New Bedford Bridge.

Anderson also acknowledged that even these documents did not place blame on Kiewit for the numerous design and engineering problems which have plagued the project. In connection with one of those unmarked documents, Mr. Anderson noted as follows:

> "It was just another piece of correspondence raising the possibility that a lot of the problems we're experiencing out there are not necessarily just design related but also due to constructability issues."

(Tr. at p. 19). Overall, that statement was as close as MHD could come to blaming Project problems on Kiewit: the mere possibility that Kiewit may have been at fault, without any showing to counter the undeniable and crucial facts that (1) MHD replaced its designer due to design and engineering problems, (2) FHA refused to pay for the work due to the design problems and (3) that MHD approved millions of dollars of design change extra work orders to cure those problems.

Mr. Anderson testified that the suspension was based in part upon the number of bridge malfunctions in prior winters, along with the fact that the Project was heading into another winter of construction (Tr. at p. 14) No evidence was offered, however, to show that the bridge malfunctions were due to non-performance by Kiewit. As shown below, the evidence in fact makes clear that neither the bridge malfunctions nor the number or EWO's were caused by Kiewit.

On cross-examination regarding Mr. McCourt's May 5, 1999 e-mail, Mr. Anderson testified to the following:

- There was no formal investigation of the status of the bridge after the receipt of the May 5, 1999 McCourt e-mail. (Tr. at p. 44-45.)

- The three year schedule overrun noted in the May 5th e-mail resulted, at least in part, from causes which were not Kiewit's responsibility. (Tr. at p. 47.)

- The MHD had approved payment of all monies in the fifty percent cost overrun, without clearly determining who was at fault for the costs. MHD did not offer any evidence that Kiewit had any responsibility for those extra costs. (Tr. at p. 49-50.)

- The acceleration noted in the May 5 e-mail was not related to the costs at issue. (Tr. at p. 51.)

On issues other than the May 5, 1999 e-mail, Mr. Anderson testified on cross-examination as follows:

- With the exception of EWO 88, he had no direct knowledge of any work on which Kiewit was "lagging behind . . ." (Tr. at p. 54.)

- He had no knowledge as to whether MHD had ever asked for a schedule for EWO 88. (Tr. at p. 55.)

- The schedule extension to October 31, 1999 for EWO 88 was originally agreed in October of 1998, although the Department's approval for Kiewit to perform EWO 88 did not occur until several months later, depriving Kiewit of that amount of time toward the October 31 completion date. (Tr. at p. 53-54.)

On the subject of input from the contractor on the prequalification suspension decision, Mr. Anderson testified as follows:

- He did not ask Kiewit for any response to the May 5th e-mail of Mr. McCourt. (Tr. at p. 55-56.)

- There was no standard operating procedure for bid suspensions, as it was not done very often. (Tr. at p. 56.)

- The Department liked to have as much information as possible, but he nevertheless did not ask Kiewit for information about the allegations. (Tr. at p. 57.)

Mr. Anderson then was asked about certain specific instances of Kiewit's alleged failure to perform, as raised during the review of exhibits presented during his testimony. In that regard, he testified as follows:

- Although MHD's June 22, 1998 letter complained that the floor beam which was the subject of EWO 82 was a safety issue on which Kiewit's work could not be delayed, Anderson acknowledged that the Department may have taken as many as 9 ½ months reviewing Kiewit's pricing for the work on that floor beam, and that he had not performed any investigation as to that issue. (Tr. at p. 60-61.)

- Anderson indicated that the Committee's decision was based substantially on "collective memory", and on items such as bridge shutdowns and "all the panic that ensues" upon such bridge shutdowns (Tr. at p. 62.), without in any way showing that Kiewit bore any responsibility for those events.

- Anderson pointed out that he presently oversees approximately 500 jobs and therefore doesn't know all the details of this project. (Tr. at p. 62.)

- Anderson indicated that he had performed no investigation as to Kiewit's quality of work performance overall. (Tr. at p. 63-64.)

- Anderson acknowledged that on May 25, 1999, following the suspension of Kiewit's bidding rights, MHD issued new drawings for performance of new additional work by Kiewit, but that he was unfamiliar with the details of that new additional "eye bar" work. (Tr. at p. 67-68)

B. TESTIMONY OF MICHAEL MCGRATH

MHD next offered testimony through Mr. Michael McGrath, the construction contract manager at the MHD, and the secretary of the Prequalification Committee. Mr. McGrath identified Exhibit 13, a September 25, 1996 memorandum regarding a meeting with the Prequalification Committee about the bridge project. Mr. McGrath testified briefly about some of the issues raised in that meeting, and stated that no action was taken against Kiewit as a result of the meeting. (Tr. at p. 73-75.). On cross-examination, Mr. McGrath acknowledged that that Prequalification Committee meeting raised questions regarding bridge design issues, and that MHD's design engineer was replaced after that meeting. (Tr. at p. 76-77.)

C. DOCUMENTARY EVIDENCE SUBMITTED BY MHD

MHD introduced nine exhibits, consisting of letters, memoranda and e-mails between and within MHD, its designers and Kiewit. While those exhibits show some frustration at MHD regarding bridge failures and project costs and progress, and contain some complaints about Kiewit's responsiveness to MHD requirements, none of those documents identify Kiewit as the cause of any of the problems complained of, or identify any malfeasance by Kiewit which would justify the bid suspension at issue. Those exhibits, and an analysis thereof are as follows.

1-4.(Not Reviewed Here)

5. May 5, 1999 E-Mail of McCourt

Mr. Anderson testifies that this e-mail precipitated the Committee's suspension of Kiewit's bidding rights. The e-mail complains that Kiewit is lagging behind on project progress, but fails to mention that the only progress still required is performance of extra work required as a result of MHD design errors, which extra work Kiewit had only recently been direct to perform. The e-mail complains that no schedule has been received by Kiewit, but there was no evidence that any such schedule was ever requested. The e-mail also complains that the project is 50% over budget and three years late. Again, no evidence whatsoever is presented that Kiewit is responsible for this costs overrun or delay. Indeed, as shown during Kiewit's direct evidence, none of those cost or time overruns were caused by Kiewit.

6. June 18, 1998 E-Mail of B. McCourt

This e-mail complains that Kiewit ignored directives to repair a floor beam. As discussed below, however, despite MHD identifying this floor beam as a "safety issue", MHD took 9 1/2 months to review and approve Kiewit's drawings and pricing for this $40,000 item of work. Clearly, no delay on this issue is Kiewit's responsibility.

7. June 4, 1998 Memorandum of A. Bardow

This memorandum again addresses the floor beam, and questions whether the cracking was caused by construction activities. A close review of this document and of its attachment, however, makes clear that if the floor beam cracks were due to construction, that connection was merely due to the fact that construction was being performed on such an old bridge, not due to any malfeasance of Kiewit.

8. February 4, 1998 and March 4, 1998 MHD Letters

These letters complain that Kiewit has not responded to prior correspondence and has not expedited repairs to the gear reducer for the bridge. As made clear during the testimony of Mr. Geotz, the gear reducers failed after Kiewit had demobilized following substantial completion. Kiewit was paid on extra work orders to remedy the design and operational problems which led to these failures, and Kiewit did expeditiously respond to MHD's requests on this issue.

9. October 22, 1997 E-Mail of Bernard McCourt

This e-mail complains about Kiewit's suggestion that MHD use its own maintenance contractor to perform certain emergency repair work at the bridge, and complains that Kiewit may have not had sufficient staff available for this emergency repair. As later made clear in testimony by Mr. Gordon, this request for staffing occurred long after Kiewit had substantially completed its work and demobilized. There was no reason for Kiewit to have staff standing by at tax-payer expense on a T&M basis for this extra work. In addition, once MHD rejected Kiewit's proposal to have SPS do the work, Kiewit did provide the staffing required.

10. April 23, 1997 E-Mail of B. McCourt

This e-mail complains about Kiewit's alleged failure to promptly repair hydraulic pumps without a written extra work order. As was later determined at an administrative hearing, this was clearly extra work and therefore did require a written extra work order. In addition, the work was timely performed by Kiewit, as made clear in the testimony of Mr. Gordon, discussed below.

11. January 27, 1997 Memorandum of B. McCourt

This memorandum again complains of "continuing lack of response by the contractor . . ." Nothing in this exhibit even suggests, however, that the mechanical and electrical problems at issue were caused by Kiewit. In addition, although the memorandum complains that iewit is

merely sending its electrical subcontractor to the bridge to perform electrical repairs, that is what a general contractor is supposed to due for electrical problems, along with, of course, providing direction and supervision.

Mr. McCourt further complains that Kiewit "has sought to avoid responsibility for providing a functional product, choosing to focus on perceived design flaws or lack of accurate direction." This statement inexplicably ignores the fact these were not "perceived" design flaws, but were actual design flaws which caused the MHD to (1) replace its engineer, hiring a new engineer and purchasing a new design at taxpayer expense, (2) lose funding from the FHA due to design defects and (3) issue millions of dollars of extra work orders for re-design.

12. September 23, 1996 Memorandum of M. Delaney

This memorandum lists a series of bridge failures in April and May of 1996, but contains no evidence whatsoever that any of the problems resulted from any malfeasance by Kiewit. To the contrary, the hand written notes on this exhibit point out design errors in the gear ratio for the rotary cam limit switch, operator errors and other errors not Kiewit's responsibility. In addition, Mr. McLenithan's testimony, discussed below, shows that these failures were not caused by Kiewit.

13. September 25, 1996 McGrath Memorandum

This memorandum lists issues raised between MHD and Kiewit at a 1996 Prequalification Committee meeting. As discussed above, these provide evidence of an MHD inquiry regarding the bridge, but no evidence of any malfeasance by Kiewit.

III. EVIDENCE PRESENTED BY KIEWIT

A. KIEWIT REBUTTAL OF MHD EVIDENCE

Before presenting its affirmative evidence, Kiewit presented testimony by four witnesses to rebut MHD's contentions that Kiewit had failed to respond to MHD requirements during the course of the project. Those contentions were contained in a series of documents reviewed and discussed during Mr. Anderson's testimony, Exhibits 5 - 12 plus two unmarked documents, as discussed in part above.

The following is a summary and analysis of those MHD contentions, along with Kiewit's rebuttal evidence as to the issues raised in each of the MHD documents.

1. Brake Adjustments

A March 10, 1999 letter to MHD dated from Hardesty & Hanover ("H&H") was reviewed during Mr. Anderson's testimony, but was not offered into evidence. That H&H letter raised a question as to whether improper adjustment of the bridge brakes had contributed to a failure of the gear box. The H&H letter did not in any way state that Kiewit had improperly adjusted the brakes, but instead merely stated that "Hardesty & Hanover believes that improper adjustment of the brakes, not necessarily defective gauges, was the cause of gear box failure." Nevertheless, Mr. Anderson's testimony suggested that this letter was an example of one of Kiewit's failures to perform. (Tr. at p. 27-28).

In rebuttal to this testimony, Mr. Jeffrey Goetz, a Project Engineer and Field Superintendent for Kiewit, testified that the brakes at issue were installed in April of 1996 under the supervision of field representatives of the manufacturer of the brakes, and were adjusted at that time. In January or February of 1998, at the request of MHD, and again under the supervision of the brake manufacturer, Kiewit again adjusted the brakes. Both adjustments were

done in accordance with manufacturer's directions, and there was no basis for contending either that the adjustments were incorrect, or that incorrect adjustments caused the problems at issue. (Tr. at p. 83-85).

In addition, the H&H letter about the brake adjustment was not issued until March 10, 1999, and H&H had no opportunity to observe the original brake adjustments. Moreover, during the time between the brake installation, adjustments and the H&H letter, MHD, as owner and operator of the bridge, had ample opportunity to adjust those brakes, with or without manufacturer supervision. There was no evidence that any improper adjustment, if it existed, was Kiewit's responsibility. (Tr. at p. 83-85).

Finally, it is important to note that the H&H letter makes clear that a referenced Lichtenstein letter failed to address "gear reducer" and "control system" issues which H&H believed to have contributed the machinery failures which plagued the project, and which, as discussed below, were clearly the responsibility of MHD and its designers, and not Kiewit.

2. <u>Gear Reducer Failure</u>

Exhibit 8 contained copies of two MHD letters to Kiewit. In those letters, MHD complains that Kiewit was not responding promptly enough to repair issues regarding gear reducers on the bridge. Mr. Goetz testified about this issue, and explained that Kiewit had demobilized in 1996, after which there was a gear box failure in October of 1997. At that time, Kiewit was directed to return to the project site to remove the gear boxes, and to send them to the manufacturer to be overhauled. That work was clearly extra work, outside of the scope of the original contract, and MHD issued extra work orders to compensate Kiewit for these repairs. (Tr. at p.85-86).

Despite the timeliness complaints in Exhibit 8, Mr. Goetz testified that the gear boxes were sent out to the manufacturer as directed by MHD, and returned and reinstalled at the bridge by Kiewit as expeditiously as possible. (Tr. at p. 85-86). Other than generalized complaint about this issue, there was no evidence offered by MHD to the contrary.

3. Project Staffing For Winching Operation

Exhibit 9 was a 10/22/97 e-mail from Bernard McCourt which complained that Kiewit had been non-responsive and had inadequately staffed the bridge winching operation in October of 1997. Mr. Jeffrey Gordon, a Project Manager for Kiewit, testified about the issues raised in that exhibit. Mr. Gordon testified that in October of 1997, ten or eleven months after Kiewit had demobilized, Kiewit received an emergency call regarding problems with the gear boxes at the bridge. Mr. Gordon testified that, because Kiewit had completed its work and therefore did not presently have staff available at the bridge, he suggested that the MHD might be better off using SPS, MHD's maintenance contractor, especially since this was maintenance, not new construction work, and since SPS was already available to perform the work. When MHD declined this option, however, Kiewit did partially re-mobilize for this work. (Tr. at p. 89-90).

4. Hydraulic Pumps

Exhibit 10 contained a complaint by MHD that Kiewit had "refused to respond" to directives regarding repair of hydraulic pumps, "stating that they have completed all work and would require an extra work order. . ." The Department is not, of course, permitted to order a contractor to perform extra work except in writing, and Kiewit was well within its rights in requesting a written extra work order. Nevertheless, Mr. Gordon's testimony clearly showed that Kiewit was responsive to MHD on this issue, and that Kiewit did remove the pump at issue, and did ship it to the appropriate manufacturer for repair. Kiewit later received additional

compensation for that repair, which was determined to be extra work beyond the original contract's requirements. (Tr. at p. 90-91).

5. Temporary Heaters and Maintenance

Exhibit 11, an MHD memorandum of January 27, 1997, set forth MHD claims that Kiewit has not been responsive in connection with temporary heaters and other maintenance issues. Mr. Gordon testified that there was no lack of responsiveness, and that upon request by MassHighway, Kiewit did direct its subcontractor to install the required heaters, for which additional compensation was paid by MHD. Mr. Gordon also testified that the pump at issue was a back-up pump, that the entire system remained up and running despite MHD's complaints. (Tr. at p. 91-92).

Again, Mr. Gordon made clear that these repair requests were made after Kiewit had completed its work and demobilized. (Tr. at p. 94-95). Clearly, a contractor cannot reasonably be required to instantaneously respond to requests for additional work after it has completed its work and is merely awaiting project close-out by the Department. It was further noted that the Commonwealth's designer had refused to follow recommendations from MHD personnel regarding this hydraulic pump, and that it was the refusal of the Commonwealth's engineer to heed that advice that caused this problem. (Tr. at p. 97-98).

6. Floor Beam

Exhibits 6 & 7 both addressed issues arising from a cracked floor beam on the bridge. An unmarked June 22, 1998 letter then set forth MHD complaints that the floor beam crack was a safety problem requiring immediate repair. In Mr. Anderson's testimony, it was suggested that Kiewit had caused safety problems by delaying that repair, and that Kiewit may have contributed to the cracking by its own work. (Tr. at p. 20-21).

Hank Kelly, project sponsor for Kiewit, testified regarding this floor beam repair. Mr. Kelly described in detail the history of EWO 82, which provided additional compensation to Kiewit to perform that floor beam repair. (Tr. at p. 100-103). Mr. Kelly's testimony on this issue referred to the bar chart found at Tab N in Kiewit's Exhibit Binder, Exhibit 4 (hereinafter referred to as Exhibit 4-N, et. seq.). That bar chart showed that after the crack in the floor beam was discovered in April of 1997, Kiewit had promptly provided pricing for an extra work order to repair that beam. Instead of directing that this so-called public safety work proceed immediately, with or without agreed pricing, MHD failed to issue any order to Kiewit and failed to timely review Kiewit's pricing for a total of nine and one-half months. (Tr. at p. 100-103, Exhibit 4-N.) Clearly, the complaints regarding Kiewit's responsiveness upon this issue are without merit in light of these delays by the Department.

Exhibit 7, in turn, raised questions as to whether the floor beam crack was caused by construction activities. Mr. Kelly testified that, prior to seeing that exhibit on the day of the hearing, Kiewit was not aware of any claims that it was responsible for the crack. Mr. Kelly also testified that MHD paid Kiewit to repair the crack, clearly showing that MHD did not believe Kiewit to be responsible for the crack. (Tr. at p. 104).

A review of the language of Exhibit 7, however, along with its attachment, shows that, contrary to Mr. Anderson's testimony, there is not even a <u>suggestion</u> that a failure by Kiewit to properly perform had caused the crack. Instead, the letter indicates that the beam crack probably resulted merely from construction being performed on a very old bridge, and the fact that the old beam was fatigued as a result of the numerous stress cycles which it had suffered over its life. So, too, a HNTB report attached to Exhibit 4-I does not identify any cause for the bridge crack, and does not even raise the <u>possibility</u> that it was caused by any malfeasance by Kiewit.

7. Bridge Breakdowns

Finally, Exhibit 12 lists a series of nine bridge breakdown incidents. In Mr. Anderson's testimony, the inference was made that these breakdowns were somehow Kiewit's responsibility. Kiewit's John McLenithan, a Project Engineer, testified regarding these breakdowns, and made clear that none of those failures were Kiewit's responsibility. McLenithan testified that there were two main causes to several of the Bridge breakdowns, those being incorrect designs for both the rotary cam switch and the bridge gear boxes. (Tr. at p. 105.)

As to the first of those design problems, the rotary cam switch problem was discovered during testing immediately prior to the April 15, 1996 bridge opening. That flaw was that the specifications required a switch with an 800/1 ratio, whereas the actual requirement of the system, after re-engineering, was 1600/1. (Tr. at p. 106). This error was, without dispute, caused by the MHD's designer, Lichtenstein, and was even acknowledged in Liechtenstein's May 29, 1996 letter, Exhibit 4-5. That rotary cam switch was replaced at the Department's expense. (Tr. at p. 106-107). The second of those design problems, the gear box failure "resulted from the plugging of the motors due to the incorrect manual operation of the bridge." (Exhibit 4-X, MHD Executive Summary).

As to each of the nine items identified in Exhibit 12, Mr. McLenithan testified as follows:

- Item 1: Because the rotary cam switch was inadequate as designed, the Bridge had to be operated manually, and the MHD bridge operators failed to operate the bridge properly under the high wind loads which were present on April 16, 1996. MHD is responsible for operation of the bridge, and this was, therefore, not a Kiewit problem. In addition, no evidence was ever offered by the MHD to demonstrate that Kiewit caused this problem, only that the problem occurred. (Tr. at p.107-109)

- Items 2, 3 and 4: These failures all arose from the malfunctioning of barrier gates due to inadequate design. That design problem consisted of the specification of an asphalt surface on which heavy, wheeled gates rolled. Those gates cut into the surface of the asphalt and were therefore unable to properly roll in and out of position. These items were cured by an MHD design change which directed Kiewit to cut out the asphalt and replace it with concrete, for which Kiewit was paid additional compensation. This was therefore not a Kiewit problem. In addition, no evidence was ever offered by MHD that Kiewit caused the problem, only that the problem occurred. (Tr. at p. 109-111.)

- Items 5 and 6: These failures were hydraulic system and motor brake failures, and apparently arose from problems with manual operation of the bridge by MHD bridge operators and operator difficulty centering the bridge. (See Exhibit 12, handwritten notes of Michael McGrath). This was therefore not a Kiewit problem. In addition, no evidence was ever offered by MHD to show that it was caused by Kiewit, only that the problem occurred. (Tr. at p.111-112).

- Items 7, 8 and 9: These failures all arose from the gear boxes which were replaced twice at MHD expense. Specifically, the noises referred to in items 7 and 8, and the failed opening mechanism in item 9, all arose from gear box failures due to impact loading which was believed to have resulted from improper operation by MHD operators. Kiewit was paid for the additional work involved in replacing these gear boxes. This was therefore not a Kiewit problem. In addition, no evidence was ever offered by MHD that Kiewit caused this problem, only that the problem occurred. (Tr. at p. 112-113)

B. KIEWIT'S DIRECT TESTIMONIAL EVIDENCE

Kiewit then presented evidence through three witnesses, Mssrs. Jeffrey Gordon, Hank Kelly and John Testa. That evidence is discussed below.

1. Testimony of Jeffrey Gordon

Jeffrey Gordon, a Kiewit project manager for the New Bedford Bridge, testified about a series of issues, including the overall original contract price and work description, original MHD and Kiewit schedules, revised Kiewit schedules, problems with the drum girder, timely opening of the ridge and percentage completion by that opening date.

Mr. Gordon's testimony established the following facts:

- MHD's original schedule would have disrupted vehicular traffic for 20 months, but Kiewit's bid schedule was to expedite this work to reduce that disruption to 8 months, at no additional cost to the Commonwealth. (Tr. at p. 115-117.)

- Kiewit would have reduced traffic disruptions from 20 months to 8 months, but for the discovery of a latent site condition, that being a cracked "drum girder." MHD acknowledged that discovery to be a differing site condition and paid $700,000 and allowed a 3 month time extension. (Tr. at p. p. 117-119.)

- Despite the drum girder problem, Kiewit still opened the Bridge on time in April of 1996, in accordance with the original MHD schedule, and received an accommodation from the Department for their on time work. (Tr. at p. 119.)

- In April of 1996, when the Bridge was reopened to traffic, Kiewit was approximately 97-98% complete with its work, having performed over $15 Million Dollars worth of its $16 Million Dollar contract. (Tr. at p. 120-121.)

- Having substantially completed its work in April of 1996, Kiewit began demobilization. (Tr. at p. 120.)

2. Testimony of Hank Kelly

Mr. Hank Kelly, Kiewit's project sponsor, testified about the overall project schedule and value, the more serious design problems, the processing of the extra work orders, and the suspension of Kiewit's bidding rights.

Mr. Kelly's testimony established the following facts:

- Contract work was performed from January of 1995 through April of 1996, over approximately 16 months, while extra work has engaged Kiewit for 39 months, from April of 1996 through the present date. Exhibit 4-J, a bar chart, shows contract work in green and extra work in red. (Tr. at p. 122-124.)

- A full 78% of the change orders occurred after April of 1996, when the bridge was opened to traffic. Exhibits 4-H and 4-I, which list all of the project change orders, show the portion of the change orders which occurred before and after April 1996, and show the change orders which relate to design changes in the bridge's drive system. (Tr. at p. 122-124.)

- The major change orders which have occupied Kiewit since April 1996 have resulted from MHD design errors, none of which were Kiewit's responsibility. Those change orders, as shown on Exhibit 4-J, were as follows:

  - Rotary Cam Switch: 4/17/96 - 7/15/96: Failure of switch which governed automatic bridge opening and closing. MHD design specified an 800:1 gear ratio, while re-design showed a 1600:1 ratio was required. Remedied by MHD design change at MHD expense. (Tr. at p. 124-127.)

  - Gear Reducer Failure No 1: 4/28/96 - 8/2/96: Gear reducer teeth broke due to excessive torque, believed to be due to improper operation by MHD operations. (See Lichtenstein memorandum Exhibit 4-6, at p. 45, & 1: "It was agreed the proximate cause

of the reducer failure was excessive torques caused by improper operating procedures.") Kiewit repaired these gear reducers at MHD expense (Tr. at p. 127-132.)

- PLC: 6/13/96 - 9/22/96 - Bridge logic control was redesigned and modified at MHD's direction and expense. (Tr. at p. 132, 136.)

- Additional Training: 7/20/96 - 8/29/96 - Additional training for MHD bridge operators was required to avoid further bridge operator errors, at MHD expense. (Tr. at p. 132.)

- Twenty-four hour Standby Watch: 10/13/96 - 12/8/96 - Kiewit's electrical subcontractor was paid to have twenty-four hour crew on site to prevent or mitigate further bridge malfunctions due to design errors. (Tr. at p. 132-133.)

- Hydraulic Pump Failure: 1/7/97 - 2/28/97 - Pump failure due to water infiltration. MHD design error remedied at MHD expense (Tr. at p. 133.)

- Floor beam repair (EWO 82) 4/25/97 - 7/29/98. Cracked floor beam repaired by Kiewit at MHD expense. (Tr. at p. 101-103, 133), with substantial MHD processing delays.

- SCR Drive Change Order (EWO 88): 6/30/97-10/31/99 - Replacement of bridge drive system with new design, due to defective design, at MHD expense. (Tr. at p. 138-143.) , with substantial MHD processing delays.

- Gear Reducer Failure No. 2: 10/17/97-1/8/98 - Reducers fail again, remedied at MHD expense. (Tr. at p. 135.)

- Permanent Winch Operations (EWO 84): 2/2/98-3/31/99. Installation of permanent winch system, and entirely new bridge feature to operate bridge in event of shutdowns, at MHD expense. (Tr. at p. 136-138.) , with substantial MHD processing delays.

- Emergency Repairs: 12/24/98-2/16/99 Emergency repairs to hydraulics and electronics required due to equipment failures for which Kiewit was not responsible, and for which Kiewit was paid on a T&M basis. (Tr. at p. 136.)

No evidence was offered by the MHD to even suggest that Kiewit was responsible for any of these change orders. Although Mr. Anderson testified that "well, you know, with everything that goes wrong out there we try and figure out what the causes are. . . ", (Tr. at page 124), there was no evidence offered to even point fingers at Kiewit on these design error change orders.

One internal MHD memorandum, an "Executive Summary" regarding these problems (Exhibit 4-X), did raise questions at page 2 as to whether any of the problems are due to whether "the system as provided was deficient." The rest of that memorandum, however, shows that the MHD and its consultants were unable to identify any contractor fault, and instead identified only design errors and design changes.

Mr. Kelly then testified in detail about the lengthy approval processes for the EWO 82, EWO 84 and EWO 88. In that regard, his testimony established the following facts:

- Kiewit performed responsively on EWO 82, while the Department spent 9½ months reviewing pricing for this $40,000 change order. (Tr. at p. 101-103.) This testimony established that Kiewit was in no way at fault for the length of time this change order was in process.

- Kiewit performed responsively on EWO 84, while the MHD spent 6 months reviewing pricing, lost shop drawing submitted by Kiewit and further delayed the process, and delayed testing of the winch system installed as part of this change order. (Tr. at p. 136-139.) This testimony established that Kiewit was in no way at fault for the length of time this change order was in process.

- Kiewit performed responsively on EWO 88, while MHD spent 9 months reviewing pricing and 2 months preparing preliminary drawing for Kiewit. (Tr. at p. 139-143.) Kiewit then reviewed and priced this undisputedly extra work, to install an entirely redesigned bridge drive system.

- The currently approved remaining work of EWO 88 cannot be completed faster than the present schedule because of long lead equipment items which are in the process of being fabricated for installation at the Bridge. (Tr. at p. 143.)

- A time extension of one year was originally established to perform the work of EWO 88, from October 31, 1998 to October 31, 1999. MHD then failed to approve EWO 88 for 4 months, preventing Kiewit from performing that work as scheduled. (Tr. at p. 141-143.)

- Kiewit has recently been asked to price new work, being a substantial redesign and refabrication of eye-bars, estimated to cost approximately one million dollars. That work will probably extend the project schedule beyond the present October 31, 1999 completion date. (Tr. at p. 144-146.)

- The eye-bars at issue were replaced in their entirety as part of the original contract, but are now to be replaced once again due to design error by MHD's consulting engineers. Tr. at p. 145.)

Mr. Kelly then testified about the suspension process, as follows:

- On May 10, 1999 Kiewit attended a meeting of the MHD prequalification committee at which time it was told that its bidding rights have been placed "on hold". (Tr. at p. 150-151.)

- Kiewit was told that the action arose from scheduling of work at the New Bedford Bridge, due to the MHD's understanding that Kiewit's work was going to continue until December of 1999, and the fact that any work after October 31, 1999 was unacceptable to the MHD. (Tr. at p. 152-153.)

- Kiewit then conferred with its fabricators and subcontractors in order to determine whether the work could be expedited, and then prepared and submitted an expedited schedule showing completion of construction by October 31, 1999. (Tr. at p. 153.)

- Kiewit was not invited back to another meeting with the prequalification committee, but instead was merely given a letter stating that its prequalification remained on hold. Tr. at p. 154.)

- One of the changes in Kiewit's schedule was a requirement that MHD respond more expeditiously during the approval process, which was necessary in order to complete the work on time. (Tr. at p. 157.)

3. <u>Testimony of John Testa</u>

Finally, Kiewit offered testimony by Mr. John Testa, Kiewit's Division Manager and Vice President, in charge of Kiewit's work in New England, New York, New Jersey, Pennsylvania and Eastern Canada. Mr. Testa testified about Kiewit's bidding and work volume, its Massachusetts bid margins, its MHD construction volume, its Massachusetts staff, Kiewit's bidding and bonding capacity and Kiewit's reputation for excellence and commendations by numerous awarding authorities. Mr. Testa then testified about the New Bedford Bridge Project, its schedule and costs, the numerous change orders, the suspension of Kiewit's bidding rights and the impact of that action on Kiewit's operations.

Through this testimony, the following facts were proved:

- Kiewit bids approximately $1.5 Billion Dollars each month. (Tr. at p. 160.)

- Kiewit plans to bid an additional $150 Million Dollars of Massachusetts work during 1999. (Tr. at p. 160.)

- Kiewit has saved Massachusetts tax payers approximately $72 Million Dollars on low-bid margins over the past 5 years. (Tr. at p. 160.)

- Kiewit's MHD work volume in 1997, 1998 and 1999 was $65 Million, $141 Million and $151 Million, respectively. (Tr. at p. 160-161.)

- Kiewit received its annual prequalifications on April 26, 1999 to bid up to its single project bonding limit of $300 Million and its aggregate bonding limit of $5 Billion Dollars. (Tr. at p. 162.)

Mr. Testa then testified about Exhibit 5, the May 5, 1999 mail which precipitated the action by MHD in suspending Kiewit's bidding rights, as follow:

- The New Bedford job schedule has been out of Kiewit's control since Kiewit completed the original contract work. Since that time, the job has consisted solely of MHD ordered T&M changes, with only minor exceptions. (Tr. at p. 164.)

- Following the award of the contract, Kiewit did promise an accelerated schedule at no extra cost, and would have provided exactly what it promised, but for the differing site condition of the cracked drum girder, plus the other owner ordered changes. (Tr. at p. 165.)

- Although the McCourt e-mail complains that Kiewit has been on the job for 5 years, the last 3 years have consisted almost entirely of MHD design changes. During that time, Kiewit has rebuilt the entire bridge drive and electrical system of the bridge, as directed by MHD, albeit in a piece-meal fashion. Since April of 1996, Kiewit has been on the job solely due to MHD design changes. (Tr. at p. 166-167.)

- MHD never requested a written schedule for EWO 88, and never requested an October 31 completion date until the May 10 suspension meeting. (Tr. at p. 168.)

- MHD and Kiewit agreed in October of 1998 for a 1 year extension to perform EWO 88, through October of 1999. (Tr. at p. 168-169.), but then delayed four months in issuing approvals for EWO 88, preventing Kiewit from performing that new work in accordance with that schedule.

C. KIEWIT'S DOCUMENTARY EVIDENCE

Finally, Kiewit presented a notebook of Exhibits, marked as Exhibit 4, including tabs A-Z and 1-8, listed herein as Exhibits 4-A through 4-Z and 4-1 through 4-8. Those exhibits show that Kiewit was not responsible for the cost and time overruns, as discussed below.

4-A. MHD/Kiewit Contract

(Full Specifications Separately Submitted)

4-B. General Plan and Elevation

4-C. Bridge Photographs

(Separately Submitted)

4-D. Bar Chart: MHD v. Kiewit v. Actual Schedules

This exhibit shows the time savings allowed by Kiewit's construction schedule, despite the drum girder problem, and shows that the bridge was re-opened on time.

4-E. Kevin Sullivan Letter of April 15, 1996

This letter from MHD demonstrates that Kiewit did in fact complete its work on the bridge in a commendable and expeditious manner. In conjunction with evidence showing that all work performed after April 1996 was extra work, required as a result of design errors by the Commonwealth, this exhibit shows that Kiewit was not in any way at fault for the cost overruns or the delays on this project.

4-F. Lichtenstein letter of December 18, 1996

This letter demonstrates that the bridge was substantially complete in 1996. In the letter, MHD's original designer Lichtenstein states that "the bridge is presently operating in an acceptable manner." None of the remaining comments in the letter complain of any fault of Kiewit in connection with the construction of the bridge. Lichtenstein also recommends that the

Department accept the bridge, without in any way suggesting that Kiewit is at fault for any bridge problems.

4-G. <u>Parsons, Brinkeroff Report</u>

This report was commissioned by Kiewit and performed by Parsons, Brinkeroff, Quade & Douglas, Inc. Kiewit engaged Parsons to evaluate the original bridge design, to inspect the bridge equipment as installed, and to render opinions as to the cause of the problems. The Parsons report does not identify any construction problems, and instead identifies the following design errors as causing the bridge's operational problems:

- Although Kiewit did supply the gear reducers as specified by the contract, the gear reducer as specified by MHD was undersized, and did not even satisfy AASHTO capacity requirements.

- Although the brakes supplied by Kiewit were in accordance with the specifications, the brakes specified by MHD were not properly matched with the specified speed reducer and electric drive motor. The brakes are oversized and therefore provide tork which can damage bridge drive systems.

- The bridge control system provides no deceleration controls, which subjects the bridge mechanisms to excessive loading.

- There are no safety interlocks to prevent shock loads and stress reversals in the drive machinery.

- All of these items are contributing factors in the drive system machinery failures.

- It is "apparent that the machinery system components are mis-matched and not correctly sized for the application ..."

- The failure of the gearbox and speed reducers is a result of repeated overloading and stress reversals resulting from these design deficiencies.

- The internal gearing of the speed reducer is the weakest link of the drive train.

4-H. **Change Order Summary**

This summary shows that $6.3 million or 76.7% of the change orders were for the bridge drive system.

4-I. Change Order Pie Chart

This pie chart shows (i) that 78% of the change order work occurred after April, 1996, when Kiewit otherwise was ready to demobilize and (ii) that 76.7% of the change order work was for bridge drive design problems, clearly not Kiewit's responsibility.

4-J. Bar Chart: Contract v. Extra Work.

This bar chart shows contract work in green and extra work in red. This exhibit shows 16 months of contract work and 39 months of extra work, clearly identifying owner generated change orders as the reason why Kiewit is still on this job, three years after substantial completion.

4-K. Kiewit Percentage Completion Chart w/ 5/96 Requirement

This exhibit shows Kiewit's percentages of completion from May 4, 1996 through May 22, 1999. This shows 97% completion by the end of the May 4, 1996 work period. This exhibit also shows that since February of 1997, less than $25,000 of contract work has been performed, while millions of dollars of extra work have been performed.

4-L. Extra Work Order 84

This exhibit is the Change Order for the permanent winch system. The EWO documents show that the purpose of this work is,

> "to provide for a backup system for operation of the bridge until such time as the drive system modifications, as proposed by Hardesty and Hanover, are completed and also to serve as a back-up to the drive system if needed in the future ..."

It is clear from this document that EWO 84 is new work required as a result of design defects and changes. This exhibit also shows the one-year period during which this work was being proposed, reviewed and performed to be a time overrun which is in no way due to Kiewit's fault.

4-M. Extra Work Order 88

This exhibit is the change order for the redesigned, new bridge drive system. This EWO is clearly for the purpose of installing an entirely new electrical and mechanical system known as a SCR drive at the bridge, and is not the responsibility of Kiewit. This exhibit also shows that EWO 88 was not approved until February 23, 1999, despite the fact that Kiewit's time extension to perform this work through October 31, 1999 was established four months earlier.

4-N. Bar Chart: Processing and Perform. of EWO 82,84,88

This bar chart shows the time sequences for EWO #82, #84, and #88. This bar chart shows the extraordinary delays caused by MHD reviewing, processing and losing Kiewit pricing and shop drawing submissions. This chart makes clear that Kiewit's presence on the job three years after the bridge was reopened to traffic results from owner generated design changes and design errors, and from the Department's unhurried approach to processing change orders.

4-O. Time Extension Orders w/ McCourt Letters

This exhibit consists of five time extension document packages, each under cover of a letter of Bernard McCourt. These letters all include admissions by MHD that Kiewit has not been in any way at fault in connection with the lingering work on this project. Specifically, these letters contain the following statements by Mr. McCourt:

- November 25, 1996: "**The contractor** has performed his work expeditiously and skillfully...**would have completed** the work in the time specified ... **but for extra work orders". . . "This delay has occurred without the fault or negligence of the**

contractor." (emphasis added).

- March 31, 1997: "**The contractor would have completed** the work in the time specified **but an on-going design review** by Hardesty and Hanover, Consultant/Engineers, may result in additional work for modifications to the newly installed bridge operating system. ... **This delay has occurred without the fault or negligence of the contractor.**" (emphasis added).

- May 7, 1997: "**The contractor would have completed** the work in the time specified **but an on-going design review** by Hardesty and Hanover, Consultant/Engineers, may result in additional work for modifications to the newly installed bridge operating system. ... **This delay has occurred without the fault or negligence of the contractor.**" (emphasis added).

- February 11, 1998: "**The contractor would have completed** the work in the time specified **but an Extra Work Order is to be processed** for modifications to the newly installed bridge operating system." (emphasis added).

- November 12, 1998: "Extra Work Order #84 was approved for the installation of a permanent cable winch system for operation of the bridge. Also, the contractor has submitted a price for extra work for the installation of an SCR drive system for operation of the bridge. ... **This delay has occurred without the fault or negligence of the contractor.**" (emphasis added).

These letters make clear that Kiewit has not been in any way at fault in these delays, and that the delays have arisen from continuing engineering work and changes being generated by the Department. Although Mr. Anderson, in his testimony, suggested that these were “form letters”, their language in most cases is not “form letter” language. Moreover, form letter or not, these official records of the Department are issued for an official propose, whether to obtain FHA funds or otherwise, and cannot merely be disregarded or withdrawn at the Department’s convenience.

4-P. <u>ENR Excerpts</u>

This excerpt from *Engineering News Record* shows Kiewit's position as a leading national contractor.

4-Q. Commendation Letters

This exhibit contains a series of commendation letters from the Central Artery Tunnel Project, the MBTA and the Executive Office of Transportation and Construction. These letters commend Kiewit's outstanding performance on Massachusetts construction projects. These letters overwhelmingly demonstrate that, absent more than the vague, conclusory and easily rebutted complaints about Kiewit's responsiveness on this Project, Kiewit should not be prevented from bidding in Massachusetts.

4-R. April 26, 1999 Kiewit Prequal. Certificate

This exhibit is a copy of Kiewit's pre-qualification certificate, and shows its bonding and bidding capacities of $300 million for single projects and $5 billion for aggregate, in 14 qualified categories of work.

4-S. MHD Suspension Notice to Kiewit

This exhibit is the suspension notice generated by the MHD Prequalification Committee, complaining about Kiewit's schedule performance and noting the Department's desire to have the work completed by October 31, 1999.

4-T. Kiewit Response to MHD Suspension Letter

This exhibit includes a detailed plan which satisfies the concerns raised in the May 10th suspension Letter, showing that construction work will be complete by October 31, 1999.

4-U. MHD Response Letter of May 18, 1999

This letter states that Kiewit's bidding rights will remain on hold until the project is finished. As made clear during the hearing, this constitutes an indefinite suspension of Kiewit's bidding rights, and sets forth no specified manner in which Kiewit, by revising its schedule, can avoid this suspension. This is particularly true because MHD continues to propose new work

which will take many months to complete.

4-V. Kiewit Appeal Letter

This exhibit sets forth the basis of Kiewit's appeal of the MHD suspension.

4-W. August 1l, 1996 McCourt Letter to Broderick

In this letter, with its attachments, MHD clearly admits the existence of design problems which are its responsibility. This exhibit includes the following statements on these issues:

- August 1, 1996, McCourt letter: "As you are aware, following the failure of the gear reduction units, a review by **an independent consultant, Hardesty and Hanover, found 'weaknesses in the design, including basis incompatibility between the control and drive system'.** The interaction between a crane drive ... and the PLC ... control was questioned as well as the ability of the control system to prohibit movements which could damage the bridge. ... There still remains a lack of confidence in the functioning of the bridge." (emphasis added)

- July 25, 1996 Memorandum of William R. Geary: "Kiewit Company and Brewster Electric Company have, in my opinion, installed the required equipment, and they still can not make this drifting stop past fully closed."

- July 25, 1996 Memorandum of William R. Geary: "I am trying to address these items as they come up but every time I do there is another item to be applied to the system, rotor resisters, limit switches, relays and on and on and on. **When is this going to stop? How many more items can be added"**(emphasis added)

- July 25, 1996 Memorandum of W. Ferry, Bridge Operator, listing numerous operational problems with the new bridge design. Mr. Ferry states as follows: "So far the old system was superior in positioning the bridge ... certainly the old archaic system of just mechanical controls and relays would have done just as good of a job as this if not better, at much less a cost to the taxpayers. ... **of course, we should have turn of the century technology in this bridge, but please lets make it the right century."** (emphasis added)

- August 1, 1996 Memorandum from Clifford Chausse to Gil Alegi: **"I understand Kiewit's desire to end the obligation at this site.** However, my conversations with William Ferry, Gregory Wood, Paul Jodoin, William Geary along with perusal of correspondence from Kiewit and Lichtenstein leave me with serious concerns on the ability of the bridge to perform effectively. All individuals concerned indicate they see a high potential for failure of the operating system leading to mechanical failures. (emphasis added)

4-X. MHD Executive Summary

This October 23, 1996 MHD internal memorandum is an "Executive Summary" and sets forth the Department's conclusions as to the nature of problems the bridge. This memorandum identifies the basic problem as "the inappropriate use of advanced technology, and that the Department "does not have this capability in-house" for diagnosis of incorrect operational malfunctions ..."

This executive summary then states that the Department is "not sure" if the system as specified was defective or if the system as provided was deficient, and proceeds to "systematically sort through these categories in an attempt to isolate the root problem." The memorandum then reviews the numerous project problems, but does not identify any malfeasance by Kiewit. The memorandum states that "it appears reasonable to assume that no party is completely faultless" (page 4), and that funds are being withheld from payment to Kiewit to force the parties to work together to resolve operational problems, but does not even contain a suggestion as to possible errors by Kiewit in performing the work at issue. Clearly, if there were such errors, MHD would have identified them in this report.

4-Y: June 11, 1997 Memorandum of Bernard McCourt

This memorandum contains Mr. McCourt’s statements of the "need to bring H&H, Link and Kiewit back into the picture before we experience a major outage at this site." This makes it clear that Kiewit was done with its work, and that MHD understood that Kiewit was done with its work, and was merely continuing to hold Kiewit on the job to cure design and operational problems which were not Kiewit's responsibility.

4-Z. January 13, 1999 MHD E-Mail

This e-mail from Alex Bardow, forwarded by David Anderson to William McCabe, clearly identifies continuing bridge problems, including additional costs for work already completed by Kiewit which must be redesigned and replaced, and shows the type of disorganized and piecemeal engineering which has plagued the project, none of which is Kiewit's responsibility.

This e-mail clearly identifies for Mr. Anderson the fact that Kiewit was not at fault, and should have led Mr. Anderson to inquire further into Mr. McCourt's May 5 1999 e-mail before acting with the Pre-qualification Committee to suspend Kiewit's bidding rights. The memorandum states in pertinent part as follows (emphasis added):

"The thing that I am most concerned about in tacking on additional work is that we do not repeat the mistakes that were made in addressing the problems with the original Lichtenstein operating system. At that time, as problems manifested themselves the PLC system was modified piecemeal, until it was such a patchwork of revisions that no-one really understood what was going on and, potentially some of the changes could have been conflicting with other, non-modified parts of the operating system, thereby contributing to the unreliability of this system ... at least now, with the H&H system, we once have a coherently designed system. ... If [the new] changes can conflict with their system design ... we will have to weigh the potential benefit of having these additional improvements versus the additional delay time of having H&H redesign their system, not to mention the added cost both in their fee as well as Mass Highway having to eat components that Kiewit may have already bought ..." (emphasis added)

4-1 May 5, 1999 Bernard McCourt E-mail

This exhibit, already separately admitted as Exhibit 5, contains complaints about Kiewit's performance on the project which are without basis and fact. Evidence presented throughout the hearing shows that the cost and time overruns at issue, along with the continual work on EWO #88, were caused by the Department and not by Kiewit.

4-2. May 27, 1997 FHA Letter Re Design Defects

This Federal Highway Administration letter makes clear that numerous change orders on this bridge resulted from design errors, not from any act or admission of Kiewit.

4-3. April 22, 1998 MHD Letter Re Design Defects

This MHD letter to Lichtenstein makes clear that MHD believes that Lichtenstein design errors have caused the problems on this bridge.

4-4. May 17, 1996 MHD Memorandum Re Design Errors

This memorandum from Alex Bardow to William McCabe of MHD, with its attached a May 17, 1996 Hardesty and Hanover letter, identifies design errors, along with short and long term recommendations for redesign work, to cure existing design weaknesses. Neither of these documents identify any malfeasance by Kiewit.

4-5. May 29, 1996 Lichtenstein letter to MHD.

This letter includes an admission by Lichtenstein that it specified an "incorrect gear ratio" for the "rotary cam limit switch." The letter also questions whether damage to the system has been caused by improper bridge operation, but does not even accuse Kiewit of any malfeasance.

4-6. June 3, 1996 Lichtenstein Meeting Minutes

This memorandum records the meeting held among MHD, Hardesty & Hanover, Lichtenstein and another MHD consultant to identify problems and solutions for the bridge.

Among other things, it is concluded that certain design modifications were necessary and appropriate, and that "improper operating procedures" caused some of the gear reducer failures. Despite the fact that Kiewit was not even present at this meeting to defend itself, there are no allegations that any of the design or operation problems were Kiewit's responsibility.

4-7. Kiewit Employee List

This exhibit is a list of Kiewit's northeast district employees as of June 14, 1999 showing the distribution of Kiewit's forces on projects including the New Bedford Bridge.

4-8. Kiewit MHD/CAT Project Volume

This exhibit shows Kiewit's total job volume for MHD and CAT in 1997, 1998 and 1999, showing the volume of the New Bedford Bridge as opposed to the other CAT and MHD projects on which Kiewit is engaged.

IV. ISSUES OF LAW PRESENTED

1. The action of the MHD Prequalification Committee in placing Kiewit's prequalification "on hold" is, in effect, an indefinite suspension of Kiewit's bidding rights. A contractor's reputation, livelihood and ability to conduct its business, however, is a protected liberty interest. Dairy Products, Inc. v. Secretary of Defense, 631 F. 2d. 953, 961 (D.C. Cir. 1980).

2. Suspension of bidding rights can have a devastating effect on a contractor's reputation, and can permanently damage its business. Such a suspension of a contractor's bidding rights is therefore an extraordinary remedy which should be rarely imposed, and which cannot be imposed without due process, without good cause and without substantial evidence. See Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252, 1258-59 (2d Civ. 1975); Art-Metal USA, Inc. v. Solomon, F. Supp. 1,4-5 (D.D.C. 1978).

3. The purpose of suspending a contractor from bidding is to protect the public from a contractor who lacks integrity or responsibility. Opinion of the Attorney General, July 12, 1984. Suspension is a sanction which should not be used to punish a contractor to improve unsatisfactory performances, or to compel a contractor to improve performance. See, e.g., Shane Meat Co. v. Department of Defense, 800 F.2d 334, 338 (3rd Cir. 1988) ; Steven D. Gordon, "Suspension and Debarment from Federal Programs," 23 Pub. Cont. L.J. 573, 581 (1994).

4. Instead, contractual remedies are available to an owner if the contractor does not perform satisfactorily. If a contractor has not satisfactorily performed, those remedies include withholding payment or retainage, partial or total termination, negative evaluations, liquidated damages, deletion of work, and supplementation of work forces.

5. Unless a contractor has a poor or unsatisfactory record of performance on a substantial portion of its work on various MHD contracts during the relevant period, however, the extraordinary remedy of suspension should not be used.

6. MHD regulations allow it to suspend bidding qualifications if a contractor's past or current performance on a project is "unsatisfactory". No fair consideration of the New Bedford Bridge project can, however, in any way justify the Committee's alleged conclusion that Kiewit's performance has been at all unsatisfactory, and certainly not a conclusion that Kiewit's performance has been so unsatisfactory as to justify suspension.

7. In turn, such a conclusion must be supported by substantial evidence. Whether under statute or common law, substantial evidence is necessary to support administrative action. See, e.g., New Boston Garden Corp. v. Board of Assessor of Boston, 383 Mass. 456, 466 (1981) (quoting Boston Edison Co. v. Board of Selectmen of Concord, 355 Mass. 79, 92 (1968) and L.L. Jaffe, Judicial Control of Administrative Action 598 (1965).

8. Here, there is no substantial evidence to support the Committee's decision. While the MHD's May 10, 1999 letter states that it is placing Kiewit's bidding rights "on hold" due to "the inordinate amount of time it is taking to complete" work on the New Bedford Bridge, the following facts regarding the scheduling of that work cannot credibly be disputed:

(a) Kiewit did open the bridge on time,

(b) Kiewit was commended in writing by the MHD for that performance,

(c) Kiewit has, for the past two and one half years, only been working on new work required by MHD's engineers to cure engineering problems which were MHD's own responsibility,

(d) Kiewit is receiving additional compensation for that extra work,

(e) Kiewit has received MHD time extensions to do the work, and is therefore still on schedule, and

9. No fair consideration of these facts can lead to the conclusion that Kiewit was the cause of any scheduling problems on the Project. Moreover, even if someone could conclude that Kiewit were somehow at fault for any scheduling problems on this Project, they could in no way fairly conclude that Kiewit's alleged fault was of sufficient magnitude to justify a finding that Kiewit not be permitted to bid new MHD work.

10. Not only can Kiewit not be faulted for its performance on the New Bedford Bridge, but its reputation and performance on other projects must be considered in determining its eligibility to bid on future work. Here, Kiewit's recent project history includes resounding praise for work by Kiewit on numerous projects, including work on the Central Artery Tunnel Project, a project owned by the MHD. For example, by letters dated January 21, 1999 and May 26, 1999 regarding the new Broadway Bridge, Kiewit is commended for its "hard work and dedication" for the "ahead of schedule grand opening of the New Broadway Bridge…", and

Kiewit's work is referred to as "a testament to the principles of partnering" in construction, "a monumental success…" and "a lasting testimony for future generations…"
See Exhibit I.

V. FINDINGS

Kiewit performed its work on the New Bedford Bridge in an exemplary manner, completing the work on time and minimizing disruption to vehicular traffic, despite numerous design changes by the Department, and despite a 50% cost increase, almost all of which occurred after the bridge was substantially complete. Clearly, this is not "unsatisfactory" performance, and provides no basis to ignore Kiewit's proven abilities and accomplishments, and to deprive both Kiewit of its right to bid and the taxpayers of the benefit of Kiewit's work.

During the course of the June 21, 1999 hearing, no evidence was presented by MHD to justify its suspension of Kiewit's bidding rights, or to demonstrate that any of the reasons for that suspension, as set forth in Mr. McCourt's May 5, 1999 e-mail and in the May 10, 1999 suspension notice were valid. To the contrary, the evidence presented showed Kiewit completing its work on a timely basis, but being compelled to continue working for three additional years, not as a result of any wrongdoing, but as a result of poor engineering by the Department's consulting engineers.

While the evidence offered by the Department showed frustration at the extreme cost and time overruns of this project, the Department introduced no evidence whatsoever that Kiewit was to blame for these problems, and no basis to suspend Kiewit's rights to bid contracts to the Massachusetts Highway Department. Kiewit performed the work on schedule, and has remained MHD's contractor since that time solely to perform work made necessary by MHD design

problems. There is no evidence to support a finding that Kiewit's work on this project justifies the Committee's action. That decision must therefore be vacated.

VI. RECOMMENDATION

Kiewit Construction Company's prequalification with the Massachusetts Highway Department should be restored.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

APPENDIX C-1

DECISIONS/RULINGS

Design Contract Appeals

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: May 16, 1996

RE: Board of Contract Appeals

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

CONTRACTOR: **H. W. Lochner, Inc.**
CONTRACT #: **88715**
CITY/TOWN: **Beverly/Salem**
CLAIM: **Extra work in the amount of $108,549.00.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, MAY 22, 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. Blundo, Dep.Ch.Eng,Hwy.Eng.
Secretary's Office
P.Patneaude, Mgr.Eng.Exp.
Steve O'Donnell, Contr.Adm.
Alex Bardow, Br. Eng.
Ned Corcoran, Ch. Counsel
Beth Pellegrini, Audit
Frank Garvey, Dir.Fin.Affairs.

H.W. Lochner, Inc.
470 Atlantic Ave.
Boston, MA 02210

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 **H.W. LOCHNER, INC.**, 470 Atlantic Avenue, Boston, MA 02210, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, MAY 22, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

H. W. Lochner, Inc. (the Consultant), aggrieved by the Massachusetts Highway Department's (the Department) failure to pay for alleged extra work in the amount totaling $108,549.00 on Contract #88715, appealed to the Board of Contract Appeals.

Contract #88715 (the Contract) was for the design to replace Bridge No. B-11-4=S-1-12 along a new alignment carrying the new Bridge Street Bypass across the Danvers River between the Cities of Salem and Beverly.

The Contract was awarded by the Board of Commissioners on June 24, 1988, Item #50. The Contract is dated June 29, 1988. The initial contract completion date was July 11, 1992. The Board voted an addendum to the Contract on April 8, 1992, Item #12 which extended the completion date to June 30, 1995 and increased the maximum obligation by $200,000.00 to a "not to exceed" figure of $1,693,330.00.

A hearing was held on December 6, 1994. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
John Driscoll	Deputy Chief Counsel
Robert Lapsley	Project Manager - MHD
Steven Walsh	Audit Unit - MHD
Steven Berlucchi	H. W. Lochner
Edward Mahoney	H. W. Lochner

Entered as exhibits were:

Exhibit #1.....Contract #88715
Exhibit #2.....Statement of Claim

A post hearing submission was requested of the Consultant, but due to turn over at the Consultant's office, was not submitted for over seven months. All submissions are now in and are a part of the file.

FACTS PRESENTED:

All Consultant claims are based on an agreed statement of fact. The areas of work outside of the scope of the original contract and

the agreed upon man hours are as follows:

Task (Highway)	Hours		Total
1. Flush Island @ Front, Cabot & Rantoul Streets	80	-	80
2. Parking Under Bridge			
· Geometric & Grading Calculations	15		
· 2 Additional Mylar Drawings	66		
· 1 Additional Cross-Section Sheet	18		
· Drainage Modifications	6		
· Quantity Estimates	9		
· Revisions to Striping Plan & Typical Section Sheet	6		
	120	-	120
3. Coordination with MHD Environmental Consultant			
A. Environmental Permits			
· Research & Furnish Data	32		
· USCG Permit	36		
· Beverly Conservation Commission Responses	52		
	120	-	120
B. Memorandum of Agreement	220	-	220
4. Expanded Scope of Landscaping Work due to MOA & Coordination with other Plans	20	-	20
5. Alternate Design Schemes for Neckdown @ Front and Cabot Streets			
· Develop 8 schemes	20		
· Revise 12 mylar drawings to incorporate final scheme	30		
· Calculations	16		
· Drainage, Utility & Grading Impacts	12		
· Quantity estimates	16		
	94	-	94
6. Incorporation of Mass. Electric Conduits and Manholes into Plans, Special Provisions & Estimates	90	-	90
Task (Structural)			
1. Seismic Redesign	800		
2. Coordination with DRC Consultants, Inc.	160		

3.	Edwards & Kelcey Interfacing	0		
4.	Mass. Electric Company Interfacing	60		
5.	Extra structural Submissions & Responses	140		
		1,160	-	1,160
	Total Hours:			**1,904**

The man hours (1904) were agreed to both at the hearing on December 6, 1994 and at a prior negotiating session on August 24, 1994. For a more detailed analysis of the task performed, I refer the Board to exhibit #2.

FINDINGS:

Massachusetts General Laws (M.G.L.) c. 29, § 29A "Rules and Regulations regarding employment and compensation of consultants; forms; contracts; payments; restrictions" governs all "03" consultant contracts.

I find that this Contract is an "03" consultant contract.

Pursuant to authority granted by M.G.L. c. 29, § 29A, the Executive Office for Administration and Finance has issued Administrative Bulletins regarding "03" contracts. At the time of award of this Contract, Administrative Bulletin 88-1 [1] was applicable to this Contract.

I find that the Consultant performed the extra work alleged in this appeal.

I find that no approved request for the Consultant's extra work was filed with the Comptroller.

I find that Administrative Bulletin 88-1, Section 6.0 Contract Approval Requirements, at subsection 6.4 Comptroller's

[1] Administrative Bulletin 88-1, § 9.0 Effective dates provides in part:

> These regulations will supersede the provisions of Administrative Bulletin 82-1 for Contracts, renewals, extensions or modifications on or after July 1, 1988.

Responsibilities prohibits payment for extra work performed prior to a Consultant Approval form being filed with the Comptroller.[2] I find that no Consultant Approval form was filed with the Comptroller for the extra work at issue in this appeal.

Any current attempt to execute a Contract amendment or modification for the extra work performed would be subject to 801 CMR 20.00, (Administrative Bulletin 93-4) which states at 20.01(3):

> "801 CMR 20.00 shall be effective on April 23, 1993 and shall supersede all prior regulations under 801 CMR 20.00 and Administrative Bulletins 88-1, 88-2, 90-3, 90-7 and 92-5" (emphasis added).

801 CMR 20.08(1) Contract Processing Procedure states:

> (1) No payments shall be made prior to the date the approved SR attached to the executed Contract or certified copy thereof, including any applicable attachments, has been filed with the Office of the Comptroller. All encumbrances should be at "PENDS" status in the Suspense File (SUSF) in MMARS prior to filing the Contract. For the purposes of 801 CMR 20.00 the time of filing shall be the date the completed SR/SC and the executed Contract, or certified copy thereof, including any applicable attachments, have been approved by the Office of the Comptroller, which shall be indicated by "DONE" status in the Suspense File in MMARS.

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[2] Administrative Bulletin 88-1, Subsection 6.4 Comptroller's Responsibilities, at 6.42 provides:

> No payment shall be made, nor any obligation for payment incurred, by the Commonwealth on account of any service rendered prior to the date upon which the approved Consultant Approval form therefore is filed with the Comptroller...A copy shall be considered to be "filed" with the Comptroller ... when it is delivered to the office of the Comptroller's Division or when the Secretary signs and dates the Consultant Approval form and his/her approval is electronically entered into MMARS (whichever is earlier) (emphasis added).

801 CMR 20.09 (1) (a) further states:

> 20.09 Amendments, Renewals and Extensions
>
> (1) Amendments.
>
> (a) An Amendment or change to a Contract which has been filed with the Office of the Comptroller must be made in writing, must reference the original encumbrance document identification number, and shall not be effective until approved and filed pursuant to the provisions of 801 CMR 20.08.

I find that 801 CMR 20.08 (1) and 801 CMR 20.09 (1) (a) prohibits payment to the Consultant of the extra work alleged in this appeal.

If alternative means of funding could be provided for the extra work performed by the Consultant, I find that the Consultant's agreed upon total of $93,595.00 is a fair and accurate reflection of the extra work costs to the Consultant.

RECOMMENDATION:

The appeal of H. W. Lochner, Inc., on Contract #88715 should be denied because M.G.L. c. 29, § 29A and applicable Administrative Bulletins prohibit payment to the Consultant for the extra work performed prior to a Contract Approval Form being filed with the Comptroller.

If alternative means of funding could be provided, the Consultant should be paid $93,595.00 for the extra work performed.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: June 7, 1996

RE: Board of Contract Appeals

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

CONTRACTOR: **A.G. Lichtenstein & Assoc., Inc.**
CONTRACT #: **90216**
CITY/TOWN: **New Bedford/Fairhaven**
CLAIM: **Extra Work in the amount of $29,000.00**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, JUNE 12, 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
J. Blundo, Dep.Ch, Eng.Hwy.Eng.
Secretary's Office
Paul Patneaude, Mgr.Eng.Exp.
Ned Corcoran, Ch. Counsel
Steve O'Donnell, Contr. Adm.
Beth Pellegrini, Audit
Frank Garvey, Fisc. Mgmt.

A.G. Lichtenstein
& Associates, Inc.
12 Irving Street
Framingham, MA 01701

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.G. LICHTENSTEIN & ASSOC., INC.**, 12 Irving street, Framingham, MA 01701, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, JUNE 12, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

A. G. Lichtenstein & Associates, Inc. (the Consultant), aggrieved by the Massachusetts Highway Department's (the Department) failure to pay for extra work in the amount totaling $29,000.00 on Contract #90216, appealed to the Board of Contract Appeals.

Contract #90216 (the Contract) was for the design and preparation of complete contract plans, specifications and estimates for the rehabilitation of Bridge No. F-1-2=N-1-6, Route 6 over the Acushnet River in New Bedford and Fairhaven, and all required approach work.

The Contract was awarded by the Board of Commissioners on June 6, 1990, Item #11. The Contract is dated September 18, 1990. The initial contract completion date was June 30, 1992. The Board voted several addenda to the Contract extending the completion date to December 31, 1996.

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

Peter Milano	Chief Administrative Law Judge
Dean Kalavritinos	Chief Counsel's Office
Paul Blair	Branch Office Manager, Lichtenstein
Joseph Izzo	Project Manager, Lichtenstein
Paul Patneaude	MHD – Expediting

Entered as Exhibits were:

Exhibit #1.....	Contract #90216
Exhibit #2.....	Statement of Claim
Exhibit #3.....	Memo from Patneaude to Chief Adm. Law Judge dated 1/11/95
Exhibit #4.....	Memo from Director of Audit Operations to Chief Adm. Law Judge dated 8/16/95
Exhibit #5.....	Letter from Consultant to Ross Dindio, Chief Engineer dated 5/5/94
Exhibit #6.....	Letter from Claimant to Paul Patneaude, Expediting dated 9/13/94

The hearing was held open until the Audit Section could submit its report. The audit report dated April 29, 1996 is attached hereto and made a part hereof and marked Attachment I.

FACTS AND ISSUES PRESENTED:

As the audit report reflects there is agreement between the Department and the Consultant that $29,000.00 is owed on this Contract.

Lichtenstein was required to expend additional funds in order to complete the work on a significantly accelerated schedule, at the Department's request. The accelerated schedule had not been anticipated, and in order to meet this revised accelerated schedule and complete all the previously defined Extra Work Tasks, Lichtenstein was required to place into service more expensive personnel and implement the use of extensive overtime. A second factor which also significantly contributed to expenditure of additional funds was the delay in award of the Construction Contract on the subject project. This delay resulted in a need to update the Contract Documents on numerous occasions to satisfy numerous Department comments/changes which have been developed during over more than a year of review and to also keep current with changes in Item Specifications and new technological developments (i. e. isolation bearings, etc.). Contract #90216 does not have any remaining funds available to compensate the Consultant for this work.

FINDINGS:

Massachusetts General Laws (M.G.L.) c. 29, § 29A "Rules and Regulations regarding employment and compensation of consultants; forms; contracts; payments; restrictions" governs all "03" consultant contracts.

I find that this Contract is an "03" consultant contract.

Pursuant to authority granted by M.G.L. c. 29, § 29A, the Executive Office for Administration and Finance has issued Administrative Bulletins regarding "03" contracts. At the time of

award of this Contract, Administrative Bulletin 88-1 [1] was applicable to this Contract.

I find that the Consultant performed the extra work alleged in this appeal.

I find that no approved request for the Consultant's extra work was filed with the Comptroller.

I find that Administrative Bulletin 88-1, Section 6.0 Contract Approval Requirements, at subsection 6.4 Comptroller's Responsibilities prohibits payment for extra work performed prior to a Consultant Approval form being filed with the Comptroller.[2] I find that no Consultant Approval form was filed with the Comptroller for the extra work at issue in this appeal.

Any current attempt to execute a Contract amendment or modification for the extra work performed would be subject to 801 CMR 20.00, (Administrative Bulletin 93-4) which states at 20.01(3):

> "801 CMR 20.00 shall be effective on April 23, 1993 and shall supersede all prior regulations

---

[1] Administrative Bulletin 88-1, § 9.0 Effective dates provides in part:

> These regulations will supersede the provisions of Administrative Bulletin 82-1 for Contracts, renewals, extensions or modifications on or after July 1, 1988.

[2] Administrative Bulletin 88-1, Subsection 6.4 Comptroller's Responsibilities, at 6.42 provides:

> No payment shall be made, nor any obligation for payment incurred, by the Commonwealth on account of any service rendered prior to the date upon which the approved Consultant Approval form therefore is filed with the Comptroller...A copy shall be considered to be "filed" with the Comptroller ... when it is delivered to the office of the Comptroller's Division or when the Secretary signs and dates the Consultant Approval form and his/her approval is electronically entered into MMARS (whichever is earlier) (emphasis added).

> under 801 CMR 20.00 and Administrative Bulletins 88-1, 88-2, 90-3, 90-7 and 92-5" (emphasis added).

801 CMR 20.08(1) Contract Processing Procedure states:

> (1) No payments shall be made prior to the date the approved SR attached to the executed Contract or certified copy thereof, including any applicable attachments, has been filed with the Office of the Comptroller. All encumbrances should be at "PENDS" status in the Suspense File (SUSF) in MMARS prior to filing the Contract. For the purposes of 801 CMR 20.00 the time of filing shall be the date the completed SR/SC and the executed Contract, or certified copy thereof, including any applicable attachments, have been approved by the Office of the Comptroller, which shall be indicated by "DONE" status in the Suspense File in MMARS.

801 CMR 20.09 (1) (a) further states:

> 20.09 Amendments, Renewals and Extensions
>
> (1) Amendments.
>
> (a) An Amendment or change to a Contract which has been filed with the Office of the Comptroller must be made in writing, must reference the original encumbrance document identification number, and shall not be effective until approved and filed pursuant to the provisions of 801 CMR 20.08.

I find that 801 CMR 20.08 (1) and 801 CMR 20.09 (1) (a) prohibits payment to the Consultant of the extra work alleged in this appeal.

If alternative means of funding could be provided for the extra work performed by the Consultant, I find that the Consultant's agreed upon total of $29,000.00 is a fair and accurate reflection of the extra work costs to the Consultant.

RECOMMENDATION:

The appeal of A. G. Lichtenstein & Associates, Inc., on Contract #90216 should be denied because M.G.L. c. 29, § 29A and applicable Administrative Bulletins prohibit payment to the Consultant for the

extra work performed prior to a Contract Approval Form being filed with the Comptroller.

If alternative means of funding could be provided, the Consultant should be paid $29,000.00 for the extra work performed.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: June 14, 1996

RE: Board of Contract Appeals

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

CONTRACTOR: **James P. Purcell Associates, Inc.**
CONTRACT #: **24466**
CITY/TOWN: **Attleboro/Somerville/Worcester**
CLAIM: **Extra work in the amount of $126,843.00.**

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, JUNE 19, 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
Alex Bardow, Br. Eng.
Secretary's Office
Ned Corcoran, Ch. Counsel
J. Blundo, Dep.Ch.Eng,Hwy.Eng.
P.Patneaude, Mgr.Eng.Exp.
Steve O'Donnell, Contr.Adm.
Beth Pellegrini, Audit
Frank Garvey, Fisc. Mgmt.

James P. Purcell Assoc.,Inc.
90 National Drive
Glastonbury, CT 06033

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 **JAMES P. PURCELL ASSOCIATES, INC.**, 90 National Drive, Glastonbury, CT 06033, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, JUNE 19, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

James P. Purcell Associates, Inc. (the Consultant), aggrieved by the Massachusetts Highway Department's (the Department) failure to pay for alleged extra work in the amount totaling $126,843.00 on Contract #24466, appealed to the Board of Contract Appeals.

Contract #24466 (the Contract) was for the design to replace four Bridges:

- Attleboro, Bridge No. A-16-28: Thurber Ave. over MBTA
- Attleboro, Bridge No. A-16-30: Pond St. over MBTA
- Somerville,Bridge No. S-17-6: Walnut St. over MBTA & B&M RR
- Worcester, Bridge No. W-44-21: Mill St. over Tatnuck Brook

The Contract is dated August 15, 1985. The initial contract completion date was June 30, 1988 and was extended to June 30, 1990.

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

Peter Milano	Chief Administrative Law Judge
James Lynch	Purcell Associates
Matt Card	Purcell Associates
Arthur Daiopulos	MHD - Bridge Section

Entered as Exhibits were:

Exhibit #1.....	Contract #24466
Exhibit #2.....	Statement of Claim
Exhibit #3.....	Memo from Alex Bardow to the Chief Administrative Law Judge dated December 13, 1995.

FACTS PRESENTED:

All Consultant claims are based on an agreed statement of fact. The areas of work outside of the scope of the original contract and the agreed upon man hours are reflected in Exhibit #3 which is attached hereto and made a part hereof.

Exhibit #3 is broken down into three components: 1) the memo from Alex Bardow to me; 2) the Consultant's original position on their extra work; and 3) the Department's position, which has now been agreed upon by the Consultant.

FINDINGS:

Massachusetts General Laws (M.G.L.) c. 29, § 29A "Rules and Regulations regarding employment and compensation of consultants; forms; contracts; payments; restrictions" governs all "03" consultant contracts.

I find that this Contract is an "03" consultant contract.

Pursuant to authority granted by M.G.L. c. 29, § 29A, the Executive Office for Administration and Finance has issued Administrative Bulletins regarding "03" contracts. At the time these costs were incurred and the Contracts completion expired, Administrative Bulletin 88-1 [1] was applicable to this Contract.

I find that the Consultant performed the extra work alleged in this appeal.

I find that no approved request to extend the Contract completion date was filed with the Comptroller.

I find that Administrative Bulletin 88-1, Section 6.0 Contract Approval Requirements, at subsection 6.4 Comptroller's Responsibilities prohibits payment for extra work performed prior to a Consultant Approval form being filed with the Comptroller.[2]

---

[1] Administrative Bulletin 88-1, § 9.0 Effective dates provides in part:

> These regulations will supersede the provisions of Administrative Bulletin 82-1 for Contracts, renewals, extensions or modifications on or after July 1, 1988.

[2] Administrative Bulletin 88-1, Subsection 6.4 Comptroller's Responsibilities, at 6.42 provides:

> No payment shall be made, nor any obligation for payment incurred, by the Commonwealth on account of any service rendered prior to the date upon which the approved Consultant Approval form therefore is filed with the Comptroller...A copy shall be considered to be "filed" with the Comptroller ... when it is delivered to the office of the Comptroller's Division or when the Secretary signs and dates the Consultant Approval form and his/her approval is electronically entered into MMARS (whichever is earlier) (emphasis added).

I find that no Consultant Approval form was filed with the Comptroller for the extra work at issue in this appeal nor was the Contract completion date extended by amendment.

Any current attempt to execute a Contract amendment or modification for the extra work performed would be subject to 801 CMR 20.00, (Administrative Bulletin 93-4) which states at 20.01(3):

> "801 CMR 20.00 shall be effective on April 23, 1993 and shall supersede all prior regulations under 801 CMR 20.00 and Administrative Bulletins 88-1, 88-2, 90-3, 90-7 and 92-5" (emphasis added).

801 CMR 20.08(1) Contract Processing Procedure states:

> (1) No payments shall be made prior to the date the approved SR attached to the executed Contract or certified copy thereof, including any applicable attachments, has been filed with the Office of the Comptroller. All encumbrances should be at "PENDS" status in the Suspense File (SUSF) in MMARS prior to filing the Contract. For the purposes of 801 CMR 20.00 the time of filing shall be the date the completed SR/SC and the executed Contract, or certified copy thereof, including any applicable attachments, have been approved by the Office of the Comptroller, which shall be indicated by "DONE" status in the Suspense File in MMARS.

801 CMR 20.09 (1) (a) further states:

> 20.09 Amendments, Renewals and Extensions
>
> (1) Amendments.
>
> (a) An Amendment or change to a Contract which has been filed with the Office of the Comptroller must be made in writing, must reference the original encumbrance document identification number, and shall not be effective until approved and filed pursuant to the provisions of 801 CMR 20.08.

I find that 801 CMR 20.08 (1) and 801 CMR 20.09 (1) (a) prohibits payment to the Consultant of the work alleged in this appeal because the Contract completion date has expired.

If alternative means of funding could be provided for the extra work performed by the Consultant, I find that the Consultant's agreed upon total of $40,300.00 is a fair and accurate reflection of the extra work costs to the Consultant.

RECOMMENDATION:

The appeal of James P. Purcell Associates, Inc., on Contract #24466 should be denied because M.G.L. c. 29, § 29A and applicable Administrative Bulletins prohibit payment to the Consultant for the extra work performed prior to a Contract Approval Form being filed with the Comptroller.

If alternative means of funding could be provided, the Consultant should be paid $40,300.00 for the extra work performed.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTRODUCTION:

Vanasse Hangen Brustlin, Inc. (VHB) aggrieved by the Massachusetts Highway Department's (MassHighway) failure to pay its claim for $61,609.30 for work done on Contract #95589 (the Contract), appealed to the Board of Contract Appeals.

Contract #95589 was for the conceptual design, traffic studies and preparation of an environmental assessment/environmental impact report for Phase II of the Route 1 transportation improvement project for Plainville, Wrentham, Foxborough, Walpole and Sharon.

MassHighway was implementing in 1996 Phase I of the Route 1 Safety Improvements Project in the towns of Wrentham, Foxborough, Walpole, and Sharon. Phase I consisted of needed safety improvements along approximately eight miles of Route 1 between I-495 and I-95 and included the following major components:

- the addition of shoulders on Route 1 from North Street in Foxborough north to I-95, and from Pine Street in Foxborough south to I-495;
- the addition of sidewalks between Pine and North Streets in Foxborough;
- construction of a left-turn lane in both directions on Route 1 at the Foxborough Stadium entrance; and
- widening the Route 1 bridge over the Conrail railroad.

Phase I of the project received a waiver under the Massachusetts Environmental Policy Act (MEPA) to allow the needed safety improvements to be constructed before an Environmental Impact Report (EIR) for the entire project was prepared and reviewed.

One of the conditions of the waiver was that MassHighway examine the environmental impacts of Phase I in the EIR to be written before Phase II construction was begun.

Additional Phase I work consisting of a temporary median barrier on Route 1 and jughandle intersections in Walpole was later studied. If this additional Phase I work received a Phase I waiver from EOEA, and was constructed before Phase II, the EA/EIR would assess the impacts of the construction.

Phase II of the proposed project represented long-term improvements needed to correct the existing safety deficiencies and future travel demands in the project corridor. Fluctuations in traffic demands along Route 1 during Foxboro Stadium events were an issue. Phase II of the project was likely to include the following components.

- Definition of the long-term Route 1 cross-section necessary to address existing safety issues and future traffic demand.

- Definition of improvements to the I-95/Route 1 and I-495/Route 1 interchanges to address safety issues and provide additional capacity to and from the Route 1 corridor.

- Evaluation of the development of a "smart corridor" to better manage fluctuations in peak traffic demand. The smart corridor may incorporate the following features: closed circuit television to provide visual information on the entire corridor; detection equipment to obtain volume and speed data; a variable message system to provide motorists with roadway and parking information; radio highway advisories during stadium events; and a central traffic control center.

A Route 1 bypass roadway from I-95 to Foxboro Stadium designed to alleviate congestion on Route 1 during stadium events was also studied. This bypass study was not part of this scope. However, the EA/EIR would incorporate the results of this study.

A hearing was held on June 3, 1999. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
John Driscoll	Deputy Chief Counsel
Gregory Prendergast	Dep. Ch. Eng. for Environmental
Anne Zebrowski	VHB
Frank Bracaglia	VHB
James D'Angelo	VHB

Entered as Exhibits were:

Exhibit #1 …….. Contract #95589
Exhibit #2 …….. Statement of Claim
Exhibit #3 …….. Memo to Peter Milano from Greg Prendergast dated October 27, 1998

FACTS AND ISSUES OF LAW PRESENTED:

This matter is before the Board on an agreed statement of fact.

MassHighway retained VHB under Contract #95589, dated August 27, 1996, for conceptual design, traffic studies, and preparation of the Environmental Assessment/Environmental Impact Report for the Route 1 Transportation Improvement Project in Sharon, Walpole, Foxborough, and Wrentham. The contract maximum obligation was $465,058.00.

During the course of that study, MassHighway directed VHB to undertake additional traffic studies, conceptual engineering design, and environmental services beyond the scope of the original scope of services.

VHB and MassHighway agreed upon the cost of these additional services in the amount of $49,982.00.

On July 30, 1997, VHB submitted a formal request to MassHighway for an increase of $49,982.00 in funds to the contract to cover the cost of the additional services. The Board of Commissioners tabled this request for the rest of the 1997 calendar year

With MassHighway's concurrence, VHB performed the additional services. VHB submitted to MassHighway Invoice #12, dated September 15, 1997, in the amount of $50,241.30; Invoices #13, dated October 17, 1997, in the amount of $11,214.52; and Invoice #14, dated November 15, 1997, in the amount of $153.48. The total amount of theses invoices was $61,609.30.

On January 14, 1998, at MassHighway's direction, VHB resubmitted a request for an increase of $49,982.00 in funds to the contract. On April 23, 1998, the Board of Commissioner's approved a contract amendment for this increase of funds and the contract maximum obligation became $515,040.00

On April 28, 1998, VHB requested a shift in funds for the Contract to reallocate $11,000.00 from unused direct expenses to salary costs, indirect costs, and net fee. This shift in funds did not involve any additional funds and the contract maximum obligation remained at $515,040.00. The Board of Commissioners approved this shift in funds on May 13, 1998.

MassHighway could not process or pay Invoices #12, #13, and #14 under normal contract payment procedures because, at the time VHB submitted the invoices, MassHighway had not yet approved the contract amendment and the maximum obligation of $465,058.00 had been reached.

MassHighway has determined that VHB has performed the additional traffic studies, conceptual engineering design, and environmental services satisfactorily.

The current contract termination date for Contract #95589 is December 31, 2000.

VHB's claim is for $61,609.30. With MassHighway-approved increase in funds of $49,982.00 and MassHighway-approved shift in funds of $11,000.00, Contract #95589 currently has a maximum obligation of $515,040.00 in the appropriate payment categories to allow payment of Invoices #12, #13, and #14.

M.G.L. c. 29 § 29A entitled: "Rules and Regulations regarding employment and compensation of consultant; forms; contract; payments; restrictions" govern consultant contracts. Pursuant to authority granted by M.G.L. c. 29 § 29A, the Executive Office of Administration and Finance has issued Administrative Regulations regulating "03" contracts. 801 CMR 21.00 govern these contracts. 801 CMR 21.07 deals with contract amendments but refers only to RFR's. This Contract was not as a result of an RFR but was a direct select. Thus one would look to the Contract to see if it provides for amendments.

Section 24 of the Standard Provision states:

> 24. AMENDMENT
>
> If, during the term of the contract, the Department revises the limits of the project or makes other substantial changes in the scope or character of the work so as to thereby increase the work to be performed by the Consultant, such increased work shall result in an additional fee to be paid to the Consultant in accordance with Article VI Section C, provided that a written agreement concerning such increased work and additional fee has been made by all

> parties concerned prior to the performance of such increased work. In the event that no such written agreement has been executed prior to the performance of such increased work, the Consultant shall not be entitled to any additional fee. On projects being reimbursed with Federal Funds, approval of said written agreement by the F.H.W.A. shall be required prior to the performance of such increased work. (emphasis added)

Pursuant to this provision this claim would have to fail because the work was performed prior to the amendment being voted by the Board of Commissioners (see underlined above). This situation is truly inequitable because the Commonwealth would receive the benefit of work it ordered VHB to do but did not pay for it.

Common Law recognizes the theory of Quantum Meruit. Black's Law Dictionary, Fifth Edition, defines Quantum Meruit as follows:

> "quantum meruit" means "as much as he deserves" and it is an expression that describes the extent of liability on a contract implied by law. Nardi & Co., Inc. v. Allabastro, 20 III. App. 3d 323, 314 N.E. 2d 367, 370. An equitable doctrine, based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby: under those circumstances, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract therefor, Swiftships, Inc. v. Burdin, La. App. 338 So. 2d 1193, 1195. Essential elements of recovery under quantum meruit are: (1) valuable services were rendered or materials furnished, (2) for person sought to be charged, (3) which services and materials were accepted by person sought to be charged, used and enjoyed by him, and (4) under such circumstances as reasonably notified person sought to be charged that plaintiff, in performing such services, was expected to be paid by person sought to be charged. Montes v. Naismith & Trevino Const. Co., Tex. Civ. App., 459 S. W. 2d 691, 694.

The Supreme Judicial Court accepted the theory of quantum meruit as applied to a municipality in the case of Peabody N.E., Inc. v. Town of Marshfield 426 Mass 436

(1998). The Supreme Judicial Court stated in this case:

> A contractor "may recover in quantum meruit," if he can prove both substantial performance of the contract and an endeavor on his part in good faith to perform fully. J.A. Sullivan Corp. v. Commonwealth, supra at 796, quoting Andre v. Maguire, supra at 516. Generally, "an intentional departure form the precise requirements of the contract is not consistent with good faith in the endeavor fully to perform it." J.A. Sullivan Corp. Commonwealth, supra at 797, quoting Andre v. Maguire, supra. Here, the master expressly found that the plaintiff's failure to complete the project by January 27, 1991, was an unintentional departure from the contract's requirement. Indeed, he found that the plaintiff's delayed performance was at least "in part" caused by the town's improper rejection of the pumps. Pursuant to Mass. R. Civ. 53 (h) (1), we must accept these findings of fact unless we conclude that they are "clearly erroneous, mutually inconsistent, unwarranted by the evidence before the master as a matter of law or are otherwise tainted by error of law." Since we do not so conclude, the judge's award of damages in quantum meruit is affirmed.

FINDINGS:

I find in the present matter, MassHighway clearly agrees with the factual premises. Damages in quantum meruit should be applied.

RECOMMENDATION:

The appeal of Vanasse Hangen Brustlin, Inc. on Contract #95589 should be paid in the amount of $61,609.30 under the theory of quantum meruit, according to the above report.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

APPENDIX D-1

DECISIONS/RULINGS

Relocation Appeals (M.G.L. c. 79, §7)

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: May 26, 1994

RE: Board of Relocation Appeals

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

Elmwood Pharmacy
342 Pleasant Street
Malden, MA
Parcel #1-3-C

- -

Please place this report and recommendation on the Docket Agenda WEDNESDAY, JUNE 1, 1994, for action of the Massachusetts Highway Commission acting as the Board of Relocation 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
Maryellen Lyons, Dir.,
Secretary's Office
Michael Mahoney, ROW
Christopher Quinn, Esq.

Elmwood Pharmacy
299 Pleasant Street
Malden, MA 02148

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 Betty Heitin, ELMWOOD PHARMACY, 299 Pleasant Street, Malden, MA 02148, notifying them this report and recommendation will be presented to the Board of Relocation Appeals at its meeting of **WEDNESDAY, JUNE 1, 1994** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The Elmwood Pharmacy (Elmwood), aggrieved by the Massachusetts Highway Department's (MHD) determination associated with relocation assistance appealed to the MHD's Board of Relocation Appeals.

Elmwood was a tenant at 342 Pleasant Street, Malden, MA. (also referred to as Parcel #1-3-C). Elmwood was ordered to vacate their leased space by the MHD. The building at 342 Pleasant Street was acquired by the MHD as a part of the property acquisition necessary for the construction of the Route 60 By-Pass on June 23, 1976. The construction, requiring the acquisition of 342 Pleasant Street, was a federal aid highway program (Federal Aid #M00S(13)). The Federal Highway Administration (FHWA) a division with the Federal Department of Transportation (DOT), has primary responsibility for the administration of the Federal Aid Highway Program.

Elmwood was the tenant at 342 Pleasant Street and the property was taken in preparation for the Construction of the Route 60 By-Pass. Elmwood is a displaced person eligible for relocation assistance under Massachusetts General Laws M.G.L. c. 81 "Public Ways and Works", § 7J "Relocation Assistance; acquisition of real property; payments; compliance with federal acts."

M.G.L. c. 81 § 7J provides in part:

> In any federally aided program... department is hereby authorized and directed to do all things necessary to comply with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646), as amended and supplemented...(See 42 United States Code Annotated (U.S.C.A.) § 4601 et seq.) or with any other federal act relating to relocation assistance or acquisition, insofar as the federal government requires compliance with said Public Law 91-646 or said other federal acts in order to receive said federal aid.
>
> Under a federally aided program, in relation to any person whose real property is acquired, in whole or in part, by the department for a highway purpose, or any person lawfully occupying real property acquired by the department for highway purposes, or any person who vacated real property at the written request of the

> department because of a proposed acquisition for highway purposes, the department is hereby authorized and directed to make such payments, provide such assistance and do such other things as are necessary for the department to comply with the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

Pursuant to authority granted the Department of Transportation (DOT) at 42 U.S.C.A. § 4633 (b) "regulations and procedures," DOT issued regulations entitled the Uniform Relocation Assistance and Real Property Acquisition Regulation for Federal and Federally Assisted programs: 49 Code of Federal Regulations (CFR) Part 24. 49 CFR 24 is applicable to the relocation of Elmwood. Elmwood has appealed the MHD's denial of its claim as reflected in Exhibit #1.

Pursuant to M.G.L. c. 79A, § 7:

> any person aggrieved by a determination as to eligibility for, or the amount of a ... (relocation) payment ... may have his claim reviewed by the head of the displacing agency ..." The Department's Board of Commissioners delegates to the Department's Chief Administrative Law Judge the authority to conduct Board of Relocation Appeals hearings.

A hearing was held on May 24, 1994. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Michael Mahoney	Relocation Administrator - Right of Way Bureau
Christopher Quinn	Special Assistant Attorney General - MHD
Harry German	Elmwood Pharmacy
Betty Heitin	Elmwood Pharmacy

Entered as Exhibits at the hearing were:

Exhibit #1.....	Statement of Claim
Exhibit #2.....	Elmwood Pharmacy's canceled checks reflecting payments of $14,953.00 for its Self-Move
Exhibit #3.....	Right of Ways Submissions 3 Parts: Part A - Letter dated March 1, 1993 to Betty Heitin from Edward J Corcoran II, Director of Right of Way.

Part B - Memo from Shirley Waite to
Michael Mahoney dated February 8, 1993
Part C - Memo from Christopher Quinn to
Stuart Rossman, Assistant Attorney General

FACTS AND ISSUES PRESENTED:

Elmwood Pharmacy commenced a combination self-move and commercial move on or about April 1976 from 342 Pleasant Street to 299 Pleasant Street, Malden. As bills for this move were presented to the Department for payment, a bill from Royal Pothier who was the building contractor reflected a $50 "Gratuity for Inspector". The matter was immediately referred to the Attorney General's Office.

On or about May 18, 1979, Ernest T. Chadie and Rocco Liberatore of the Right of Way Division met with then Assistant Attorney General Stephen Delinsky, head of the criminal Division and Peter Agnes of the State Police. The Department was advised that the matter would be investigated and that all payments on this claim should be held until the Department heard back from the Attorney General's Office.

As of this date the Department has not heard back from the Attorney General. On December 14, 1992, Mr. Quinn wrote the Attorney General's Office for some direction in this matter (see Exhibit #3C). There was no response to this memo by the Attorney General's Office. As of this writing the Department has been given no guidance on this claim since 1979.

It is assumed by this writer that Ms. Betty Heitin, a lovely lady of 83 years old, had no knowledge of the alleged gratuity paid the inspector and it is further assumed that any investigation conducted by the Attorney General has been concluded, if one was ever conducted.

Thus, Elmwood should be compensated for its move since it is obvious that the move has been completed and Elmwood is in business at its new location. Elmwood submitted canceled checks for $14,953.00. The Department obtained two estimates for this move. The lower of the two estimates was $10,705.00.

FINDINGS:

This acquisition was part of a federally funded project and therefore the relocation is governed by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended, 42 U.S.C. § 4601 et seq., and federal regulations thereunder (49 CFR 24), as well as Massachusetts General Laws Chapter 79A and regulations thereunder.

A claimant is entitled to be paid his actual moving expenses as determined to be reasonable and necessary as defined under 49 CFR 24.303.

I find that the move was accomplished and Elmwood has been in business at its new location. Furthermore, this claim is sixteen years old and it is highly unlikely that further documentation other than Exhibit #2 could be obtained. The Department could make a reasonable assumption based on the size of the inventory and evidence submitted at the hearing that $10,705.00, the lower of our two estimates, would be a fair and reasonable amount to compensate Elmwood for the move.

RECOMMENDATION:

The appeal of the Elmwood Pharmacy relative to its relocation move from 342 Pleasant Street, Malden to 299 Pleasant Street, Malden in the amount of $20,000.00 should be approved in the lesser amount of $10,705.00.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: July 8, 1994

RE: Board of Relocation Appeals

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

Massachusetts Recycling Technology, Inc.
P.O. Box 469
Hingham, MA 02043
Parcel #'s 65-13, 65-2, 65-3 & 65-TE-1

- -

Please place this report and recommendation on the Docket Agenda WEDNESDAY, JULY 20, 1994, for action of the Massachusetts Highway Commission acting as the Board of Relocation 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
Maryellen Lyons, Dir.,ROW
Secretary's Office
Michael Mahoney, ROW
Christopher Quinn, Esq.

Neil C. Tully, Esq.
Masterman, Culbert & Tully
One Lewis Wharf
Boston, MA 02110

Mass. Recycling Technology, Inc.
P.O. Box 469
Hingham, MA 02043

Peter Zuk, Dir. of
Central Artery

Neil MacPherson
Bechtel/Parsons
Brinckerhoff
One South Station, 4th Floor
Boston, MA 02110

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 **Neil C. Tully, Esq., Masterman, Culbert & Tully,** One Lewis Wharf, Boston, MA 02110, notifying them this report and recommendation will be presented to the Board of Relocation Appeals at its meeting of **WEDNESDAY, JULY 20, 1994** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA 02116.

INTRODUCTION:

Massachusetts Recycling Technology, Inc. (MRT), aggrieved by the Massachusetts Highway Department's (MHD) determination associated with relocation assistance, appealed to the MHD's Board of Relocation Appeals.

MRT was a tenant on a parcel of vacant land located on Congress Street, Boston, Massachusetts. MRT was required to vacate the premises by the MHD. The Congress Street parcel was acquired by the MHD under an order of taking recorded on December 24, 1991 as part of the property acquisition necessary for the construction of the Central Artery/Third Harbor Tunnel (CA/T) project. The parcel numbers were 65-13, 65-2, 65-3 and 65-TE-1. The project and construction requiring the acquisition of the Congress Street parcel are part of a federal aid highway program.

As a tenant, a parcel taken in preparation for the construction of the CA/T project, MRT is a displaced person eligible for relocation assistance under Massachusetts General Laws (M.G.L.) c. 81 "Public Ways and Works", §7J "Relocation Assistance; acquisition of real property; payments; compliance with federal acts", and M.G.L., c. 79A "Relocation Assistance".

M.G.L. c. 81 §7J provides, in part:

> In any federally aided program...the department is hereby authorized and directed to do all things necessary to comply with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646), as amended and supplemented...(See 42 United States Code Annotated (U.S.C.A.) §4601 et seq.) or with any other federal act relating to relocation assistance or acquisition, insofar as the federal government requires compliance with said Public Law 91-646 or said other federal acts in order to receive said federal aid.
>
> Under a federally aided program, in relation to any person whose real property is acquired, in whole or in part, by the department for a highway purpose, or any person lawfully occupying real property acquired by the department for highway purposes, or any person who vacated real property at the written request of the department because of a proposed acquisition for highway purposes, the department is hereby authorized and

> directed to make such payments, provide such assistance, and do such other things as are necessary for the department to comply with the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act 1970...This section shall not affect the obligations of the department under chapter seventy-nine A (emphasis added)."

Under this section, the MHD is required to provide benefits mandated under federal law, but the MHD is not relieved from its obligations under state law. The benefits to be provided under federal statutes and regulations constitute the minimum benefits to be provided to a displaced person. See, e.g., United Auto Workers Local 887 v. Dept. of Transportation, 25 Cal. Rptr. 2d 290 (1993); Columbia v. Baurchter, 713 S.W.2d 263 (Mo 1986); and Robzen's Inc. v. U.S. Dept. of Housing, 515 F. Supp. 223 (M.D. Pa. 1981). A displaced person is entitled to the most favorable benefits or treatment that would be available under either the state or federal statutes and regulations.

Under the authority granted in M.G.L. c. 79A, §12, the Bureau of Relocation within the Department of Community Affairs promulgated regulations appearing at 760 C.M.R. 27.00 "Relocation Assistance", governing relocation of displaced persons. Pursuant to 42 U.S.C.A., §4633, the Department of Transportation issued regulations entitled Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs: 49 CFR Part 24. Both 760 C.M.R. 27.00 and 49 CFR Part 24 apply to the relocation of MRT. In addition, to the extent it is necessary to determine the "cost of the goods to the business" under 49 CFR 24.303(10)(a) of any personal property owned by MRT, the cost principles set forth in 48 CFR Part 31: Contract Cost Principles and Procedures, apply.

MRT has appealed the MHD's denial of its claim as reflected in Exhibit No. 1. Pursuant to M.G.L., c. 79A, §7:

> "any person aggrieved by a determination as to eligibility for, or the amount of a...(relocation) payment...may have his claim reviewed by the head of the displacing agency..."

The MHD's Board of Commissioners delegates to the MHD's Chief Administrative Law Judge the authority to conduct Board of Relocation Appeals hearings.

Hearings were held on October 7, 1993 and October 15, 1993. Those present at the October 7, 1993 hearing were:

Peter Milano	Chief Administrative Law Judge
Christopher Quinn, Esq.	Assistant Attorney General, Right of Way Bureau
Neil MacPherson	Bechtel/Parsons Brinckerhoff
Wayne L. Mory	BSC/Cullinan Engineering
Thomas M. Kent	Coopers & Lybrand
Peter G. Lahaie	Coopers & Lybrand
Neal C. Tully, Esq.	Masterman, Culbert & Tully
Richard McCourt	Massachusetts Recycling Technology, Inc.
Virginia McCourt	Massachusetts Recycling Technology, Inc.
Mark Murphy	James W. Flett Company
Bob Priestley	Bechtel/Parsons Brinckerhoff - Survey Coordinator
Douglas J. Waite	Stenographer - Arlington Reporting Corporation

Those present at the October 15, 1993 hearing were:

Peter Milano	Chief Administrative Law Judge
Christopher Quinn, Esq.	Assistant Attorney General, Right of Way Bureau
Neil MacPherson	Bechtel/Parsons Brinckerhoff
Wayne L. Mory	BSC/Cullinan Engineering
Thomas M. Kent	Coopers & Lybrand
Peter G. Lahaie	Coopers & Lybrand
Neal C. Tully, Esq.	Masterman, Culbert & Tully
Richard McCourt	Massachusetts Recycling Technology, Inc.
Virginia McCourt	Massachusetts Recycling Technology, Inc.
David Sullivan	J.F. White Contracting Co.
Gunther Greulich	Gunther Engineering, Inc.
Richard M. Tarbox	Stenographer - Arlington Reporting Corporation

The following were entered as exhibits at the hearings:

Exhibit 1.....Statement of Claim

(a) Letter of July 30, 1993 from Tully to Milano setting forth nature of the claim;
(b) Letter of April 21, 1992 from Zuk to McCourt setting forth the MHD's award of relocation benefits;
(c) Letter of April 29, 1993 from Corcoran to Tully
(d) Coopers & Lybrand report of April 10, 1992 (in letter form, addressed to Mullan) with attached exhibits:

1. Summary of Crushed Aggregate Valuation Methods;
2. Analysis of Cost submitted;
3. Footnotes to Analysis of Costs submitted;
4. Volkert memorandum on McCourt Material Pile Volumes;
5. Flaherty memorandum on cost to move crushed stone;
6. McCourt letter of October 10, 1991 to MacPherson;
7. Lease amendment, ratification dated March 23, 1992 (in letter form to Mullan);
8. MHD memorandum on economic rental.

(e) Letter of March 10, 1993 from Tully to Corcoran setting forth basis of claim, with attached exhibits:

A. BSC/Cullinan survey summary;
B. Flett estimate of material;
C. Flett computer plan;
D. White computer plan;
E. White volume estimate;
F. Plan of land (processing operations) (See Ex. 4);
G. Thompson & Lichtner test reports;
H. Thompson & Lichtner conversion factor;
I. Flett estimate of moving costs;
J. Jones estimate of moving costs;
K. McCourt projections on start-up;
L. MRT price schedule;
M. MRT product circular;
N. McCourt notes of October, 1989 processor meetings;
O. Kelleher's profit analysis;
P. Vitale draft agreement;
Q. Reddish 1990 analysis;
R. May, 1991 temporary shut-down notice;
S. CA/T Conceptual Processing Layout
T. July 13, 1990 bill to Eastern States;
U. July 30, 1990 bill to Schumacher;
V. Enpro cover letter, boring logs and MRT check no. 109;
W. Public Works Supply Co. bills;
X. July 31, 1990 invoice to Schumacher;
Y. August 5, 1990 invoice to ARR Max;
Z. John McCourt/MRT reconciliation ($16,530);

AA. Lease acknowledgement
BB. Lease checks (eight - $380,750)
CC. McCourt discontinuance letter

Exhibit 2A.....McCourt Sketch of 7.5 acre plot layout;
Exhibit 2B.....McCourt calculations on yardage and area;

Exhibit 3.....McCourt Lease with amendment;
Exhibit 4.....Plan of 7.5 acres;
Exhibit 5.....Recap/Woodland crushing operation records;
Exhibit 6.....Photograph of Woodland operations;
Exhibit 7.....RFP for material processing operation with attached plan;
Exhibit 8.....John McCourt Co. check dated 8/23/90 to Mass. Recycling Technology, Inc. in the amount of $16,530.00;
Exhibit 9.....BSC/Cullinan Plan, Rev B with final grades, as submitted to Flett;
Exhibit 10.....BSC/Cullinan Plan Drawing No. SOO-2-Y-108 of Sept., 1991 with volume estimates, Rev A (Survey Plan);
Exhibit 11.....BSC/Cullinan Plan Drawing No. SOO-2-Y-108 of May, 1992 with volume estimates, Rev B;
Exhibit 12.....Ag-Tek shaded cut-fill regions (Flett);
Exhibit 13.....BSC/Cullinan Survey Report;
Exhibit 14.....McCourt Site Grading & Drainage Plan, last revised 6/28/92 (basis of White estimate);
Exhibit 15.....J.F. White Ag-Tek Sitework Report with shaded plan;
Exhibit 16.....BSC Sketch Plan, as marked by Greulich;
Exhibit 17.....McCourt Material Piles 9/91 (Ex. 10 as marked by Gruelich);
Exhibit 18.....BTD Plan of 1989 elevations.

Both hearings were stenographically recorded. There is a 184 page transcript from the hearing on October 7 and 167 page transcript from the hearing on October 15. Gunther Greulich submitted an affidavit, through the claimant's counsel, following the second day of hearing. There were a number of additional exhibits attached to his affidavit as follows:

Exhibit A.....Resume of Gunther Greulich, PLS, PE
Exhibit B.....Mory Memorandum of November 17, 1993

Att. 1: Greulich Memorandum of October 20, 1993
Att. 2: BSC/Cullinan Plan Drawing No. S-OO2-Y-108 with Mory Annotations (See Trial Ex. 10)
Att. 3: Sketch Plan-Point Plot, undated, with Mory Annotations (See Trail Ex. 13)
Att. 4: Benchmark, Artery 59
Att. 5: Benchmark, Artery 74
Att. 6: Benchmark, Artery 77
Att. 7: Computer printout, page 1, dated August 28, 1991
Att. 8: Computer printout, page 2, dated August 28, 1991
Att. 9: Computer printout, page 3, dated August 28,

1991
Att. 10: Pages 98 and 99 from Survey Field Notes
Att. 11: Plan of pile (base plan for cross-sections)
Att. 12: Cross-section plots, stations 00.000 to 125.000
Att. 13: Cross-section plots, stations 150.000 to 275.000
Att. 14: Cross-section plots, stations 350.000 to 525.000
Att. 15: Cross-section plots, stations 450.000 to 550.000

Exhibit C.....Plan of pile (base plan for cross sections), Att. 11 above, with Greulich Annotations
Exhibit D.....Plan Drawing No. S-OO2-Y-108 with Greulich Annotations (See Trial Ex. 10)
Exhibit E.....Cross-section plots (Atts. 12 to 15 above) with Greulich Annotations
Exhibit F.....Cross-Section Plot 100.000 with Greulich Annotations
Exhibit G.....Portion of the Base Plan with Greulich Annotations (See Trial Ex. 18)

Gunther Greulich's affidavit and the attached exhibits were entered in evidence. In addition, each party submitted post-hearing submissions in the form of argument or requested findings, or both. All submissions are now in and are a part of the permanent record.

Following receipt of all submissions, and with notice to an assent of the parties, I retained Stephen P. DesRoche, P.L.S. of Neponset Valley Survey Associates, Inc. as an independent expert to assist me in reviewing the surveying and engineering evidence with respect to the volume estimate of material in pile A on the site formerly occupied by MRT. Mr. DesRoche submitted letter reports dated May 13, 1994 and June 10, 1994, which have also been made part of the record. His June 10, 1994 letter is attached hereto and marked Attachment I.

FACTS AND ISSUES PRESENTED:

MRT was engaged in the business of reprocessing construction rubble and excavated material into gravel and aggregate for reuse in construction projects. MRT was formed as a proprietorship and in November 1989 leased premises on C Street in South Boston (Tr.

1-48, 49; Ex. 3). As of June 1, 1990, MRT moved its operations to the Congress Street parcel (Tr. 1-50, 51; Ex. 1(e)(AA)), and on or about August 1, 1990, MRT was incorporated (TR. 1-34). Between June 1, 1990 and the end of July 1991, crushing and processing operations were conducted on the site by three different operators: Frank Vitale, d/b/a Evergreen Development, Banco, Inc., d/b/a Woodland Construction, and Recycling Concrete and Asphalt Products ("Recap") (Tr. 1-67, 68; Tr. 1-73). The material processed by Vitale was, for the most part, sold or spread on the site (Tr. 1-59, 60-61, 77, 112-113). Piles B and C shown on the plan prepared by BSC/Cullinan and entered in evidence as Exhibit 10 are the remnants of the Vitale operation. Woodland processed 43,066 tons of material (Tr. 1-72; Ex. 5), and Recap processed 27,525.8 tons of material (Tr. 1-73; Ex. 5). None of the Woodland and Recap material was sold (Tr. 1-76, 77), and only insignificant, if any, amounts of their material was spread on the site (Tr. 1-77, 112). Pile A as shown on Exhibit 10 is comprised of the 70,592 tons of material produced by Woodland and Recap (Tr. 1-76).

When advised of the impending taking and the need to vacate the premises, MRT elected to cease operations and so advised the MHD by a letter dated October 10, 1991 (Ex. 1(d)(6)). In electing to cease operations, MRT also elected not to relocate the processed material in piles A, B and C.

Under M.G.L., c. 79A, §7(I)(A)(2) and 760 C.M.R. 27.09(20), a business may receive payment for any actual direct loss for any of its tangible personal property, including inventory or goods held for sale, which it chooses not to relocate. Such payment may not exceed the estimated reasonable expense of moving such property; that is, the amount of the payment for actual direct loss of tangible personal property, where no sale for salvage has been held, is the lower of the fair market value for the continued use to the business or the estimated expenses which would have been incurred had the personal property been moved.

The federal standard, as set forth in 49 CFR 24.303(10), for determining the actual direct loss of tangible personal property as a result of moving or discontinuing a business is similar to the state standard. The payment consists of the lesser of

> (a) the fair market value of the item for continued use at the displacement site, subject to the qualification that when payment for property loss is claimed goods held for sale, the fair market value shall be based on the cost of the goods to the business, not the potential selling price; or
>
> (b) the estimated cost of moving the personal property, but with no allowance for storage.

In order to make its determination of the benefits due to MRT, the MHD engaged BSC/Cullinan to estimate the quantity, by volume, of the processed material on site and engaged Coopers & Lybrand (Coopers) to estimate the cost of the goods to MRT, since MRT held the processed material for sale. BSC/Cullinan conducted an on-site survey in August 1991 and submitted the survey plan and a report to the MHD in September 1991. The survey plan and report were introduced as Exhibits 10 and 13, respectively.

BSC/Cullinan identified three piles of processed material on the site and estimated the volume in cubic yards of each as follows:

Pile A	36,007
Pile B	1,095
Pile C	1,252
Total	38,354

MHD obtained quotes for the cost of moving the processed material for a distance of fifty miles, and on the basis of the quotes determined that the cost would be $14.66 per cubic, or a total of $562,270.00.

Coopers conducted a review of MRT's operations and records starting in January or February 1991 (Tr. 2-103). Coopers submitted a report to MHD on March 13, 1992. After receiving additional information from MRT, Coopers submitted an updated report dated April

10, 1992. The April 10, 1992 report was entered in evidence as Exhibit 1(d), and the March 13 report was made available for review. Coopers concluded that: "overall, the adjusted cost for the material on site based upon the procedures performed could range from $436,977 to $761,805 depending on interpretations of the documentation supporting MRT's costs..." See Ex., 1(d) at page 4. Based on this recommendation and the supporting exhibits, MHD determined that the cost of the goods to the business, and thus the fair market value of the items for continued use at the displacement site (federal standard) or for continued use to the business (state standard) was $436,977.

The MHD paid MRT $436,977 as the lesser of the value of the personal property for continued use or the estimated moving expenses.

MRT challenges several of the underlying determinations made by the MHD. First, MRT contends that MHD underestimated the quantity of material in pile A. MRT's principle contention was that a volume of 36,007 cubic yards was simply inconsistent with a verified weight of 70,592 tons. MRT offered the results of tests done by Thomas & Lichtner Company, Inc., an independent engineering laboratory, which indicated that the material in pile A would have a volume of 39,306 cubic yards to 41,943 cubic yards at 100% compaction (Tr. 1-87 to 89; Ex. 1(e)(G)). Based on the test results, Thomas & Lichtner estimated a volume of 52,290 cubic yards, assuming the material was damp and loose (Ex. 1(e)(H)). Richard McCourt, an experienced contractor, (Tr. 1-30 to 33), estimated that there was in excess of 46,000 cubic yards of material in pile A (Tr. 1-89). Gunther Greulich, PLS, PE, an experienced and recognized expert, estimated on the basis of generally accepted engineering standards for estimating volume based on weight that pile A had a volume of 40,223± cubic yards to 47,536± cubic yards (Greulich Aff.¶ 11).

MRT also offered the testimony of two experienced contractors who had been involved in regrading the site. Both had estimated the volume of material to be removed from pile A in order to meet the

finished grade and elevation specified by MHD (Tr. 1-128 to 130; Tr. 2-19). The final elevations were above the bottom of the pile, and their estimates therefore did not involve all of the material in the pile. David Sullivan of J.F. White Contracting Company and Mark Murphy of James F. Flett Company estimated, respectively, that there were 38,756 cubic yards and 38,200 cubic yards of material in the part of pile A above the final elevations for the regraded site (Tr. 1-144, 2-23).

Gunther Greulich undertook a detailed review and analysis of the BSC/Cullinan plan, survey report, and field notes. BSC/Cullinan provided cross-sections of the pile to Greulich as part of his review. Greulich concluded that the survey excluded several areas that should have been included in the calculation of the volume of the pile. Greulich's analysis of the file notes indicated that the westerly sideline of the pile followed a different path than shown on the survey plan (Greulich Aff. ¶ 6(a) and Aff. Exs. C and D; Exs. 16 and 17). In addition, Greulich identified two small areas which he believed should be included in the footprint of the pile given the toe of slope used by BSC/Cullinan and the general contours of the pile (Greulich Aff. ¶'s 6 and 8; Aff. Exs. C and D).

More significantly, Greulich identified from the cross-sections an apparent error in the computer program that distorted the base of the pile creating artificial internal peaks in the base of the pile (Greulich Aff. ¶ 6(c)(ii); Aff. Exs. E and F). Moreover, it was MRT's position that even after these peaks had been eliminated, the base of the pile was lower than the elevation used by BSC/Cullinan as a starting point for its survey. BSC/Cullinan purported to calculate the volume from a base elevation at the toe of the slope around the perimeter of the pile (Tr. 2-88, 89, 93). MRT contends that before it began operations, the elevation in the area of the pile footprint was lower than the elevation of the toe of the slope after the pile was created. MRT contends, in effect, that it filled a low or swale in the course of creating the pile. In support of

its position, MRT offered a base plan of existing conditions prepared by BSC in July 1989 which was referenced as one of the sources for the BSC/Cullinan survey plan (Tr. 1-169 to 175; Ex. 1(3e)(A) and Ex. 18) and the testimony of Richard McCourt as to the site conditions when MRT began operations (TR. 1-124, 125). MRT contends that it owned all of the material that it produced, that it held all of the material for sale, and that it could have removed the material to the original elevations and contours of the property. Greulich calculated that there were 6453 cu. yds. between the ground elevation shown on the 1989 plan and the base of the pile as shown on BSC cross-sections. Greulich estimated that the total volume of pile A was 45,593± cu. yds. (Greulich Aff.¶ 8).

DesRoche reviewed the exhibits, the trial transcript, cross-sections of pile A furnished by BSC/Cullinan, and various aerial photographs taken proximate to the time that the survey was undertaken. DesRoche concluded that the westerly sideline of pile A was accurately portrayed on the survey plan and that the two small areas identified by Greulich had been properly excluded from the volume estimate (DesRoche Letter, May 13, 1994). Regarding the base of the pile, DesRoche agreed with Greulich that the interior mounding shown on the cross-sections appeared to be a computer error. DesRoche estimated that there were 1,500 to 2,000 cu. yds. of material between the base of the pile, if defined as a plane running from toe of slope to toe of slope under the pile, and the base as shown on the cross-sections (DesRoche Letter, May 13, 1994). DesRoche then estimated the volume assuming that the base of the pile was the original elevation of the property as shown on the 1989 base plan, with the area of the pre-existing pile levelled to a grade and elevation consistent with the surrounding area. Relying on elevations outside the footprint of the pile which had been verified by BSC/Cullinan as consistent with the conditions shown on the 1989 base plan, DesRoche calculated that there was an additional 4,400 cu. yds. of material between the original surface of the property

and the base of the pile as shown on the cross-sections (See Attachment I). Greulich agreed that DesRoche's method of setting the bottom line and calculating the quantity was reasonable.

Second, MRT contends that the estimated cost to move the material is too low because it includes only the cost to load and truck the material and not the cost of restockpiling the material at a new site. MRT provided two estimates of the cost to load and truck the material, both of which supported the MHD's estimate of $14.66 per cubic yard, and two estimates of the cost to stockpile the material at the new site. The MHD stipulated that $1.58 per cubic yard was a reasonable cost to stockpile the material at a new site, if such a cost was appropriate to include in estimating the cost to move (Ex. 1(e)(I); Tr. 1-55).

Third, MRT contends that Coopers misapplied the relocation regulations and the federal cost principles to exclude certain costs of producing the processed materials. The excluded costs fall into three categories: all costs of production (and offsetting income) incurred between June 1, 1990 and July 31, 1990, in the net amount of $81,930.00; 40% of the land occupation costs (rent and real estate taxes) incurred between August 1, 1990 and October 10, 1991, in the amount of $144,272; and, all land occupation costs incurred between October 11, 1991 and December 24, 1991, in the amount of $62,916.00. Coopers did not question whether the amounts had been incurred, but whether they were properly chargeable to the cost of production under the circumstances of this particular case. The pre-August 1990 expenses were excluded on the basis that MRT was not incorporated until August 1990. On the other hand, some items of pre-August income and expense were included in Cooper's calculation of the cost of production (TR. 2-145, 146). Cooper's conceded that if pre-incorporation income and expenses could be charged to or had been assumed by MRT, these expenses should be included to be consistent (Tr. 2-148, 149). With regard to a portion of the land occupance costs between August 1990 and October 10, 1991, Coopers advanced

various theories: that MRT needed only 60% of the leased land to conduct its operations; that a portion of the property represented "storage", which was not reimbursable under 49 CFR 24.305(k); and that the cost of so much of the property as was not used in active production should be excluded from the cost basis of the material (Tr. 2-128). Post-October 10, 1991, land costs were excluded on the basis that MRT had ceased operations on that date.

FINDINGS:

This acquisition was part of a federally funded project and therefore the relocation is governed by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended, 42 USCS §4601 et. seq., and the federal regulations thereunder (49 CFR 24) and by M.G.L., c. 79A and the state regulations thereunder (760 C.M.R. 27).

MRT is a displaced person within the meaning of the state and federal regulations and is therefore entitled to relocation benefits.

MRT elected to cease business operations and to abandon its personal property in place. MRT's personal property consisted of the stockpiled, processed material on the Congress Street site. For the loss of its tangible personal property, MRT is entitled to a payment equal to the lesser of the value of the personal property for continued use at the site or the estimated cost of relocating the material to a new site.

I find that as of the date MRT ceased operations, there were 42,754 cu. yds. of material on the site which were MRT's personal property and eligible for relocation. This total is made up of 40,407 cu. yds. in pile A (36,007 cu. yds. calculated by BSC/Cullinan plus 4,400 cu. yds. between the base line used by BSC/Cullinan and the surface of the site at the time MRT began operations), 1,095 cu. yds. in pile B, and 1,252 cu. yds in pile C.

Under M.G.L. c. 79A, "personal property" is defined as tangible

property situated on the real property to be vacated by a displaced person and which is considered personal property and is non-compensable as real property, and, in the case of tenant, fixtures and equipment and other property which may be characterized as real property under state or local law, but which the tenant may lawfully, and at his election, determine to move and for which the tenant is not compensated in the real property acquisition. See also 760 C.M.R. 27.01(k). This case presents somewhat unusual circumstances for the application of these principles. The item or items in issue are gravel, aggregate and processed material. When spread on a site or incorporated in a construction project (as, for example, a road bed or back fill), such material would properly be characterized as part of the real property. Here, the material was MRT's stock-in-trade, specifically produced by MRT, and held by MRT for sale. The question is at what point, in stockpiling the material, does some portion, if any, of the material "merge" with the underlying property and lose its character as MRT's inventory. There is then a further question of whether, even if some portion of the pile were deemed to become part of the real estate, the tenant could lawfully and at his election determine to move such material and, if so, whether the tenant was compensated for such material in the real property acquisition.

Under state law, as between a landlord and tenant, things which the tenant has at his own expense affixed to the freehold for purposes of trade, business, or manufacture, may be removed by the tenant before the expiration of the term. The right of removal depends upon the mode in which the thing to be removed is annexed to the real property, and the effect which its removal would have upon the premises. The right of removal may be exercised whenever it is not contrary to prevailing custom, causes no material injury to the estate, and where the thing can be removed without losing its essential character or value as a person chattel. Consiglio v. Carey, 12 Mass. App. Ct. 135, 138-139 (1981), quoting Hanrahan v.

O'Reilly, 102 Mass. 201, 203 (1869) and cases collected. See also Stone v. Livingston, 222 Mass. 192 (1915) (dealing with the relative rights of a mortgagor and mortgagee).

Here, the property in issue was not in any sense "affixed" to the property. Rather, in the course of creating the pile, the general contours and elevation of the property in the location of the pile and the area immediately adjacent to the pile were changed. The material could be removed without doing any material injury to the property, assuming that the person so removing the material did no more than return the property to its original condition, and removing the material would certainly have no effect on the essential character and value of the gravel as gravel. Even if some portion of the processed material could be characterized as real property, I find that as between MRT and the owner of the property, MRT was lawfully entitled to remove the processed material with pile A before the expiration of the term, and having received nothing from the land acquisition, that MRT was not compensated for the processed material in the real property acquisition.

In brief, I find that as of October 10, 1991, pile A consisted of 70,592 tons of material which had been processed by MRT and was held by MRT for sale, that MRT had a right to remove all of such processed material for sale or otherwise to the limits of the original contours and elevations of the site at the time MRT commenced operations on the site, and that all of such material was MRT's personal property for purposes of determining the relocation benefits to which MRT was entitled.

To determine the volume of the 70,592 tons of material in pile A for purposes of estimating the cost of relocating the material, I find that the BSC/Cullinan survey was generally reliable, with the exception of the determination of the location of the base of the pile. BSC/Cullinan's estimate has to be adjusted to account for the material between the internal mounds shown on the cross-sections and the original surface of the property.

The original surface of the property cannot be identified with certainty, but I find that the 1989 base plan, taken with the uncontradicted testimony of Richard McCourt, affords a reasonable basis for fixing the condition of the property as of the time MRT began operations.

I further find that DesRoche's estimate of 4,400 cubic yards of material between the original surface and the base of the pile as established by BSC/Cullinan to be a reasonable and conservative estimate. It compares favorably with Mr. Greulich's estimate of 6,453 cu. yds. based on a slightly different methodology, it is within and at the lower end of the range of estimates based on conversion from weight to volume, and it brings the total volume for pile A to the approximate level that would be supported by the estimates of Messrs. Sullivan and Murphy. The exact volume of pile A cannot be calculated with absolute precision, but on all the evidence, I find that a volume estimate of 40,407 cu. yds. for pile A to be fair and reasonable, and I adopt that volume for purposes of determining MRT's relocation benefits. The volume of piles B and C was not disputed (Tr. 1-15), and I therefore find that the total volume of material classified as personal property and eligible for relocation was 42,754 cu. yds.

Regarding the reasonable cost to relocate the personal property, I find that $14.66 was a fair and reasonable estimate of the cost to load and truck the materials to a new site. I further find that MRT was entitled to a reasonable allowance to restockpile the material at the new site. The purpose of estimating the "expenses which would have been incurred had the personal property been moved" is to determine the cost of an actual move. Had there been an actual move, MRT would have been entitled to reimbursement for the cost of such items as "disconnecting, dismantling, removing, reassembling, reconnecting, and reinstalling machinery, equipment, or personal property (including goods and inventory kept for sale)." 760 C.M.R. 27.04(8)(f); See also 49 CFR 24.303(a)(2) and (3). MRT's

property was stored in different piles at the Congress Street site. The different piles had different characteristics and would have been segregated at a new site. As the regulations apply to MRT's inventory, MRT was entitled to have its inventory stockpiled at a new site in a configuation similar to the old site. The MHD has stipulated that $1.58 cu. yd. is a reasonable cost for such stockpiling (Ex. 1(e)(K); Tr. 1-55), and I therefore find that $16.24 per cu. yd. is a reasonable estimate of the unit cost of relocating MRT's personal property.

I find that the estimated reasonable expense of moving MRT's personal property, within the meaning of 760 C.M.R. 27.09(20) and 49 CFR 24.303(10) was $694.324/96 (42,754 cu. yds. x $16.24).

With respect to the value of the material, I find that the cost to produce the material is a reasonable and appropriate gauge of the value of the material in place for continued use to the business. Federal regulations dictate such an approach for goods held for sale, as is the situation here. 49 CFR §24.303(a)(10)(i). Such an approach is consistent with state law. Cost is generally accepted as a measure of value, particularly in circumstances such as this where the issue is value to a particular owner or value for a particular use. See, for general discussions of the principles governing a determination of value, Agoos Leather Cos., Inc. v. American & Foreign Ins. Co., 342 Mass. 603 (1961) (insurance loss); Assessors of Quincy v. Boston Consolidated Gas Co., 309 Mass. 60 (1941) (real and personal property taxes). See also, by analogy, Blakeley v. Assessors of Boston, 391 Mass. 473 (1984) (original cost of construction, recently incurred, is a legitimate method of valuing a building). Here, moreover, both parties proceeded on the basis that the cost of the material was the appropriate measure of value and both presented evidence relevant to the determination of the cost to produce the material.

I find that the Coopers report of April 10, 1992 (Ex. 1(d)), and particularly Exhibit 2 of the report, adequately and accurately

sets forth the categories, items, and amounts of expense incurred and income received by MRT in the course of producing the processed material, and I adopt and incorporate the underlying conclusions in the report and attached Exhibit 2 as to such categories, items, and amounts of expense and income. I find, however, that the amount that Coopers recommended and the MHD adopted as the total cost to produce the material, $436,977.00, must be adjusted to account for two categories of costs and expenses which were substantiated by Coopers but which were excluded from the total.

The first category relates to the expenses incurred and income received by MRT for operations between June 1, 1990 and July 31, 1990. I find that the net amount of such excluded income and expenses was $81,930.00, calculated as follows from the information in Exhibit 2 of the Coopers report:

Costs		
1.	Water Service	$ 1,991.00
2.	Office Trailer Rental	263.00
3.	Generator Rental	1,350.00
4.	Equipment Rental	1,923.00
5.	Equipment Rental	10,493.00
6.	Field Supervisory Services	27,842.00
7.	Land Costs (Rent & Taxes)	49,998.00
	Total	$93,860.00
Revenue		11,930.00
Net expense		$81,930.00

This amount was excluded from the cost basis of the material because MRT was not incorporated until August 1990. While it is the general rule under Massachusetts law that a corporation is not liable for contracts or debts incurred prior to incorporation, a corporation may explicitly or implicitly assume pre-incorporation contracts and debts, in which case they become enforceable by and against the corporation. See, e.g., North Anson Lumber Co. v. Smith, 209 Mass. 333 (1911). I find that in the circumstances of this case, MRT ratified and assumed any pre-incorporation debts, expenses, or contracts. MRT was a single, continuing business enterprise before

and after incorporation. The same principals were involved, the same name was used (Tr. 1-102), and the nature of the business remained the same (Tr. 1-97). The incorporated MRT assumed control and ownership of the material and equipment on the site (Tr. 1-97). Most significantly, the incorporated MRT paid expenses incurred and collected revenue earned before incorporation (Tr. 1-99 to 101; Ex. 1(e)(T) to (Y); Ex. 8). Coopers itself included in its recommended cost basis items of expense that were incurred prior to incorporation, but not paid until after incorporation (Tr. 2-134, 146). I find that the net expenses in this category were incurred as part of the cost of producing the material, were assumed and paid by MRT, and are properly included in determining the cost of the material to the business.

The second category relates to the cost of occupying the Congress Street site from August 1, 1990 to October 10, 1991. The MHD, on Coopers' recommendation, disallowed 40% of the rent and taxes for this period, a total of $144,272.00. Different rationales for the disallowance were advanced at various times. Coopers posited both that 60% of the site was adequate for MRT's operations and that a portion of the site, unquantified but inferably 40%, was not used in active production of the material. No evidence was offered to support either proposition. On the contrary, there was evidence that the entire site was needed as of the time occupancy commenced for the level of operations projected by MRT (Tr. 1-37 to 43, 48 to 51; Exs. 1(e)(K), (N), and (O); Exs. 2A and 2B); that although the business never achieved the projected level of operations, the entire site was used (Tr. 1-82, 83); that two crushing plants operated on the site simultaneously at times (Tr. 1-62 to 65; Ex. 4); and that on at least two occasions the site capacity was reached and MRT was forced to stop accepting material for processing (Tr. 1-66, 67; 1-81, 82; Ex. 1(e) (R)). To the extent part of the site was not used from time to time, I find that any costs associated with such intermittent down time were costs of idle capacity under 48 CFR 31.205-17 and are

eligible for inclusion in the cost basis of the material.

Coopers also suggested that to the extent part of the site was used to store materials, such storage costs should be disallowed under 49 CFR 24.305(k). The reference to storage in that section, as in section 49 CFR 24.303(10), relates to storage of personal property after a person has been displaced. They relate to storage that might be required in the course of the relocation process itself. These sections have no bearing on the determination of the costs incurred as an operating business entity before the business becomes a displaced person.

I find that all of the costs of occupying the Congress Street site from August 1, 1990 to October 10, 1991 were reasonable and were necessary in conducting the business of MRT and in producing the processed material. I find that all of such costs should be included in the cost of producing the material for purpose of determining the value of the material for continued use to the business.

MRT urged the inclusion of a third category of excluded costs, those relating to rent and real estate taxes for the period from October 11, 1991 to December 24, 1991, when the recording of the order of taking terminated the lease. MRT contends that such costs qualify for inclusion in the cost basis under 48 CFR 31.205-42(e), governing rental costs under unexpired leases. The time after October 10, 1991 stands on a different footing because MRT ceased operations and no longer used the site. All of the material at issue had been produced by October 10, 1991, and on an equitable basis such expenses incurred after MRT had ceased operations should not be charged to the cost basis of the material. I find that such post-October 10, 1991 expenses should not be included in the cost basis of the material.

Based on the foregoing, I find that the value of the processed material for continued use to MRT at the displacement site, based on the cost of the goods to the business, was $663,179.00, which amount includes $436,977.00 as determined by Coopers in its report of April 10, 1991, $81,930.00 for the next pre-incorporation costs

and expenses, and $144,272.00 for the balance of the occupancy costs for the period from August 1, 1990 to October 10, 1991.

RECOMMENDATION:

The appeal of MRT relative to the benefits due to MRT for the actual direct loss of tangible personal property as a result of discontinuing its business should be approved in the amount of $663,179.00, which amount is the lesser of the value of the property to MRT for continued use at the displacement site and the estimated cost of moving the property ($694,324.96). MRT should be paid this amount less $436,977.00 previously paid to MRT. MRT should be paid an additional $226,202.00.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: December 22, 1994

RE: Board of Relocation Appeals

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

Pleasant Mountain Pet Rest
76 Liberty Street
Plymouth, MA 02360
Parcel 6-50-6-W-13

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, DECEMBER 28, 1994**, for action of the Massachusetts Highway Commission acting as the Board of Relocation 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, Chief Counsel (2)
Secretary's Office (2)
Edward Hildebrandt
Pleasant Mountain Pet Rest
76 Liberty Street
Plymouth, MA 02360

Maryellen Lyons, Dir. ROW
Michael Mahoney
Christopher Quinn, Esq.

R.E. Dutil, Jr.
ROW Program Manager
Federal Highway Administration
Transportation Systems Center
55 Broadway - 10th Floor
Cambridge, MA. 02142

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 **PLEASANT MOUNTAIN PET REST, 76 Liberty Street, Plymouth, MA 02360** notifying them this report and recommendation will be presented to the Board of Relocation Appeals at its meeting of **WEDNESDAY, DECEMBER 28, 1994** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

Pleasant Mountain Pet Rest (Pleasant), aggrieved by the Massachusetts Highway Department's (MHD) determination associated with relocation assistance appealed to the MHD's Board of Relocation Appeal.

Pleasant was owner of the property located at 76 Liberty Street, Plymouth, MA 02360 (also referred to as parcel 6-50-6-W-13). Pleasant was ordered to vacate part of its property by the MHD. The property at Plymouth was acquired by the MHD as a part of the property acquisition necessary for the reconstruction of the Route 44 project on June 16, 1993. The construction, requiring the acquisition of the Plymouth property, is a federal aid highway program. The Federal Highway Administration (FHWA), a division with the Federal Department of Transportation (DOT), has primary responsibility for the administration of the Federal Aid Highway Program.

Pleasant was the owner of the pet cemetery in Plymouth and the property was taken in preparation for the reconstruction of Route 44. Pleasant is a displaced person eligible for relocation assistance under Massachusetts General Laws (M.G.L.) c. 81 "Public Ways and Works," §. 7J "Relocation Assistance; acquisition of real property; payment; compliance with federal acts."

M.G.L. c. 81 § 7J provides in part:

> In any federally aided program ... the department is hereby authorized and directed to do things necessary to comply with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646), as amended and supplemented...(See 42 United States Code Annotated (U.S.C.A.) § 4601 et seq.) or with any other federal act relating to relocation assistance or acquisition, insofar as the federal government requires compliance with said Public Law 91-646 or said other federal acts in order to receive said federal aid. Under a federally aided program, in relation to any person whose real property is acquired, in whole or in part, by the department for a highway purpose, or any person lawfully occupying real property

> acquired by the department for highway purposes, or any person who vacated real property at the written request of the department because of a proposed acquisition for highway purposes, the department is hereby authorized and directed to make such payments, provide such assistance and do such other things as are necessary for the department to comply with the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970."

Pursuant to authority granted the Department of Transportation (DOT) at 42 U.S.C.A. § 4633 (b) "regulations and procedures," DOT issued regulations entitled the Uniform Relocation Assistance and Real Property Acquisition Regulation for Federal and Federally Assisted programs: 49 Code of Federal Regulations (CFR) Part 24 (FHWA Docket No. 87-22) Interim Final Rules, implementation date December 17, 1987. 49 CFR 24 is applicable to the relocation of Pleasant. Pleasant has appealed the MHD's denial of his claim as reflected in Exhibit #1.

Pursuant to M.G.L. c. 79A, § 7: "any person aggrieved by a determination as to eligibility for, or the amount of a ... (relocation) payment ... may have his claim reviewed by the head of the displacing agency ..." The Department's Board of Commissioners delegates to the Department's Chief Administrative Law Judge the authority to conduct Board of Relocation Appeals hearings.

A hearing was held on November 22, 1994. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Michael Mahoney, Jr.	Relocation Administrator
Shirley Waite	Right of Way
Edward Hildebrandt	Pleasant Mt. Pet Rest

Entered as Exhibits at the hearing were:

Exhibit #1.....	Statement of Claim
Exhibit #2.....	Interoffice memo plus attachments to Peter Milano from Maryellen Lyons, Dir. of Right of Way dated October 11, 1994

After the hearing, Edward Hildebrandt submitted a post hearing submission which is now a part of the permanent record.

FACTS AND ISSUES PRESENTED:

The Department has paid all aspects of the claim of Pleasant. This claim was for 237 hours of labor at $25.00 for Edward Hildebrandt. Part of these hours were for Mr. Hildebrandt's time spent helping the grave diggers dig up the existing graves. This portion of the claim has been deleted from the claim. The balance of the hours billed are eligible for reimbursement as Move Planner costs pursuant to 49 CFR § 24.303 (8) which states in part:

> "Professional services necessary for:
> (i) Planning the move of personal property
> (ii) Moving the personal property
> (iii) Installing the relocated personal property at the replacement location."

Mr. Hildebrandt states that the graves in the land taking area were mostly sold before Edward Hildebrandt took ownership of the cemetery. Mr. Hildebrandt spent a great deal of time during the Spring of 1994 finding the owners. In some cases the addresses were not correct and the new address had to be located.

The second step in the procedure was to write each owner about the land taking and mail them letters, certified return receipt request.

Upon receipt of the return receipts, Mr. Hildebrandt then called each owner to smooth their concerns and answer any questions they might have about their rights as owners; their concerns about disturbing their pet graves; and their concerns about where the new grave would be in the cemetery. In many cases the owners wanted to see the cemetery and choose where the new location would be. Scheduling of visits to the cemetery had to be made, meeting with the owners and again reassuring them of the dignity in which all transfers would be made.

The next step was to plot the new locations where the transfers

were to be made. This was made more difficult as the owners sometimes had two or more pets to be relocated, these owners with multiple pets wanted their pets together and in a good location.

During the actual move, Mr. Hildebrandt was required to supervise the care and handling of each pet's move, directing them to their new location; and re-landscaping the new graves.

Once the transfers were made, Mr. Hildebrandt had to contact the individual owners. At this point in time many owners wanted to re-visit the grave to make sure all was as they wanted. Mr. Hildebrandt had to meet with them again to show the new site. He had to make sure markers were in place and in some cases he had to transfer trees and plants. Finally, Mr. Hildebrandt had to write the owners and send them their new deeds.

FINDINGS:

The evidence in this claim strongly supports the position that Edward Hildebrandt was in fact the best qualified person to plan Pleasants' planning move. I find he is entitled to move planning costs.

The claim is for 237 hours, but Mr. Hildebrandt and the Department agree that 197 hours were spent on planning the move. I find 197 hours to be reasonable.

The rate Mr. Hildebrandt is asking, $25.00 per hour is reasonable. Under past claims involving move planning costs, a professional move planner, Ms. Jacki Pontremoli, told me she billed out at $40.00 per hour. I find the $25.00 rate to be fair since Mr. Hildebrandts' one and only move plan was Pleasant Mountain Pet Rest.

This acquisition was part of a federally aided project and therefore the relocation is governed by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended, 42 U.S.C. § 4601 et seq., and federal regulations thereunder (49 CFR 24), as well as Massachusetts General Laws Chapter 79A and regulations thereunder.

I find that 42 U.S.C. § 4601 et seq., and federal regulations thereunder (49 CFR 24) do not preclude Edward Hildebrandt from acting as a move planner in this matter merely because he was an owner of the cemetery (see 49 CFR 23.303 (8) supra). In fact I find that Edward Hildebrandt was more qualified to plan this move than a professional planner because of his knowledge and background in the pet cemetery business.

RECOMMENDATION:

Pleasant Mountain Pet Rest's claim for cost incurred to hire Edward Hildebrandt as the move planner in its relocation should be approved in the lesser amount of $4925.00 which represents 197 hours at $25.00 per hour.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: July 18, 1995

RE: Board of Relocation Appeals

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

Noonan-Leyden Press
Samoset Street
Plymouth, MA 02360
Parcel 7-13

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, JULY 26, 1995**, for action of the Massachusetts Highway Commission acting as the Board of Relocation 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, Chief Counsel (2)
Secretary's Office (2)
Mollica Associates
197 Portland Street
Boston, MA 02114

Maryellen Lyons, Dir. ROW
Michael Mahoney
Christopher Quinn, Esq.

Noonan-Leyden Press
Samoset Street
Plymouth, MA 02360

R.E. Dutil, Jr.
ROW Program Manager
Federal Highway Administration
Transportation Systems Center
55 Broad - 10th Floor
Cambridge, MA 02142

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 **MOLLICA ASSOCIATES, RELOCATION CONSULTANT FOR NOONAN-LEYDEN PRESS**, 197 Portland Street, Boston, MA 02114, notifying them this report and recommendation will be presented to the Board of Contract Appeals at its meeting of **WEDNESDAY, JULY 26, 1995** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

Noonan-Leyden Press (NLP), aggrieved by the Massachusetts Highway Department's (MHD) determination associated with relocation assistance appealed to the MHD's Board of Relocation Appeal.

NLP was a tenant of the property located on Samoset Street, Plymouth, MA 02360 (also referred to as parcel No. 7-13). NLP was ordered to vacate its property by the MHD. The property at Plymouth was acquired by the MHD as a part of the property acquisition necessary for the reconstruction of the Route 44 project on June 16, 1993. The construction, requiring the acquisition of the Plymouth property, is a federal aid highway program. The Federal Highway Administration (FHWA), a division with the Federal Department of Transportation (DOT), has primary responsibility for the administration of the Federal Aid Highway Program.

NLP was the owner of a printing company in Plymouth and the property was taken in preparation for the reconstruction of Route 44. NLP is a displaced person eligible for relocation assistance under Massachusetts General Laws (M.G.L.) c. 81 "Public Ways and Works," § 7J "Relocation Assistance; acquisition of real property; payment; compliance with federal acts."

M.G.L. c. 81 § 7J provides in part:

> In any federally aided program...the department is hereby authorized and directed to do all things necessary to comply with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646), as amended and supplemented...(See 42 States Code Annotated (U.S.C.A) § 4601 et seq.) or with any other federal act relating to relocation assistance or acquisition, insofar as the federal government requires compliance with said Public Law 91-646 or said other federal acts in order to receive said federal aid under a federally aided program, in relation to any person whose real property is acquired, in whole or in part, by the department for a highway purpose, or any person lawfully occupying real property acquired by the department for highway purposes, or any person who vacated real property at the written request of the department because of a proposed acquisition for highway purposes, the department is hereby authorized and directed to make such payments, provide such assistance and do such

other things as are necessary for the department to comply with the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

Pursuant to authority granted the Department of Transportation (DOT) at 42 U.S.C.A. § 4633 (b) "regulations and procedures," DOT issued regulations entitled the Uniform Relocation Assistance and Real Property Acquisition Regulation for Federal and Federally Assisted programs: 49 Code of Federal Regulations (CFR) Part 24 (FHWA Docket No. 87022) Interim Final Rules, implementation date December 17, 1987. 49 CFR 24 is applicable to the relocation of NLP. NLP has appealed the MHD's denial of his claim as reflected in Exhibit #1.

Pursuant to M.G.L. c. 79A, § 7: "any person aggrieved by a determination as to eligibility for, or the amount of a ... (relocation) payment ... may have his claim reviewed by the head of the displacing agency ..." The Department's Board of Commissioners delegates to the Department's Chief Administrative Law Judge the authority to conduct Board of Relocation Appeals hearings.

A hearing was held on April 25, 1995. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Michael Mahoney, Jr.	Relocation Administrator
Shirley Waite	Right of Way Relocation Sup.
Amelia Winston	Right of Way Agent
Wayne A. Sunderland	Right of Way Area Sup.
Christopher Quinn	Special Asst. Attorney Gen.-MHD
Ron Dutil	FHWA
Samuel Mollica	Relocation Consultant - NLP
Ron Paolo	V.P. - NLP
Thomas V. Noonan	Pres. & Treasurer - NLP

Entered as Exhibits at the hearing were:

Exhibit #1.....	Statement of Claim
Exhibit #2.....	Support of Statement of Claim under cover letter dated March 30, 1994.
Exhibit #3.....	Report for Grievance Hearing dated April 25, 1995.

After the hearing, MHD submitted a post hearing submission dated June 5, 1995 which is now a part of the permanent record.

FACTS AND ISSUES PRESENTED:

When NLP purchased the building at Samoset Street, Plymouth there were three general air conditioning units on the premises which were sufficient for their business needs. Furthermore, concrete pads upon which the printing press were set on were not compensated for at the new location. The equipment could not function without the required pads on which the equipment is secured nor could the printing process function without the required proper temperature controls within the production areas.

The issue in the present case is an issue related to Tenant-Owned Improvements see 49 CFR 24.105.

In the present matter, neither the pads nor the air conditioners were included in the real estate appraisal.

For the purpose of implementing 49 CFR 24.105, the Department is guided by paragraph (b) - Improvements Considered to be Real Property which states:

> "Any building, structure, or other improvement, which would be considered to be real property if owned by the owner of the real property on which it is located, shall be considered to real property for purposes of this Subpart."

Consequently, tenant-owned improvements determined to be real property will be acquired as tenant-owned improvements in accordance with 49 CFR 24.105. Accordingly, the Department must secure appraisals to establish the just compensation for the tenant-owned improvements. The compensation will be the amount which the improvement contributes to the fair market value of the whole property

or its salvage value, whichever is greater. Payment will be made in accordance with such provision, including subsection (d) requiring, among other actions, that the Department be provided with a transfer of title from the owner of the tenant improvements and a disclaimer from the owner of the real property.

Subsection (e) recognizes that the tenant-owner has the right to reject payment as described above and obtain payment in accordance with other applicable law. However, the tenant-owner can only pursue payment under other applicable law that covers real property interest. Accordingly, the tenant-owner cannot seek alternative compensation under the relocation benefits section of 49 CFR Part 24 since relocation benefits are only applicable to personal property.

Personal property can be defined as movable items not permanently affixed to and part of the real estate. In deciding whether or not an item is personal property or real estate, usually there must be considered (1) the manner in which it is annexed; (2) the intention of the party who made the annexation (that is, to leave permanently or to remove at some time); and (3) the purpose for which the premises are used. As an example, an item such as a roof-mounted air conditioning unit which was installed by the tenant to service his printing presses and was an integral part of the tenant's printing operation that could be removed without damaging the building, I am inclined to say that the item is personalty.

Likewise, the cost of pits, pads and foundation can be reimbursed as eligible moving costs under 49 CFR 24.303(a) (3) if they are necessary for the reinstallation of equipment or machinery, or the installation of substitute items, that are necessary for the

foundations was clearly included in the just compensation paid for the real property.

NLP's initial claim was for $16,337.00 for the pads. However, included in this amount were the pads for an air compressor and a rubbish compactor. At the hearing it was agreed upon that this claim should be for $14,243.00.

The air conditioner claim was in the amount of $89,660.00. The Department submitted an estimate after the hearing for $88,100.00, a difference of $1560.00. The original air conditioners serviced a 29,000 s. f. building. The new building was 35,000 s. f. The old site was 83% of the new site and using NLP's claimed amount of $89,660.00, the amount of the claim should be $74,417.80.

FINDINGS:

I find that the air conditioners and concrete pads claim at the hearing were personalty and were eligible moving costs under 49 CFR 24.303 (a) (3) which states in part:

> **§ 24.303 Payment for actual reasonable moving and related expenses-nonresidential moves.**
>
> (a) Eligible costs. Any business or farm operation which qualifies as a displaced person (defined at § 24.2(g) is entitled to payment for such actual moving and related expenses, as the Agency determines to be reasonable and necessary, including expenses for:
>
> (3) Disconnecting, dismantling, removing, reassembling, and reinstalling relocated machinery, equipment, and other personal property, including substitute personal property described at § 24.303(a)(12).

I find that the cost for the pads was $14,243.00 and the cost of substituted air conditioning units should be $74,417.80.

RECOMMENDATION:

Noonan-Leyden Press' claim for costs to relocate concrete pads and air conditioners should be approved in the lesser amount of $88,660.80.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: October 2, 1995

RE: Board of Relocation Appeals

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

House of Bianchi, Inc.
293A Street
Boston, MA 02110
Parcel V

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, OCTOBER 11, 1995**, for action of the Massachusetts Highway Commission acting as the Board of Relocation 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 Engineer Dindio
Ned Corcoran, Chief Counsel
Secretary's Office

Charles Bartoloni
Relocation Consultant
for House of Bianchi
House of Bianchi
One Brainard Avenue
Medford, MA 02155

Maryellen Lyons
Michael Mahoney
Christopher Quinn, Esq.
Peter Zuk, CA/T (2)

Neil MacPherson (2)
Bechtel/Parsons, Brinckerhoff
One South Station
4th Floor
Boston, MA 02110

R.E. Dutil, Jr.
ROW Program Manager
Federal Highway Administration
Transportation Systems Center
55 Broadway - 10th Floor
Cambridge, MA 02142

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 **CHARLES BARTOLONI, RELOCATION CONSULTANT FOR HOUSE OF BIANCHI**, One Brainard Avenue, Medford, MA 02155, notifying them this report and recommendation will be presented to the Board of Relocation Appeals at its meeting of **WEDNESDAY, OCTOBER 11, 1995** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

House of Bianchi, Inc. (Bianchi), aggrieved by the Massachusetts Highway Department's (MHD) determination associated with relocation assistance appealed to the MHD's Board of Relocation Appeals.

House of Bianchi, Inc. was a tenant at 293 A Street, Boston, MA (also referred to as parcel "V"). Bianchi was ordered to vacate their leased space by the MHD. The owner of 293 A Street was Bianchi Associates. The building at 293 A Street was acquired by the MHD as a part of the property acquisition necessary for the construction of the Central Artery/Third Harbor Tunnel (CA/T) project on March 25, 1992. The construction, requiring the acquisition of 293 A Street, is a federal aid highway program. The Federal Highway Administration (FHWA), a division within the Federal Department of Transportation (DOT), has primary responsibility for the administration of the Federal Aid Highway Program.

Bianchi was the tenant at 293 A Street and the property was taken in preparation for the construction of the CA/T. Bianchi is a displaced person eligible for relocation assistance under Massachusetts General Laws (M.G.L.) c. 81 "Public Ways and Works," § 7J "Relocation Assistance; acquisition of real property; payments; compliance with federal acts." M.G.L. c. 81 § 7J provides in part:

> **"In any federally aided program...the department is hereby authorized and directed to do all things necessary to comply with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646), as amended and supplemented...(See 42 United States Code Annotated (U.S.C.A) § 4601 et seq.) or with any other federal act relating to relocation assistance or acquisition, insofar as the federal government requires compliance with said Public Law 91-646 or said other federal acts in order to receive said federal aid. Under a federally aided program, in relation to any person whose real property is acquired, in whole or in part, by the department for a highway purpose, or any person lawfully occupying real property acquired by the department for highway purposes, or any person who vacated real property**

at the written request of the department because of a proposed acquisition for highway purposes, the department is hereby authorized and directed to make such payments, provide such assistance and do such other payments, provide such assistance and do such other things as are necessary for the department to comply with the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970."

Pursuant to authority granted the Department of Transportation (DOT) at 42 U.S.C.A. § 4633 (b) "regulations and procedures," DOT issued regulations entitled the Uniform Relocation Assistance and Real Property Acquisition Regulation for Federal and Federally Assisted programs: 49 Code of Federal Regulations (CFR) Part 24 (FHWA Docket No. 87-22) Interim Final Rules, implementation date December 17, 1987. 49 CFR 24 is applicable to the relocation of Bianchi.

Pursuant to M.G.L. c. 79A, § 7: "any person aggrieved by a determination as to eligibility for, or the amount of a ... (relocation) payment ... may have his claim reviewed by the head of the displacing agency ..." The Department's Board of Commissioners delegates to the Department's Chief Administrative Law Judge the authority to conduct Board of Relocation Appeals hearings.

A hearing was held on September 13, 1994. A second hearing was held on April 11, 1995. Present representing the parties at these hearing were:

Peter Milano	Chief Administrative Law Judge
Robert P. Ellard	House of Bianchi
Salvatore Macone	House of Bianchi
Roland Smith	House of Bianchi
Charles Bartoloni	House of Bianchi - Relocation Consultant
Christopher Quinn	MHD - Special Asst. Attorney General
Nancy A. Scoppa	Relocation Specialist - B/PB
Robert Cunningham	Specifications Engineer - B/PB
Michael A. Mahoney	Relocation Administrator - MHD
Shirley Waite	Relocation Supervisor - MHD
Steven Mollica	Executive Office of Communities and Development - Relocation
Victoria Felson	B/PB
Kristine Cartwright	B/PB

Neil MacPherson	B/PB
Gerald Solomon	MHD - CAT - ROW
Ron Dutel	FHWA
Carol Almeida	FHWA
Wayne Coil	FHWA
Goodwin Morrison	Morrison Electric

Entered and marked as exhibits were:

Exhibit #1.....Statement of Claim
Exhibit #2.....Business Relocation Benefit
Exhibit #3.....Invoice of CID Associates
(Architectural Services)
Exhibit #4.....Summary of Exhibits

Post hearing submissions were requested of the claimant in this matter. All submissions are now in.

FACTS AND ISSUES PRESENTED:

Exhibit #1, the Statement of Claim, was broken down into six (6) items by the claim: Item #1 was miscellaneous electrical expenses in the amount of $14,607.45; Item #2 was for linkage payment to the City of Medford in the amount of $41,194.69; Item #3 was for the building permit in Medford in the amount of $5,000.00; Item #4 was for relocation expenses incurred by the Claimant for a satellite facility located at 168 A Street, Boston in the amount of $5,992.25; Item #5 was for electrical feeders necessary to reconnect machinery at the Medford location in the amount of $16,428.00; and Item #6 was for architectural and new site in the amount of $66,000.00. The total cost of the claim was $149,222.39. To date the claimant has been paid $459,371.21 plus $10,000.00 for the Business Reestablishment Payment.

Item #1 was for the added electrical cost. Bechtel/Parsons Brinckerhoff (B/PB) prepared the electrical estimate. One was for approximately $178,000.00. The second or lower estimate was for approximately $78,888.00. The low bidder was asked to price the job with a view to performing the work. However, when he visited the

site in Medford, Fafard Real Estate and Development Corp. (Fafard), was already doing the work. B/PB actually had the low bidder resubmit their bid at a lower value after review ($77,000.00). There was a tremendous spread from the low and high bidder (about $100,000.00). Fafard's cost ran $14,607.00 over the low bid (see Exhibit #1 Invoice dated 2/4/93). During the course of the hearing we numerically marked this invoice 1-20. Number 5, 11, 12, 15 and 17 were then struck out of the claim totaling $841.06. The rest of the items appeared to be legitimate extra work. An agreement on this claim was reached during the hearing to pay the claim 10% over the $77,000.00 plus $1,180.50 which was the cost to hook up the electrical feed to the trash compaction system. The total agreement for this portion of the claim was $8,880.50.

Item #2 of the Statement of Claim is for Linkage Payment in the amount of $41,194.69.

As a condition of occupancy of the new location, the claimant was required to pay a "Developer Linkage Payment" to the City of Medford in the amount of $41,194.69. This cost was directly attributable to the claimant's relocation. The cost was denied as an eligible moving expense and instead was included as part of the claimant's Business Reestablishment Expense which is subject to a $10,000.00 maximum.

The issue on the Linkage Payment is whether it is to be categorized as a fee, license or certification required of the displaced person at the replacement location and as such is eligible for reimbursement without limitation as described in both 49 CFR Part 24.303(a)(6). Eligible costs are "any license, permit or certification required of the displaced person at the replacement location..."

While one time impact fees for anticipated heavy utility usage is one of several expenses which may be included as part of the Business Reestablishment Expense, the Linkage Payment is not

based entirely on utility usage but rather is based on square footage of the building, type of business, and number of employees employed by the business which is being assessed the linkage payment and the anticipated usage of various city services, in addition to utilities, by these employees.

According to the City of Medford Linkage Program, Rules and Regulations, General Administration and Procedure "The Linkage Program is additional and supplemental to, and not in substitution of, any other requirements imposed by the City of Medford on the development of land or the issuance of a building permit, occupancy permit, variance, density bonus, special permit and/or rezoning." This continues with "Applicants who propose to develop in the city may be subject to the Medford Linkage Program which requires the payment of a fee to offset the impacts that new development place on the City's infrastructure and public service systems." (Note: These impacts are specifically relative to impact on the City's infrastructure and public service systems, not utility usage).

This office did extensive research to determine if any court of record has reviewed the issue of linkage payments. This offices research located no authority concerning linkage payments and whether or not they should be classified as licenses or permits versus impact fees or assessment.

An extensive search of the Massachusetts General Laws Annotated (M.G.L.A) revealed no statutory law regarding linkage payments. Provisions addressing licenses, permits, and assessments also were not helpful. There was nothing relevant in the sections of the M.G.L.A. dealing with the powers of cities and towns. Search of the Massachusetts Digest on these same subjects located no case law regarding linkage fees or anything closely analogous.

We then turned to the West CD-ROM on Massachusetts case law and Attorney General Opinions. The term "linkage fees" could be found in neither the case law nor the opinions. While on the West CD-ROM,

we also searched through reported decisions on relocation assistance in an attempt to find a decision regarding anything analogous to the fees at issue here. This research also produced nothing helpful.

Both parties were asked to assist me in my research. The Department did submit a brief, but the claimant did not.

The applicable federal law for this issue is found at 49 CFR 24.303(a)(6) which provides for compensation of the following:

> **"any license, permit, or certification required of the displaced person at the replacement location..."**

No reported cases could be located which addressed this issue. The Department's position is that absent any case law which rules upon this regulation, the official interpretation of the Federal Highway Administration (FHWA) must be adhered to. The FHWA transmittal dated 3/92 specifically responds to this issue. The transmittal is found within exhibit 2 of the submission (see exhibit 4) of response of Bechtel Parsons Brinkerhoff (BPB) dated February 24, 1995, and is entitled "Relocation Assistance and Payments Questions and Answers Document". The answer to the question concerning limitations on licensing and permitting costs is that eligibility does not extend to "...one time assessments that any business would have to pay for occupancy of a property".

The linkage requirement is a precondition to the issuance of a permit, as opposed to being the requirement of obtaining the permit itself. This payment is a one time assessment. As such the payment would be eligible under the provisions contained in 49 CFR 24.304(11). This provision refers to <u>"Impact fees or one time assessments for anticipated heavy utility usage."</u> (emphasis added). While the subject payment may not have related exclusively to utility usage, it is an impact fee under the first and distinct clause of the regulation. As an impact fee the payment comes within the $10,000.00 maximum allowance of the BRB provisions. This amount has already been exceeded in this case.

No reported cases ruling on the relevant state regulation, 760 CMR 27.09(8) could be found. While the first sentence of this regulation may arguably appear to apply to a linkage payment, eligibility is restricted by the second sentence which reads, "The amount may not exceed the amount that the business concern would be required to pay annually." emphasis added. The common and accepted meaning of this word is that it refers to more than one year.

I find the Department is not liable for the linkage payment beyond the $10,000.00 already paid the claimant under 49 CFR 24.304 Reestablishment Expenses.

The Building Permit, Item #3 of the statement of claim, is for $5,000.00 paid by the claimant. This cost is compensable under 760 CMR 27.09(8). However, the claimant should only be compensated for that portion of the fee which was required to reestablish the personal property at the new site. Since the claimant bought a shell of a building most of the work was attributable to upgrading the real property. I find that ten (10%) per cent of the building permit is directly related to the reestablishing of the personal property. Thus, $500.00 is due the claimant.

The next claim is for relocation of personal property located at 168 A Street, South Boston. The building which the Claimant formerly occupied at 293 A Street, South Boston was taken by eminent domain for the CA/T. Bianchi occupied a second building located at 168 A Street which was approximately 3/10ths of a mile in distance from the 293 A Street property. The Claimant had requested that the 168 A Street be acquired due to the integration of the operation of these two location. Ultimately, for various reasons, the property was not taken. Consequently, the owner of 168 A Street was not a displaced person as defined by 49 CFR § 24.2 (g) and thus not entitled to relocation benefits.

Item #5 of Exhibit #1, the Statement of Claim, is for the reconnection of the electrical feeders at the replacement site. The

total amount of this claim is $16,428.00. The Department denied payment based on its belief that the electrical service was "an increase in the electrical capacity necessary to accommodate the machinery and equipment being relocated by this Department". (See Letter to House of Bianchi from Edward J. Corcoran II, dated December 14, 1992, Exhibit #1, Item #5). The Code of Federal Regulation provides at 49 CFR § 24.303 (a)(3):

> **"(3) Disconnecting, dismantling, removing, reassembling, and reinstalling relocated machinery, equipment, and other personal property, including substitute personal property described at § 24.303 (a) (12). This includes connection to utilities available nearby. It also includes modifications to the personal property necessary to adapt it to the replacement structure, the replacement site, or the utilities at the replacement site, and modifications necessary to adapt the utilities at the replacement site to the personal property. (Expenses for providing utilities from the right-of-way to the building or improvement are excluded)."**

The work required at the House of Bianchi's Medford site (replacement location) was not **reconnection** of the feeders, it was **installation of new feeders**, including switch gear, conduit, wire, panels and accessories. The building leased by HOB in Medford did not include any permanent electrical service or distribution whatsoever. See 9/30/92 memorandum from B/PB Electrical Engineer confirming that the Medford replacement site had no existing electrical structure, Exhibit #4.

Mr. Robert Noone, Appraiser, Robert Noone Co., Peabody, MA, has confirmed that the risers/feeders at the acquired site were included as part of the value of the real property. The acquisition of the property at 293 A Street, Boston, MA, was based upon Robert Noone Co.'s appraisal. See Exhibit #4 from Robert Noone confirming the above and Exhibit #4 from the appraisal confirming that the highest and best use of the acquired property was determined to be

manufacturing. Since the electrical installation, including risers/feeders, was included in the protanto/real property payment to Bianchi Associates, the property owner, the electrical installation **is not** compensable as part of the personal property claim of HOB, the tenant.

Section 27.09(11) of 760 CMR, states... "The amount of a relocation payment for moving expenses may not include any expenditures for changes in or to a utility service...for which compensation was made at the old location.: State Regulation 760 CMR Section 27.09(14)(3), provides further confirmation that "no relocation payment in connection with a change in or to a building or structure shall be made for any items from which compensation was made as an acquisition cost."

49 CFR Part 24.3 Appendix A, also states that a duplication of payment for an item is prohibited.

Mr. Goodwin Morrison of Morrison Electric, exhibit #4, has confirmed that electrical power of identical voltage to that utilized at A Street was available for the new location in Medford (see exhibit #15). House of Bianchi's present landlord, J.J.J. Realty Trust (whose ownership includes the same individuals as the ownership of House of Bianchi) chose to install power of a different upgraded voltage necessitating installation of three transformers to match the power selected to House of Bianchi's relocated manufacturing equipment. The voltage selection was made to minimize installation and operating costs. Specifically, the installation of the different, upgraded voltage, was not for the relocated sewing machines and other manufacturing equipment, rather, it was to afford the landlord
a lower installation cost and utility rate for the building lighting, temperature control, etc.

The final part of this claim is for architectural fees necessary to build out the relocated site in the amount of $66,000.00 (See

Exhibit #3). The Department denied this claim based on 49 CFR § 24.304 Reestablishment Expenses which provides for an additional $10,000.00 in addition to the payments allowed under 49 CFR § 24.303. The House of Bianchi was allowed the opportunity to show other areas where the $10,000.00 could have been applied. Their post hearing submission is now a part of the file and shows $58,034.78 which could have been applied to the $10,000.00. The file contains copies of invoices and canceled checks to support the cost.

The issue that this forum must entertain is whether or not the architectural services provided by CID Associates, Inc. is reimbursable under 49 CFR Part 24 or under 760 CMR 27.00. The stated purpose of 49 CFR Part 24 is annunciated in § 24.1:

> **§ 24.1 Purpose.**
>
> **The purpose of this part is to promulgate rules to implement the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 et seq), in accordance with the following objectives:**
>
> **(a) To ensure that owners of real property to be acquired for Federal and federally-assisted projects are treated fairly and consistently, to encourage and expedite acquisition by agreements with such owners, to minimize litigation and relieve congestion in the courts, and to promote public confidence in Federal and federally-assisted land acquisition programs;**
>
> **(b) To ensure that persons displaced as a direct result of Federal or federally-assisted projects are treated fairly, consistently, and equitably so that such persons will not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole: and**
>
> **(c) To ensure that Agencies implement these regulations in a manner that is efficient and cost effective.**

The stated purpose of 760 CMR 27.00 is annunciated in 27.01 (1):

(1) Introduction. Under M.G.L. c. 79A, as amended by St. 1973, c. 863, all persons displaced by state and local public activity shall receive relocation assistance and payments commensurate with federal standards set forth in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646). The purpose of the statute is to provide for the fair and equitable treatment of all persons displaced as a result of public action. These regulations set forth in the relocation policies and requirements that apply to all agencies required to provide relocation assistance under M.G.L. c. 79A. Most of the requirements are an extension of established policies and procedures currently in effect under existing federal law P.L. 91646.

The architectural costs totaling $78,035.57, in accordance with 49 CFR Part 24.304(2), are in connection to the modifications made to building at the replacement site, and as such, are eligible as a reestablishment expense with a maximum limitation of $10,000.00.

HOB leased a shell of a building in Medford which required major renovation work to the building in accordance with their selected building design. HOB retained CID Associates, Inc. (CID), to perform the design of their building, see Standard Form of Agreement dated 12/12/91, Exhibit #4. There was a subsequent agreement, based on CID's design/plans dated 8/7/92, between J.J.J. Realty Trust, HOB's landlord in Medford, and H.A. Fafard & Sons Construction (Fafard), contractor retained to perform the renovation work (see Exhibit #4).

The work that was performed by the contractor, Fafard, glass and glazing for partition work, wall sections, roof repairs, demolition, loading dock canopy, exterior and interior doors, acoustic ceiling and bathroom partitions and accessories was in

accordance with the building design by CID. The architectural fees totalling $78,035.57 is based on work that is in connection with modifications to the real property/building. See description of renovation work included in the Agreement dated 8/7/92, Exhibit #4.

The architectural fees are not eligible under 760 CMR as Section 27.09(14)(3), Exhibit #4, states "Changes in or to a building or structure may not increase the value of the building or structure for general purpose uses..." The work based on the design of CID Associates, exterior/interior doors, bathroom partitions, glass and glazing for partition work, installation of walls, clearly increased the value of the building, as HOB leased a shell with no bathrooms/plumbing, interior walls separating office and warehouse, exterior and interior doors, etc. As a result of CID Associates design, the building was converted from a shell to a completed structure.

Mr. Steven Mollica, provides further clarification in the Informational Bulletin date 1/10/94, listed under the Criteria Section, see exhibit #4. Mr. Mollica confirms that converting a "shell" building into a building suitable for general purposes is not a compensable relocation expense in accordance with 760 CMR Section 27.09(14) Physical Changes.

The 49 CFR Part 24.304(2) allows for costs in connection with modifications to the replacement real property, to accommodate the business operation or make replacement structure suitable for conducting the business. Since the modifications made to the building were in direct connection to the building design by the architect, the architecture costs are eligible as a reestablishment expense with a maximum limit of $10,000.00 with the exception of $4,329.74 for layout of the personal property.

FINDINGS:

Item #1 of Exhibit #1 was for miscellaneous electrical expenses totaling $14,607.45. I find that the 10% overrun agreed to by the parties was reasonable and the $1180.50 for the electrical feed to the trash compactor was reasonable. The total agreement for this claim of $8880.50 was a fair settlement.

Item #2 of Exhibit #1 is for the linkage payment of $41,194.69. I find that the linkage is no part of the licensing fee and that this claim should be denied.

Item #3 of Exhibit #1 was the cost of the building permit. The claimant should be paid $500.00.

Item #4 of Exhibit #1 was the cost to relocate the equipment located at 168 A Street. I find that for this site the Claimant was not a displaced person as defined by the regulation and is denied.

Item #5 of Exhibit #1 was for the electrical feeders. I find that these feeders were enhancement to the real estate and the owners were compensated for them in the real estate taking by the Department thus should be denied.

Item #6 of Exhibit #1 was for the cost of architectural services at the new site and was necessary to reconnect the relocated equipment. However I find the Claimant is entitled only to the reduced amount of $4,329.74 for the layout of the personal property.

RECOMMENDATION:

The appeal of the House of Bianchi, Inc. for its claim for additional compensation for its relocation from 293 A Street, South Boston to 1 Brainard Avenue, Medford, in the amount of $144,222.39, should be approved in the lesser amount of $13,710.24.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: August 9, 1996

RE: Board of Relocation Appeals

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

Kevin Empey D/B/A Norfolk Dental Laboratory
Route 140, Franklin
Parcel No. 6 RT-2

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, AUGUST 14, 1996**, for action of the Massachusetts Highway Commission acting as the Board of Relocation Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

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

Chief Eng. Broderick
M. Lyons, Dir., ROW
Secretary's Office
Christopher Quinn, Esq.
M. Mahoney, ROW
David Quinn, Esq.

Kevin Empey D/B/A
Norfolk Dental Lab.
9 East Central Street
Franklin, MA 02038

R.E. Dutil, Jr.
ROW Program Manager
Federal Highway
Administration
Transportation Systems
Center
55 Broadway - 10th Floor
Cambridge, MA 02142

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 **KEVIN EMPEY D/B/A NORFOLK DENTAL LAB.**, 9 East Central Street, Franklin, MA 02038, notifying them this report and recommendation will be presented to the Board of Relocation Appeals at its meeting of **WEDNESDAY, AUGUST 14, 1996** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

Kevin Empey D/B/A Norfolk Dental Laboratory hereinafter referred to as the Claimant, aggrieved by the Massachusetts Highway Department's (MHD) determination associated with relocation assistance appealed to the MHD's Board of Relocation Appeal.

The Claimant was a tenant at 3 East Central Street (also referred to as Parcel No. 6 RT-2 - Franklin). The Claimant was ordered to vacate their premises to make way for the Route 140 Project. The property at 3 East Central Street was acquired by the MHD as part of the property acquisition necessary for the construction work on Route 140.

The construction requiring the acquisition of 3 East Central Street, Franklin, was a federal aid highway program (Federal Aid No. NH-71(1)). The Federal Highway Administration (FHWA), a division with the Federal Department of Transportation (DOT), has primary responsibility for the administration of the Federal Aid Highway Program.

The Claimant was a tenant at 3 East Central Street and the property was taken in preparation for the construction of Route 140. The Claimant is a displaced person eligible for relocation assistance under Massachusetts General Laws (M.G.L.) c. 81 "Public Ways and Works," §. 7J "Relocation Assistance; acquisition of real property; payments; compliance with federal acts." M.G.L. c. 81 § 7J provides in part:

> "In any federally aided program...the department is hereby authorized and directed to do all things necessary to comply with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646), as amended and supplemented...(See 42 United States Code Annotated (U.S.C.A.) § 4601 et seq.) or with any other federal act relating to relocation assistance or acquisition, insofar as the federal government requires compliance with said Public Law 91-646 or said other federal acts in order to receive said federal aid. Under a federally aided program, in relation to any person whose real property is acquired, in whole or in part, by the department for a highway purpose, or any person lawfully occupying real

> property acquired by the department for highway purposes, or any person who vacated real property at the written request of the department because of a proposed acquisition for highway purposes, the department is hereby authorized and directed to make such payments, provide such assistance and do such other things as are necessary for the department to comply with the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970."

Pursuant to authority granted the Department of Transportation (DOT) at 42 U.S.C.A. § 4633 (b) "regulations and procedures," DOT issued regulations entitled the Uniform Relocation Assistance and Real Property Acquisition Regulation for Federal and Federally Assisted programs: 49 Code of Federal Regulations (CFR) Part 24 (FHWA Docket No. 87-22) Interim Final Rules, implementation date December 17, 1987. 49 CFR 24 is applicable to the relocation of the Claimant. The Claimant has appealed the MHD's denial of his claim as reflected in Exhibit #1.

Pursuant to M.G.L. c. 79A, § 7: "any person aggrieved by a determination as to eligibility for, or the amount of a ... (relocation) payment ..." The Department's Board of Commissioners delegates to the Department's Chief Administrative Law Judge the authority to conduct Board of Relocation Appeals hearing.

A hearing was held on August 6, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Quinn, Esq.	Attorney, Right of Way Bureau
Michael Mahoney	Relocation Administrator
Shirley Waite	Relocation Supervisor
Kevin Empey	Norfolk Dental Lab.

Entered as Exhibits were:

Exhibit #1.....Statement of Claim
Exhibit #2.....Department's Response

FACTS AND ISSUES PRESENTED:

The only issue in dispute is an invoice in the amount of $4180.00 for the professional services of a relocation move planner, Maccini Sons Associates.

The invoice submitted included the following charges:

$85.00/hour for a planning supervisor x 28 hours = $2380.00
$50.00/hour for a clerical person x 36 hours = $1800.00
Total due $4180.00

This type of relocation service payment is allowed under the Federal Regulations Section 24.303:

"Payment for Actual Reasonable Moving and Related Expenses, Nonresidential Moves:

(a) Eligible Costs:
(8) Professional services necessary for:
(i) Planning the move of personal property".

However, Section 24.303 (a)(8)(i) payments are limited by Section 24.303 (a)"...actual moving and related expenses, as the Agency determines to be reasonable and necessary".

The Department's Business Relocation Claim Advisory Committee ("Committee") determined that the hourly rates submitted by Maccini Sons Associates for move planning (i.e. $50.00 per hour for the clerical person and $85.00 per hour for the planning supervisor) were excessive and not reasonable and necessary as required by Section 24.303 (a). Therefore, this portion of the relocation claim payment was reduced.

The Committee's determination was based upon a previous Relocation Claim Appeal hearing decision, the Brian A. Hill Case, heard on December 8, 1992. In the Brian A. Hill Case, I held the owner, who had appealed for payment of relocation planning services for herself, was allowed $30.00 per hour as she was not a professional planner and if she had used a "professional planner" a rate of $40.00 per hour would have been allowed (emphasis added).

Also, the Committee determined that $20.00 per hour including profit and overhead would be a reasonable rate for "clerical services".

Based on this decision, the Committee allowed the following payment:

Supervisor	**28 hours @**	**$40.00 =**	**$1120.00**
Clerical	**36 hours @**	**$20.00 =**	**$ 720.00**
		Total	**$1840.00**

FINDINGS:

I find that based on my previous investigation in the Brian A. Hill matter that a rate of $85.00 per hour for a move planner and $50.00 per hour for clerical support is excessive and unreasonable.

RECOMMENDATION:

The Norfolk Dental Laboratory's claim for additional cost for a move planner and clerical worker in the amount of $2340.00 should be denied and that the amount paid by the Department, $1840.00 for these services was reasonable.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: August 16, 1996

RE: Board of Relocation Appeals

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

Butler Fuel Corporation
Routes 52 & I-395
Parcel No. B & 2-93

- -

Please place this report and recommendation on the Docket Agenda **FRIDAY, AUGUST 16, 1996**, for action of the Massachusetts Highway Commission acting as the Board of Relocation Appeals.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

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

Chief Eng. Broderick
M. Lyons, Dir., ROW
Secretary's Office
Christopher Quinn, Esq.
David Quinn, Esq.
M. Mahoney, ROW

Butler Fuel Corp.
Sutton Avenue
Oxford, MA 01540

Samuel R. DeSimeone, Esq.
Mountain, Dearborn & Whiting
Counselors At Law
370 Main Street
Worcester, MA 01608-1778

R.E. Dutil, Jr.
ROW Program Manager
Federal Highway Administration
Transportation Systems Center
55 Broadway - 10th Floor
Cambridge, MA 02142

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 **BUTLER FUEL CORPORATION**, Sutton Avenue, Oxford, MA 01540, notifying them this report and recommendation will be presented to the Board of Relocation Appeals at its meeting of **FRIDAY, AUGUST 16, 1996** at 2:00 PM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

Butler Fuel Corporation (the Claimant) aggrieved by the Massachusetts Highway Department's (MHD) determination associated with relocation assistance appealed to the MHD's Board of Relocation Appeal.

The Claimant owned the property located at 43 Sutton Avenue, Oxford. The property was taken by the Massachusetts Highway Department by order of taking dated 4/27/72, Parcel B & 2-93. The property on Oxford Avenue was acquired by the Massachusetts Highway Department for the construction of Route 52 and I-395.

The construction requiring the acquisition of 43 Sutton Avenue, Oxford, was a federal aid highway program (Federal Aid No. U-383(9)). The Federal Highway Administration (FHWA), a division with the Federal Department of Transportation (DOT), has primary responsibility for the administration of the Federal Aid Highway Program.

The Claimant owned the property in Oxford and the property was taken in preparation for the construction of Route 52 and I-395. The Claimant is a displaced person eligible for relocation assistance under Massachusetts General Laws (M.G.L.) c. 81 "Public Ways and Works," §. 7J "Relocation Assistance; acquisition of property; payments; compliance with federal acts."

M.G.L. c. 81 § 7J provides in part:

> "In any federally aided program...the department is hereby authorized and directed to do all things necessary to comply with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1770 (Public Law 91-646), as amended and supplemented...(See 42 United States Code Annotated (U.S.C.A.) § 4601 et seq.) or with any other federal act relating to relocation assistance or acquisition, insofar as the federal government requires compliance with said Public Law 91-646 or said other federal acts in order to receive said federal aid. Under a federally aided program, in relation to any person whose real property is acquired, in whole or in part, by the department for a highway purpose, or any person lawfully occupying real property acquired by the department for highway purposes, or any person who vacated real property at the written

> request of the department because of a proposed acquisition for highway purposes, the department is hereby authorized and directed to make such payments, provide such assistance and do such other things as are necessary for the department to comply with the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970."

Pursuant to authority granted the Department of Transportation (DOT) at 42 U.S.C.A. § 4633 (b) "regulations and procedures," DOT issued regulations entitled the Uniform Relocation Assistance and Real Property Acquisition Regulation for Federal and Federally Assisted programs. The Claimant has appealed the MHD's denial of his claim as reflected in Exhibit #1.

Pursuant to M.G.L. c. 79A, § 7: "any person aggrieved by a determination as to eligibility for, or the amount of a ... (relocation) payment ..." The Department's Board of Commissioners delegates to the Department's Chief Administrative Law Judge the authority to conduct Board of Relocation Appeals hearings.

A hearing was held on July 2, 1996. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Quinn, Esq.	Attorney, Right of Way Bureau
Michael Mahoney	Relocation Administrator
Shirley Waite	Relocation Supervisor
Samuel DeSimone	Attorney for Butler
James T. Butler	Butler Fuel
Donna Butler Buono	Butler Fuel

FACTS, ISSUES AND FINDINGS:

This matter was heard originally in 1978 by then Hearing Examiner Domenic Alfano. Mr. Alfano died in 1979 before he had an opportunity to make his recommendation to the Board of Relocation Appeals. Between 1979 and the present, the file was lost and never recovered. I agreed to hear the matter with the proviso that the facts were to be stipulated to by the Department and the Claimant.

The stipulated facts are that by an Order of Taking dated April 26, 1972, the Commonwealth exercised its power of eminent domain by taking property of Butler Fuel Corporation (the "Claimant"). The

property was located in the Town of Oxford. The Commonwealth has paid the Claimant for the real estate involved. The Claimant conducted two businesses on the property taken: (1) one was the business of the retail sale of trailers, campers and camping supplies; (2) the second, and more significant to the issues involved in this relocation appeal, was the storage and sale of liquid propane, oil, fuel oil and similar products. Site improvements located on the property taken consisted of a corrugated metal building set upon an 8' x 10' high concrete platform. The platform was used as a storage area for full 100 pound cylinders of liquid propane and small fittings for gas burners. The real estate was serviced by municipal water supply.

In addition, there was a main office, a garage, a storage area and three 9,980 gallon, above-ground oil storage tanks. Two of these tanks were filled with No. 2 fuel oil and the third tank was filled with kerosene. The garage was used for maintenance of equipment as well as the maintenance of the trailers and campers that were sold in the trailer business. Within the garage was a pit designed for working on the undercarriage of vehicles.

Soon after the Claimant's real estate was taken, the Claimant made arrangements to buy another location in Oxford for its business operations and, with the permission of the Department of Public Works, the Claimant conducted a so-called “self-move”.

In 1975, due to the complexities of reaching a resolution with respect to some aspects of the relocation benefits that the Claimant was entitled to, the Department, with the Claimant's assent, agreed that a partial payment of the relocation claim should be made. This partial payment represented the payment for moving costs only and did not include any cost incurred by the Claimant for tradesmen's bills or other expenses. The Claimant was paid $12,439.54 for moving expenses only.

After hearing testimony and receiving documentary evidence regarding the principal relocation benefits which had been considered

by the Chief Administrative Law Judge, there remain six (6) open issues, I summarize the issues making the following findings:

1. The Claimant has maintained that the moving costs were $13,031.37 and questions the adequacy of the payment received ($12,439.54). Under the provisions of the Code of Massachusetts Regulations ("CMR") Section 27.09(5) reasonable moving expenses shall be the full amount of eligible expenses incurred. Pursuant to that provision, I find that the Claimant's moving expenses of $12,739,52 were reasonable. The Claimant having been previously paid $12,439.54 shall be paid an additional $300.00.
2. The Claimant filed a claim for the cost of drilling an artesian well on the site to which he relocated his business in the sum of $2,935.54. The Department declined to reimburse the Claimant for the installation of the artesian well. The provisions of CMR 27.09(11) provide that relocation payments for moving expenses may include necessary expenditures for reconnecting utility services, including water. I find that the location to which the Claimant relocated his business in the Town of Oxford is an appropriate location considering zoning and other business issues. The Town of Oxford does not provide municipal water throughout the town and, therefore, I find that the $2,935.54 expenditure for drilling the artesian well by the Claimant was necessary as defined under CMR 27.09(11) and should be paid.
3. The Claimant has filed a claim for $5,146.65 representing the cost of a hydraulic lift and its ancillary parts. This hydraulic lift was installed as a substitute for the service pit situated on the Claimant's original site. The Department has declined to make this payment, although it does not challenge the cost presented by the Claimant. The

provisions of the Code of Federal Regulations ("CFR"), Section 24.303(3) and (12), allow for the payment of expenses incurred reinstalling relocated machinery equipment including substitute personal property so long as the substitute item performs a comparable function at the replacement site. I find that the hydraulic lift formed a function comparable to the service pit and, therefore, I find that the $2,570.00 cost for the lift pads were a necessary and reasonable expense for the operation of the Claimant's business.

4. At its new location, the Claimant installed an upgraded intercom system and filed a claim for $840.81 representing the cost of this intercom system. The Department declined to pay this claim considering it ineligible for reimbursement because it was an improvement for what the Claimant had at its original site. I find that $140.00 paid by the Claimant for upgrading the intercom system was necessary and appropriate pursuant to the provisions of CMR 27.09(3) and (14).
5. The Claimant has filed a claim seeking reimbursement for moving two (2) bulk tanks for liquid propane from the original site to the newly located site and submitted as its costs the sum of $1,030.00. The Department had taken the position that this cost was included within the $12,439.54 originally paid. Under CMR Section 27.09(5) reasonable moving expenses shall be the full amount incurred. I find that the $1,030.00 was not so included and, therefore, find that the sum of $1,030.00 should be paid to the Claimant.
6. The Claimant has submitted a claim for reimbursement for the cost of relocating and installing three (3) oil storage tanks at its new location. The tanks were labeled as having a capacity of holding 9,980 gallons each. At the original

facility, the tanks were above ground but were moved and installed underground at the new location. 760 CMR 27.09(14) allows as an eligible expense the cost of making physical changes necessary to permit the reinstallation of relocated equipment necessary to the continued operation of a business. 49 CFR, Subtitle A, Section 24.303 (3) allows for modifications necessary in reinstalling equipment from one location to another. I find that the cost of moving the tanks was a necessary and eligible expense. I find that the difference in the cost of installing the three (3) bulk tanks underground as compared to installing them above ground was $300 - $400 and, under the provisions of the regulations cited, find that the sum of $32,638.00 was necessary and appropriate for the continued operation of the Claimant's business and that sum should be paid.

It should be noted that all cancelled checks were supplied to the Department's Consultant Harold D'ellimida, but were lost with the files.

RECOMMENDATION:

The Butler Fuel Corporation's claim for additional cost of $62,560.46 for the actual and reasonable cost of its relocation should be approved in the lesser amount of $39,603.54.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

INTEROFFICE MEMORANDUM

TO: Massachusetts Highway Commission

FROM: Peter Milano, Ch. Adm. Law Judge

DATE: October 23, 1997

RE: Board of Relocation Appeals

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

G.P. Hale Company
145 Northern Avenue, Boston
Parcel Nos. 65-RT-3 and 65-30

- -

Please place this report and recommendation on the Docket Agenda **WEDNESDAY, OCTOBER 29, 1997**, for action of the Massachusetts Highway Commission acting as the Board of Relocation 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
Gerald Solomon, Dir., ROW
Secretary's Office
David Quinn, Esq.
Nancy Scopa, ROW
K. Dettman, Ch. Couns., CA/T

Michael Portnoy, Esq.
165 Washington Street
Winchester, MA 01890

G.P. Hale Company
145 Northern Ave.
Boston, MA 02210

R.E. Dutil, Jr.
ROW Program Manager
Federal Highway Administration
Transportation Systems Center
55 Broadway - 10th Floor
Cambridge, MA 02142

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 **MICHAEL PORTNOY, ESQ.**, 165 Washington Street, Winchester, MA 01890, notifying them this report and recommendation will be presented to the Board of Relocation Appeals at its meeting of **WEDNESDAY, OCTOBER 29, 1997** at 9:30 AM, 10 Park Plaza, Room 3510, Boston, MA.

INTRODUCTION:

The G.P. Hale Company (Claimant), aggrieved by the Massachusetts Highway Department's (MassHighway) determination associated with relocation assistance appealed to the MassHighway's Board of Relocation Appeals.

The Claimant was allegedly an owner/occupant at 145 Northern Avenue, Boston, MA 02210 (also referred to as Parcel Nos. 65-RT-3 and 65-30). The Claimant was ordered to vacate their space by MassHighway. A portion of the building at 145 Northern Avenue was acquired by the MassHighway as a part of the property acquisition necessary for the construction of the Central Artery/Tunnel (CA/T) project on April 17, 1996 and May 7, 1997 from the MBTA which had taken all the building on August 11, 1995. The construction, requiring the acquisition of 145 Northern Avenue, is a federal aid highway program.[1] The Federal Highway Administration (FHWA) a division with the Federal Department of Transportation (DOT), has primary responsibility for the administration of the Federal Aid Highway Program.

If the Claimant was an owner/occupant at 145 Northern Avenue and the property was taken in preparation for the Construction of Central Artery/Tunnel, then the Claimant is a displaced person eligible for relocation assistance under Massachusetts General Laws (M.G.L.) c. 81 "Public Ways and Works", § 7J "Relocation Assistance; acquisition of real property; payments; compliance with federal acts."

M.G.L. c. 81 § 7J provides in part:

> "In any federally aided program...the department is hereby authorized and directed to do all things necessary to comply with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646), as amended and

[1] The property was originally taken by the Massachusetts Bay Transit Authority (MBTA) under an order of taking dated August 11, 1995. As of the date of the taking there was an understanding between the MBTA and CA/T that MassHighway would provide relocation assistance to the occupants of the building area that was to be taken by MassHighway

> supplemented...(See 42 United States Code Annotated (U.S.C.A.) § 4601 et seq.) or with any other federal act relating to relocation assistance or acquisition, insofar as the federal government required compliance with said Public Law 91-646 or said other federal acts in order to receive said federal aid. Under a federally aided program, in relation to any person whose real property is acquired, in whole or in part, by the department for a highway purpose, or any person lawfully occupying real property acquired by the department for highway purposes, or any person who vacated real property at the written request of the department because of a proposed acquisition for highway purposes, the department is hereby authorized and directed to make such payments, provide such assistance and do such other things as are necessary for the department to comply with the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970." (emphasis added)

Pursuant to authority granted the Department of Transportation (DOT) at 42 U.S.C.A. § 4633 (b) "regulations and procedures," DOT issued regulations entitled the Uniform Relocation Assistance and Real Property Acquisition Regulation for Federal and Federally Assisted programs: 49 Code of Federal Regulations (CFR) Part 24 (FHWA Docket No. 87-22) Interim Final Rules, implementation date December 17, 1987. 49 CFR 24 is applicable to the relation of the Claimant. The Claimant has appealed MassHighway's denial of his claim as reflected in Exhibit #1.

Pursuant to M.G.L. c. 79A, § 7:

> "any person aggrieved by a determination as to eligibility for, or the amount of a ... (relocation) payment ... may have his claim reviewed by the head of the displacing agency ..." MassHighway's Board of Commissioners delegates to the MassHighway's Chief Administrative Law Judge the authority to conduct Board of Relocation Appeals hearings.

A hearing was held on July 24, 1997 and August 12, 1997. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
David Quinn	Attorney, Right of Way Bureau MassHighway
Nancy Scopa	MassHighway - Relocation
Michael Portnoy	Attorney for G.P. Hale
Leon Weinstein	Owner - G.P. Hale
Matt Piccione	Relocation Consultant - G.P. Hale

Entered as Exhibits were:

Exhibit #1	Statement of Claim
Exhibit #2	Package of 31 pages with cover letter from Kendall Relocating Corp. to Lori Nadeau, dated September 10, 1996.
Exhibit #3	7 pages of water bills reflecting cost incurred by Globe Fish and G.P. Hale under cover letter dated July 10, 1997.
Exhibit #4	Nynex telephone bills to G.P. Hale for February 1997, April 1997 and June 1997.
Exhibit #5	Boston Gas bills made out to G.P. Hale from February through June 1997.
Exhibit #6	Random billings for G.P. Hale for product purchases.
Exhibit #7	Payments to G.P. Hale for product sold.
Exhibit #8A	Rental bills from Ryan Elliott for Globe Fish Co.
Exhibit #8B	Rental bills for G.P. Hale from Ryan Elliott
Exhibit #9	Boston Edison bills to G.P. Hale
Exhibit #10	Floor plan with designated area for lot "F" at new location for G.P. Hale.
Exhibit #11	Picture of sign at new location (BRA/EDIC Marine Industrial Park, Boston) with G.P. Hale Co. on sign.
Exhibit #12	Letter from the MBTA to tenants at 145 Northern Ave. informing all tenants including Hale that the MBTA has taken the property by order of taking dated August 11, 1995.

FACTS AND ISSUES PRESENTED:

The present matter arose as a result of the MassHighways' Business Relocation Claims Advisory Committee's (BRCAC) determination that G.P. Hale Company, the Claimant, and Globe Fish Company were one business and entitled to only one Business Reestablishment Benefit Payment (BRB) and one Incidental Searching Expense. Both companies were owned at the time of the initial taking by the MBTA by Leon Weinstein. The date of that taking was August 11, 1995. By letter dated November 14, 1995 to Patrick Moynihan, General Manager of MBTA,

from Peter Zuk, Central Artery/Tunnel Project Director, Mr. Zuk states:

> "In accordance with a letter of intent, staff from our respective agencies drafted a Memorandum of Agreement pursuant to which the Department would acquire approximately one third of the property from MBTA, and would relocate occupants within such portion of the building."

MassHighway did not take its portion of the building until April 17, 1996. However, the critical date of taking is the date the MBTA took the building, since MassHighway always was going to be responsible for relocating the tenants in the portion of the building occupied by the Claimant and Globe Fish.

By his testimony, Mr. Weinstein acquired G.P. Hale from Glen Hale in 1990 for all its outstanding debt. At that time G.P. Hale Company was incorporated. G.P. Hale was dissolved as a corporation on December 31, 1995 (see copy of the Secretary of States certification attached hereto and made a part hereof and marked Attachment I).

49 CFR 24.2 gives the following definition for "displaced person", and "person",

> (g) Displaced person - (1) General. The term displaced person means any person who moves form the real property or moves his or her personal property from the real property: (This includes a person who occupies the real property prior to its acquisition, but who does not meet the length of occupancy requirements of the Uniform Act as described at § 24.401 (a) and 24.402(a)):
>
> i. As a direct result of a written notice of intent to acquire, the initiation of negotiations for, or the acquisition of, such real property in whole or in part for a project.
>
> ii. As a direct result of rehabilitation or demolition for a project; or
>
> iii. As a direct result of a written notice of intent to acquire, or the acquisition, rehabilitation or demolition of, in whole or in part, other real property on which the person conducts a business or farm operation, for a project. However, eligibility for such person under this paragraph applies only for purposes of obtaining relocation assistance advisory services under § 24.205(c), and moving expenses under § 24.301, §24.302 or § 24.303."

> (q) Person. The term person means any individual, family, partnership, corporation or association. (emphasis added)

The BRCAC denied eligibility to the Claimant because in 1996 it did not have its own Federal Identification Number. From January 1, 1996 G.P. Hale Company has been operated as a D.B.A (doing business as) under Globe Fish. However, sufficient evidence was supplied to show that G. P. Hale has kept separate billings both prior to August 11, 1995, the date of taking by the MBTA,(see file for submissions by Claimants Attorney) and subsequent to that date. (See Exhibits 3, 4, 5, 6, 7, 8A, 8B and 9)

Both G.P. Hale and Globe Fish signed settlement agreements with the Central Artery/Tunnel projects dated May 8, 1996 and May 6, 1996 respectively which gave both entities the $10,000.00 business re-establishment expenses and $1000.00 searching expenses.

As a corporation, G.P. Hale was a "person" as defined above (49 CFR 24.2 (q)). Furthermore, the Claimant, clearly was a separate entity on August 11, 1995 and is a "displaced person" as defined in 49 CFR 24.2 (g) (Supra) (see also Attachment I and file for billing record prior to taking).

FINDINGS:

I find that the Claimant was acquired by Globe Fish Company in 1990.

I find that the Claimant was voluntarily dissolved as a Massachusetts Corporation on December 31, 1995. (See Attachment I)

I find that the Claimant has continued operation as an unincorporated business from January 1, 1996 to the date of hearing.

On August 11, 1995, the MBTA, pursuant to an Order of Taking filed at the Suffolk County Registry of Deeds, took the realty owned by Hale located at 145 Northern Avenue, Boston, Massachusetts by Eminent Domain.

I find that pursuant to separate settlement agreements MassHighway agreed to pay the Claimant and Globe each Ten Thousand ($10,000.00) Dollars for business reestablishment expenses and One Thousand ($1,000.00) Dollars each for searching expenses (see files for copies of respective settlement agreements).

I find that from the time of the Taking to the time of the hearing, the Claimant has maintained a separate business identity to the public. (See Exhibits numbered 3-9).

I find that the Claimant will be located at a separate designated space at the New England Seafood Center. (See partial plan of designated area, Exhibit #10)

I find that the Claimant was a displaced person and was entitled to all relocation benefits available to such persons (see 49 CFR 24; M.G.L. c. 81 § 7J).

I find that Leon Weinstein, as a representative of both Globe and Hale, incurred searching expenses for the actual time spent searching for a replacement site for both companies. The searching was done with representatives of the MBTA, the Highway Department and relocation consultants and real estate brokers in the waterfront areas around Boston.

I find that the Claimant is entitled to Business Reestablishment Benefit Payments of $10,000.00.

RECOMMENDATION:

The Relocation Appeal of G.P. Hale, as a result of its relocation from 145 Northern Avenue, Boston, Parcel Nos. 65-Rt-3 and 65-30 for seaching expense and Business Reestablishment 24 CFR 24.303(13) and 304 respectively, should be approved in the amount of $11,000.00.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

APPENDIX E-1

DECISIONS/RULINGS

Former Railroad Right of Way (M.G.L. c. 40, §54A)

May 4, 1995

Richard Villiotte, Esq.
City Solicitor
281 Broadway
Revere, MA 02151

Re: 190 North Shore Road
Concurrence in Building Permit
Pursuant to M.G.L. c. 40 § 54A

Dear Mr. Villiotte:

Pursuant to M.G.L. c. 30A § 11(7), this letter and the attached report of Peter Milano, Chief Administrative Law Judge for the Massachusetts Highway Department, which report and recommendation I adopt and incorporate herein, constitutes my proposed decision to concur in the City's issuance of the building permit for the above captioned property. You are hereby afforded a thirty-day period to file objections and to present arguments in writing to my decision. At the end of the thirty-day period, if no written objections are forwarded to my attention, this matter will be final. Any objection will be reviewed and final decision made within 15 days of receipt of any objections.

My final decision shall also serve as a determination, in accordance with G.L. c. 30, § 61, that the project does not "sever a substantially intact, through rail right-of-way" and that applicant has taken all feasible means and measures to avoid or minimize any environmental impacts arising from EOTC's consent to such permit.

If you have any questions regarding this matter, you may contact Judge Milano at (617)973-7890.

Sincerely,

James J. Kerasiotes
Secretary

Enc.
cc:
David L. Klebanoff, Esq.
Gilman, McLaughlin & Hanrahan
Attorney for Applicants
470 Atlantic Avenue
Boston, MA 02210

John Brennan,
Deputy General Counsel
Executive Office of Transportation
and Construction
10 Park Plaza
Boston, MA 02116

Revere Neighborhood Coalition
Adele Johanna Toro
P.O. Box 357
Revere, MA 02151

Joseph Felzani
42 Goodwin Avenue
Revere, MA 02151

Matthew Thurber
1 Carey Circle #411
Revere, MA 02115

Sheldon Kovitz
Point of Pines Beach Assoc.
53 Delano Avenue
Revere, MA 02151

EXECUTIVE OFFICE OF TRANSPORTATION AND CONSTRUCTION

- -

In Re: 190 North Shore Road Corporation and Somerset Savings Bank: Concurrence by the Secretary of the Executive Office of Transportation and Construction Pursuant to M.G.L. c. 40 § 54A

- -

HISTORICAL BACKGROUND

This matter originally commenced in 1988 with the application by 190 North Shore Road Corp. for consent to build on or appurtenant to a former railroad right of way under the provisions of G.L. c. 40 § 54A. A hearing was held on August 10, 1988. On September 7, 1988, the hearing officer recommended against consent, finding a transportation use in the potential extension of the Blue Line.

On October 4, 1988, the Secretary, Frederick P. Salvucci denied consent.

The applicants next brought an appeal under the provisions of G.L. 30A and an appeal of an adverse decision by the Superior Court to the Supreme Judicial Court. The appeal is presently stayed by an agreement between the Commonwealth and the applicant pursuant to which agreement the hearing and consideration of the original application for consent was re-opened.

The Chief Administrative Law Judge for the Massachusetts Highway Department was designated by The Executive Office of Transportation

and Construction (EOTC) as the hearing officer charged with recommending a finding on the issue of consent pursuant to M.G.L. c. 40 § 54A. This report is a recommendation of my findings to the Secretary of Transportation and Construction.

Massachusetts General Laws, Chapter 40, Section 54A provides that a city or town must obtain concurrence from the Secretary of the Executive Office of Transportation and Construction to the issuance of a building permit for any structure on lands formerly used as a railroad right-of-way or any lands appurtenant thereto formerly used by any railroad company in the Commonwealth.

A building permit was issued and construction had begun on the property. The structure is shown on a plan entitled "OCEAN NORTH CONDOMINIUM, 190 N. SHORE ROAD REVERE, MA." prepared by Peter F. Dimeo Associates, Inc. dated April 22, 1987. The parcel on which the structure is located consists of 38,565 S.F. Notification of the public hearing was published in the Boston Herald and the hearing was held at the Transportation Building, Conference room #4 on April 21, 1994.

A sign-in sheet was made available at the hearing. Twenty-four people signed in although the number of people in attendance was greater.

The record which can be reviewed in my office consists of the record of the previous hearing in 1988. A ninety-three (93) page transcript of the hearing of April 21, 1994 and post hearing submissions. All submissions are now in.

Entered and marked as exhibits were:

Exhibit #1..... Notice in Herald dated 3/26/94.

Exhibit #2..... Notice in Central Register in April 6, 1994 issue at Page 76.

Exhibit #3..... Plan entitled "Part of City of Revere, Plate 13," with Four Color Photos of the Building and Site.

Exhibit #4..... B & M Railroad Map, Sheet V-7.9/3.

Exhibit #5..... B & M Railroad Map, Sheet V-7.9/4.

Exhibit #6..... Letter from Vinay V. Mudholkar, Chief Engineer, B & M Railroad, dated April 15, 1994.

Exhibit #7..... Aerial Photograph of 190 North Shore Road, dated April 13, 1992.

Exhibit #8..... Motion to Stay Appeal in the Matter of 190 North Shore Road Corporation vs. the Secretary of the Executive Office of Transportation and Construction of the Commonwealth of Massachusetts; and 190 North Shore Road Corp. vs. Ocean Side Health Club, Inc., Martin J. McDonough, Eugene F. Grant, Myron J. Fox, and the Commonwealth of Massachusetts, SJC Docket Numbers 5257 and 5354.

Exhibit #9A..... Judgment in Land Court Tax Lien Case 95475.

Exhibit #9B..... Judgment in Land Court Tax Lien Case 95476.

Exhibit #9C..... Judgment in Land Court Tax Lien Case 95477.

Exhibit #10..... Booklet entitled "Commuting in a New Century", with specific reference to Page 9-48.

Exhibit #11..... Point of Pines Beach Association's 12-page letter to the Secretary of Environmental Affairs, dated December 23, 1991.

Exhibit #12..... Fact Sheets, Two Pages, on 190 North Shore Road presented by Point of Pines Beach Association.

Exhibit #13..... Pine Riverside Associates, Three-Page letter dated April 21, 1994 to the Executive Office of Transportation and Construction.

Speakers at the hearing were:

Peter Milano	Chief Administrative Law Judge
Attorney David Klebanoff	Attorney for 190 North Shore Road Corp. and Somerset Savings the applicant)
Richard B. Villiotte	City Solicitor, City of Revere (the respondent)
Susan Krupanski	Assistant General Counsel, MBTA
John Brennan	Deputy General Counsel, EOTC
Dennis Coffey	Director of Rail Policy and Property Management, EOTC
William Reinstein	State Representative, City of Revere
Frank Stringi	City Planner, City of Revere
Joseph W. DiCarlo	City Councillor, City of Revere
Sheldon Kovitz	Point of Pines Beach Association
Linda Rosa	Revere Resident
James R. Nelson	Revere Resident
Matt Thurber	Revere Resident
Joseph James	Revere Resident

Carol Sinclair	Revere Homeowners Association
Joan Anderson	Revere Resident
Robert E. Lund	Revere Resident

All submissions, exhibits and transcript are a part of the permanent record and can be inspected in my office, Room 7372, 10 Park Plaza, Boston, MA 02116.

FACTS AND ISSUES PRESENTED:

The property at issue is on a spur or other terminus to the former B & M Railroad right-of-way. That line was abandoned before 1926 and has not been used since. The location of the building at the terminus of that right-of-way does not impede any through right-of-way which could ever practically be used for transportation uses, since it is blocked by buildings and a road beyond the property. The testimony was that if anyone were to restore rail service in the area "the building footprint is not an area we'd essentially put a track because the property line ends." (Transcript at 21-2). Moreover, there was evidence that other structures have blocked the B & M right-of-way elsewhere along its former route.

The property also abuts the narrow gauge right-of-way of the former Boston, Revere Beach and Lynn Railroad. However, as indicated by the testimony of several witnesses, (e.g. transcript, hereinafter Tr. at 18) and demonstrated by the survey submitted by the Applicant, the building on the property does not sever or otherwise interfere with this former right-of-way. This former right-of-way is also blocked elsewhere by other large structures.

Testimony and evidence was taken from the Boston and Maine

Railroad, EOTC and MBTA, the three entities with historic interest in the area and the two agencies which had formerly been found to potentially be interested in the property. Both agencies affirmatively represented that any use they might make of the area could be accommodated with the existing property intact.

The Boston and Maine Railroad provided a letter indicating that it does not anticipate restoring freight service at the location and has "no interest" in the hearing (Ex. 6). The record reflects that the Boston and Maine has had no ownership interest in the property since 1926 (Tr. p. 20).

The MBTA was represented by Ms. Susan M. Krupanski. She indicated that the authority had reviewed the plans and "are satisfied that the former right-of-way is not severed" (Tr. 18). The MBTA did not oppose consent to build nor indicate any interest in the site or property.

The EOTC was represented by John Brennan and Dennis Coffey. Mr. Brennan demonstrated that there was no practical way of reestablishing the B & M line along any path with which the existing building would interfere (Tr. 21-22) and that the narrow gauge right-of-way "is not being severed by the footprint of the building" (Tr. 23).

Dennis Coffey is the Director of Rail Policy and Property Management for the EOTC. Mr. Coffey testified that:

> "The building appears not to sever the right-of-way, and, therefore, the Executive Office has no current or foreseeable need or interest in acquiring the property for future transportation purposes." (Tr. 25).

Furthermore, in a post hearing submission of a Memorandum from Geoff Slater, Director of Planning for the MBTA, to Dennis Coffey,

Director of Railroad Policy and Property Management, EOTC, dated March 16, 1995 (a copy of which is attached hereto and made a part hereof identified as Attachment I) states in part: "as you requested, the following is a status of the North Shore Transportation Study. With respect to use of the former narrow gauge right-of-way through Point of Pines, we have determined that we would not use that right-of-way for any future extensions."

The testimony of the above witnesses and the submissions of Attachment I were challenged in the respondent's City of Revere's Draft Recommendations and by letter dated April 18, 1995 respectively.

Mr. Villiotte's Draft Recommendation dated April 5, 1995 states at page 12:

> "At the April 21, 1994 hearing, the testimony and evidence taken from representatives of the Boston and Maine Railroad, MBTA and EOTC offered nothing new other than a present qualified expression of no interest for future use of the property. This evidence was contrary to formal or official reports of these agencies and not offered by way of a formal report, survey or vote of these entities but by spokepersons of questionable authority to commit these entities on future railroad needs."

Further, in response to Attachment I, Mr. Villiotte in his letter to me dated April 18, 1995 states:

> "In response to your letter of April 11, 1995, I would like to make the following comments on the M.B.T.A inter-office Memorandum dated March 16, 1995 from the Director of Planning to the Director of Railroad Policy and Property Management.
>
> First, I find the timing of the Memorandum and the specific reference to Somerset Savings Bank and the Sunrise at Point of Pines construction, as well as the delivery of a copy of the Memorandum to you on April 7th, suspect.
>
> Second, the Memorandum's conclusion that the M.B.T.A. "would not use (the former narrow gauge right-of-way through Point of Pines) for any future extensions" is not material to the decision to be made by the Secretary under

> Section 54A of Chapter 40 of the General Laws. There has not yet been an official and final report of the North Shore Transportation Study which includes all transportation uses. The Memorandum only contains the M.B.T.A.'s conclusion based on a Peer Review.
>
> Finally, even a final North Shore Transportation Study that hypothetically may include that no future use of the two railroad rights-of-way is planned, this conclusion should not be the determining factor in the Secretary's decision. The purpose of the statue is to indefinitely maintain the railroad rights-of-way for public use and benefit. Even the hypothetical conclusion above would not show that the rights-of-way serve no present or future useful purpose to the public."

As to the value that this testimony and submission of the MBTA has as Evidence, M.G.L. c. 30 § 11 (2) states:

> **"(2) Unless otherwise provided by any law, agencies need not observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses (emphasis provided).**

I find that the evidence submitted is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. There is no reason to assume that these witnesses would testify under oath and not be stating the truthful positions of their agency. As for Attachment I, which rebuts the basic thrust of the arguments proposed by the City of Revere, I find it to be admissible and conclusive as to the future expansion plans of the MBTA relative to any future Blue Line expansion.

Relative to the last two paragraphs of Mr. Villiotte's letter of April 18, 1995 cited above, Mr. Villiotte would have us believe that a railroad right of way can never be abandoned, that transportation policy established a decade ago or more is cast in stone and can never be changed. This position is untenable as society moves closer to the

Twenty-First Century. Transportation policies and goals have to be adaptable and subject to societal needs.

FINDINGS:

I find that the overwhelming weight of the evidence presented is that none of the transportation agencies expressed any interest in the property at issue.

I find that M.G.L. c. 40 § 54A, which states in part:

> **§ 54A. State consent to issuance of permits to purchaser required; damages in absence thereof**
>
> "If a city or town or any other person purchases any lands formerly used as a railroad right-of-way or any property appurtenant thereto formerly used by any railroad company in the commonwealth, no permit to build a structure of any kind on land so purchased shall be issued by any city or town in the commonwealth without first obtaining, after public hearing, the consent in writing to the issuance of such permit from the secretary of the executive office of transportation and construction. If said secretary does not consent to the issuance of such permit, the owner of the land may recover from the commonwealth such damages as would be awarded under the provisions of chapter seventy-nine."

gives the Secretary of Transportation the authority to consent to issuance of a building permit to properties on a railroad right-of-way or abutting same.

RECOMMENDATION:

It is recommended that the Secretary of Transportation and Construction consent to the building permit issued by the City of Revere for the property located at 190 North Shore Road, Revere.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

APPENDIX F-1

DECISIONS/RULINGS

Appeals of Permit Denials

August 9, 1995

Marc Kornitsky, Esq.
Richard L. Camann, Esq.
Mavros & Fitzgerald
119 Washington Street
Lynn, MA 01902

Re: Weddings, Inc. and the Stanley A. Vozzella Realty Trust, Request for Curb Cut Route 1 Northbound at Main Street Overpass, Saugus

Dear Mr. Kornitsky and Camann:

Pursuant to M.G.L. c. 30A § 11(7), this letter and the attached report of Peter Milano, Chief Administrative Law Judge for the Massachusetts Highway Department, which report and recommendation I adopt and incorporate herein, constitutes my proposed decision to deny your client's access request for the above captioned property. You are hereby afforded a thirty-day period to file objections and to present arguments in writing to my decision. At the end of the thirty-day period, if no written objections are forwarded to my attention, this matter will be final. Any objection will be reviewed and final decision made within 15 days of receipt of any objections.

If you have any questions regarding this matter, you may contact Judge Milano at (617)973-7890.

Sincerely,

Laurinda Bedingfield
Commissioner

Enc.
cc:
Sherman Eidelman, DHD
District 4, Arlington

Charles Sterling, Traffic Eng.

MASSACHUSETTS HIGHWAY DEPARTMENT

OFFICE OF THE COMMISSIONER

In Re: Stanley Vozzella, Trustee of the Stanley A. Vozzella Realty Trust and Weddings, Inc.
Request for a Curb Cut
Pursuant to M.G.L. c. 81 § 21

HISTORICAL BACKGROUND

Stanley Vozzella (hereinafter "Vozzella"), in his capacity as Trustee of the Stanley A. Vozzella Realty Trust under Declaration of Trust dated October 21, 1988, is the owner of a certain parcel of land, with the buildings thereon, located at 1050 Broadway, Saugus, Massachusetts (hereinafter "Real Estate"). In 1963, Vozzella first began leasing the Saugus Real Estate for a Weddings, Inc. store. From the time he first began leasing the Real Estate in 1963, Vozzella has continually operated a retail bridal sales business known as Weddings, Inc. at that location. In approximately 1968, Vozzella purchased the Real Estate from the then owner. After purchasing the Real Estate, Vozzella continued to operate Weddings, Inc. at that location without interruption.

From the time Vozzella first leased the Real Estate in 1963, customers had direct access from Route 1 into the parking area which directly abuts Route 1. There was an unrestricted driveway opening approximately eighty (80) feet in width.

In 1991, Mr. Richard Riemer (hereinafter "Riemer") purchased the company known as Weddings, Inc. and leased the Real Estate from Vozzella.

In 1994, the Massachusetts Highway Department (hereinafter "Department") began a bridge repair project for the Essex and Main

Street bridges on Route 1. The Real Estate in question abuts the Main Street Bridge. Neither Riemer nor Vozzella received any notice of a proposed curb installation across their driveway, thereby restricting direct access to Route 1. The Department had previously contacted the Petitioners to obtain an easement for storing equipment on the Real Estate but never indicated any plans for cutting off the Route 1 driveway.

In June of 1994, the Department proceeded to install curbing in front of Weddings, Inc. This was the first time Mr. Riemer was made aware of the fact that his access to Route 1 was being rescinded. Mr. Riemer was told to file an application for permit for a curb cut, which Mr. Riemer did on June 16, 1994. By letter dated July 8, 1994, the Department denied Mr. Riemer's application for a curb cut.

Riemer and Vozzella appealed the denial of the curb cut to the Commissioner. The Chief Administrative Law Judge was designated by the Commissioner as the hearing officer charged with recommending a finding on the issue of allowing the cut pursuant to M.G.L. c. 81 § 21 and the Standard Operating Procedures promulgated under authority of the statute. This report is a recommendation of my finding to the Commissioner of the Massachusetts Highway Department.

A hearing on the matter was held on March 23, 1995. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
O. Richard Riemer	Owner, Weddings, Inc.
Stanley A. Vozzella	Trustee of the Stanley A. Vozzella Realty Trust
Marc Kornitsky	Attorney for Stanley Vozzella
Richard L. Camann	Attorney for Weddings, Inc.
John Gregg	District #4 Traffic Engineer
William Davis	District #4 Asst. Permits Eng.
Richard Gardner	MHD, Boston Traffic Engineer

Entered as an exhibit was:

Exhibit #1.....Plan BNNH 6990(00)Sheets #1, 11 & 12

Post hearing submissions were requested. Submissions were offered by the claimant, the District and the Boston Traffic Office. All submissions are now in and are a part of the record.

FACTS AND ISSUES PRESENTED:

The issue presented at the hearing is whether or not a proposed curb cut of Weddings, Inc. Route 1 Northbound at Main Street should have been denied. The issue came before me based on a new application for a cut and not based on the closure of the original cut.

On June 10, 1994 Weddings, Inc. submitted an application for a Permit to remove the newly installed curbing. This request was denied by letter dated July 8, 1994 from Sherman Eidelman, District Highway Director from which the Claimants (Stanley Vozzella, Trustee of the Stanley A. Vozzella Realty Trust and Weddings, Inc.) appealed for a hearing.

The upgrading of the Route 1 roadway required widening the northbound roadway approximately 4 feet to the east, the widening provides only 3.5 feet from the face of the easterly bridge abutment to the edge of the roadway thus, reducing the already limited visibility of any vehicles maneuvering into or out of the driveway area.

The roadway lane adjacent to the driveway serves as an acceleration/deceleration lane for the ramp system in addition to facilitating through movements along Route 1. The present ramp system has a weave length of approximately 380' between ramps to accommodate these movements, substantially less than the 1000' minimum required by current AASHTO design standards.

In addition to the closed driveway along Route 1, the parcel in question has two additional points of access from the adjacent 2-way ramp system, providing direct access to and from Route 1 from both the north and south.

Presently, the setback of the building is approximately 15 feet

at the location of the old drive, not allowing sufficient room for turning movements.

The present northbound roadway facilitates over 60,000 vehicles per day, and is projected to increase to 73,000 vehicles per day by the year 2012.

According to the Department's Design Manual, the minimum sight distance is 375 feet at 50 mph and 525 feet at 60 mph; the desirable lengths for those speeds are 475 feet and 650 feet, respectively. At the approximate site of the former curb cut onto Route 1, the sight distance to the right-most NB land is on the order of 100-120 feet, or far below even the minimum guidelines.

The speed limit at Weddings, Inc. is posted as 45 mph, but any calculations on sight distance, stopping distance, perception/response times, accel/decel lane lengths, etc. should assume actual travel speeds, which can be in the 60 mph range.

Route 1 at Main Street has the second highest number of roadway accidents in Saugus, and is 27th statewide on the "Top 1000 High Accident Locations". It is difficult to determine how many of these accidents took place near the WI property, but allowing their Route 1 access to reopen would reintroduce a potentially very unsafe situation.

FINDINGS:

M.G.L. c. 81 § 21 provides in part:

> **§ 21. Excavations or driveway openings on state highways; conditions; enforcement**
>
> "No state highway shall be dug up, nor opening made therein for any purpose, nor shall any material be dumped or placed thereon or removed therefrom, and no tree shall be planted or removed or obstruction or structure placed thereon or removed therefrom or changed without the written permit of the department, and then only in accordance with its regulations, and the work shall be done under its supervision and to its satisfaction, and the entire expense of replacing and resurfacing the highway at the same level and in as good condition as before, with materials equal

in specifications to those removed, shall be paid by the persons to whom the permit was given or by whom the work was done; but a town may dig up a state highway without the approval of the department in case of immediate necessity; but in such cases it shall forthwith be replaced in as good condition as before at the expense of the town. In the case of a driveway opening on a state highway, the said department shall not grant a permit for a driveway location or alteration if the board or department in a city or town having authority over public ways and highways has notified the department by registered mail, return receipt requested, of their objection to the driveway; provided, that such objection shall be based on highway safety and accepted by the said department. The department may require a bond to guarantee the faithful and satisfactory performance of the work and payment for any damage to state highways and facilities caused by or resulting from the operations authorized by such permit.

The amount of said bond shall be determined by the department not to exceed the estimated cost of the work and possible damage, but shall be not less than two thousand dollars nor more than fifty thousand dollars. Except in case of an emergency no permit for digging up or opening any state highway shall be approved or issued by the department until copies of the notices to public utility companies required by section forty of chapter eighty-two have been filed with the department by the applicant for such permit.

Any person who builds or expands a business, residential, or other facility intending to utilize an existing access or a new access to a state highway so as to generate a substantial increase in or impact on traffic shall be required to obtain a permit under this section prior to constructing or using such access. Said person may be required by the department to install and pay for, pursuant to a permit under this section, standard traffic control devices, pavement markings, channelization, or other highway improvements to facilitate safe and efficient traffic flow, or such highway improvements may be installed by the department and up to one hundred per cent of the cost of such improvements may be assessed upon such person.

The department may issue written orders enforce the provisions of this section or the provisions of any permit, regulation, order, or approval issued under this section..."

Pursuant to M.G.L. c. 81 § 21 the Department promulgated Standard Operating Procedure for Review of State Highway Access Permits (SOP's) effective September 17, 1991.

The SOP's provide at **Part III Application Processing, Subpart 6. Denial of Permit Application:**

> The DHE may deny the issuance of an access permit for the requested use due to the failure of the applicant to provide sufficient highway improvements to facilitate safe and efficient highway operations, or when the construction and use of the access applied for would create a condition with the SHLO that is unsafe or endangers the public safety and welfare.

I find that the overwhelming weight of the evidence presented was that the access requested would create a condition within the State Highway Layout that would create an unsafe condition at the locus in question and would endanger public safety and welfare of people traveling Northbound on Route 1 in Saugus.

RECOMMENDATION:

The denial of the access cut by the claimants in the present matter should be upheld.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge

July 22, 1997

Law Offices of G. Shepard Bingham
One Central Street
Suite 201
Middleton, MA 01949

Re: R.A. Francoeur Marine, Inc.
Reducible Load Permits Appeal Denial

Dear Mr. Bingham:

Pursuant to M.G.L. c. 30A § 11(7), this letter and the attached report of Peter Milano, Chief Administrative Law Judge for the Massachusetts Highway Department, which report and recommendation I adopt and incorporate herein, constitutes my proposed decision to approve your client's reducible load permits for the above captioned matter. This decision is final as it is favorable to your client. Your client should go to the Massachusetts Highway Department's Commercial Motor Vehicle Permit's Center to pick up his three permits.

If you have any questions regarding this matter, you may contact Judge Milano at (617) 973-7890.

Sincerely,

Charles E. Kostro
Acting Commissioner

M/jd
Enc.
cc: C. Kostro
J. Leary
D. Kalavritinos
G. Broz

(Enc. only on original initials and cc's on copies)

MASSACHUSETTS HIGHWAY DEPARTMENT

OFFICE OF THE COMMISSIONER

In Re: R.A. FRANCOEUR MARINE, INC.
Appeal of a denial of Three
Reducible Load Permits
Pursuant to M.G.L. c. 90 § 19
and 19A and M.G.L. c. 85 § 30
and 30A

R.A. Francoeur Marine, Inc. (Francoeur) forwarded to the Massachusetts Highway Department's Commercial Motor Vehicle Permit's Center (MassHighway) three applications for annual overweight reducible load permits dated September 24, 1996. These permit applications were filed pursuant to M.G.L. c. 85, § 30A on forms prescribed by the Commissioner of Highways. (See Applications incorporated in Exhibit 2 of the Hearing).

On or about December 16, 1996, MassHighway forwarded a letter to Francoeur denying said applications. (See Exhibit 1).

A Notice of Appeal from said denial was filed by Francoeur in a letter dated December 17, 1996. (See letter of appeal in Exhibit 1).

This matter is governed by M.G.L. c. 90 § 19 and 19A and M.G.L. c. 85 § 30 and 30A and 700 Code of Massachusetts Regulations 7.00 (CMR). 700 CMR 7.08 states:

> **§7.08 Administrative hearing.**
>
> Any person aggrieved by the denial of a permit or any other application or interpretation of 720 CMR 7.00 affecting his permit application may file a written appeal with the Commissioner of Public Works* within five working days of receipt of said permit denial or other application or interpretation of 720 CMR 7.00. The Commissioner of Public Works* shall designate a hearing officer to hear the appeal and render to the Commissioner a report and recommendation as to the disposition of the appeal. The final determination and decision on the appeal shall be made by the Commissioner.
> * Now Commissioner of Highways.

By Interoffice Memorandum, the Commissioner designated me as the hearing officer in this matter.

A hearing on the matter was held on April 3, 1997. Present representing the parties were:

Peter Milano	Chief Administrative Law Judge
Dean Kalavritinos	Asst. Chief Counsel
John F. Leary	Asst. Chief Counsel
Heidi Bassuk	Legal Intern - MHD
John Gendall	Highway Operations Engineer
Mark Cain	Maintenance Engineer
Robert M. Lyons	Permits Engineer
G.Shepard Bingham	Atty. for Francoeur
Wayne Vynorius	R.A. Francoeur
John W. Blanchard	R.A. Francoeur

Entered as Exhibits were:

Exhibit #1 (A-H).....	Appellant's Submission
Exhibit #2	Permit Application and cover letter dated 11/21/96 from Attorney Bingham to Permits Section in Marlboro
Exhibit #3 (A, B & C)..	Pictures of flatbed trailer 5302
Exhibit #4	Attorney General's Opinion No. 57 dated 3/2/76
Exhibit #5	Congressional Record H.R. 6211 dated 12/16/82

Every year MassHighway's permit section issues between 5000 to 6000 reducible load permits annually. Since the program of issuing reducible load permits began back in the seventies, this appeal is the only such appeal to occur.

After the hearing, submissions were requested of both the Appellant and MassHighway. All legal briefs are now in and are a part of the permanent record.

The matter came before me on an agreed statement of fact. There is no dispute as to the application being filed and denied by MassHighway's permit section. The cargo in question was concrete piles which although construction material could have been controlled as to its weight by reducing the number of piles carried on the semi-trailer. This brings us to the crux of the issue before me.

The term "reducible" appears nowhere within the statutory language of M.G.L. c. 85, § 30 and 30A or M.G.L. c. 90 (See 19 or 19A). In actuality, the term is inferred in contradistinction to the special permit provision of M.G.L. c. 85 § 30A relating to the so- called "...irreducible loads with weights greater than those provided..." in said § 30A. In considering the issue of "reducible loads", Attorney General Bellotti stated that,

> "...there is no explicit distinction ...between reducible and irreducible loads; on the face of the statutes, the permit authority would appear to extend to any kind of load. The specificity and detail of the statutes with regard to such as weight, length, number of axles, vehicle configurations and type of tire, belie any facile conclusion that the Legislature implicitly assumed that crucial distinctions should be made on the basis of the type of load being carried." Op. Atty. Gen. 88, 92 (1979/1980) (emphasis supplied).

That descriptive term was actually first employed as a counterpoint to the special permit provisions of § 30A relating to "irreducible loads". As a very practical matter, every load which is not irreducible must a fortiori be reducible. As is also true, while bulk cargo is by its very nature reducible; reducible loads certainly encompass a much broader spectrum of cargo than bulk items (i.e. every product/item which is not irreducible). The fact that all reducible loads (i.e. all loads other than irreducible loads) were intended to be included in the permit issuance procedure established by M.G.L. c. 85, § 30 A is underscored by Attorney General Bellotti's own response to the following question posed by the then Commissioner of Public Works, Dean P. Amidon: to wit: "did the Commissioner have the authority to issue what is referred to as "reducible load" permits". In answering said question, Attorney General Bellotti first looked at the state of the law prior to enactment of c. 85, § 30A. He concluded that, "...the language of § 19A, taken together with that of (M.G.L. c. 85) § 30, provides a positive indication that reducible loads were not intended to be excluded from the statutes or afforded special

treatment." Op. Atty. Gen. 88, 92 (1979/1980) (emphasis supplied). The Attorney General then went on to examine the specific language of the so-called "bulk product" exception found in the final paragraph of c. 90, § 19A and noted that while construction materials and/or liquid petroleum products may certainly be "... archetypical examples of reducible loads...", the term is not confined to such a limited class of cargo. Id at p. 93. In fact, he stated,

> "The quoted provision of § 19A therefore must be read as exempting certain reducible loads, under certain conditions, from the permit requirements that would otherwise be applicable. To conclude that reducible loads were not intended by the Legislature to be subject to the permit provisions of § 30 would make the quoted provisions of § 19A unintelligible..." Id at p. 93. (emphasis supplied)

To the extent that all but certain reducible (i.e. bulk) loads are subject to the permit provisions of M.G.L. c. 85, § 30, then, after the enactment of c. 85, § 30A it is even more evident that the permitting of all but certain exempt reducible loads is not only appropriate but simply a function of satisfying the weight and axle requirements specified therein. In fact, in commenting on the legislative revisions which were ultimately embodied in c. 85, § 30A, the Attorney General said "...there can be no doubt that c. 851 (of the Acts of 1974) provides, on its face, clear authority to the Department to issue permits for reducible loads...Id at p. 94.

FINDINGS:

I find that refusing Francoeur a reducible load permit to carry concrete pilings was inappropriate.

I further limit my findings to the facts of the matter heard by me on April 3, 1997.

RECOMMENDATIONS:

R. A. Francoeur Marine, Inc.'s three applications for reducible load permits should be approved.

Respectfully submitted,

Peter Milano
Chief Administrative Law Judge