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PRE-2015
SELECTED DECISIONS/RULINGS

Volume 1
Construction Contract Appeals

APPENDIX OF DECISIONS/RULINGS

Construction Contract Appeals

***Claims re: Changes to Scope* ……………………………………………………………….A-1**

Report and Recommendation: Aggregate Industries #99080 - 11-30-04

Report and Recommendation: AGM Marine #98032 - 8-30-04

Report and Recommendation: Fiore Construction 30040- 4-27-07

Report and Recommendation: Tilcon Capaldi #31089 - 4-27-07

***Claims re: Delay Damages*……………………………………………………………………B-1**

Report and Recommendation: B&E #34574 - 5-4-11

Report and Recommendation: B&E #56482 - 7-3-13

Report and Recommendation: B&E #98442 - 4-21-04

Report and Recommendation: ECI #32137 - 4-8-10

Report and Recommendation: SPS #99118 - 5-20-04

***Claims re: Differing Site Conditions*………………………………..………………………C-1**

Report and Recommendation: AGM Marine #98453 - 12-6-10

Report and Recommendation: JTropeano #33279 - 4-8-10

Report and Recommendation: S&R #44341 - 6-20-12

***Disputes re: Damage Calculations and Final Estimates*………………………………..…D-1**

Report and Recommendation: LAL Construction #99231 - 5-26-06

Report and Recommendation: Angelo Todesca #93286 - 8-30-04

Report and Recommendation: Bardon Trimount #93174 - 4-21-04

Report and Recommendation: Derbes Bros #98204 - 8-25-05

Report and Recommendation: RDA Construction #96286 - 08-30-04

Report and Recommendation: Todesca #89123 - 5-25-06

Report and Recommendation: Todesca #93286 - 8-30-04

Disputes re: Liquidated Damages………………………………………………………...……E-1

Report and Recommendation: Northern American Bridge #97187 - 4-12-05

Disputes re: Price Adjustments…………………………………………………………..F-1

Report and Recommendation: Derbes Bros #98035 – 1-20-05

Disputes re: Specifications……………………………………………………………….G-1

Report and Recommendation: AF Amarello #32067 - 7-26-05

Report and Recommendation: AR Belli #32088 - 5-25-06

Report and Recommendation: Baltazar Contractors #31055 - 7-26-05

Report and Recommendation: Bardon Renz #97071- 5-28-04

Report and Recommendation: Gardner Engineering #32160 - 7-31-08

Report and Recommendation: Lawrence Lynch #98402 - 8-30-04

Report and Recommendation: McCourt #95284 - 3-24-05

Report and Recommendation: Middlesex Corp #98182 - 12-21-05

Report and Recommendation: Middlesex Corp #99121 - 12-21-05

Report and Recommendation: NEL #39741 - 4-3-10

Report and Recommendation: Northern Construction #31165 - 11-30-04

Report and Recommendation: Paolini #66679 - 5-30-14

Dispute re: VECP Proposal……………………………………………………………….H-1

Report and Recommendation: Roach & Sons #61793 - 8-9-13

Procedural Rulings………………………………………………………………………..I-1

Dismissed as Moot, HNTB #92670 - 1-20-05

Dismissed as Moot, O'Connell's Sons #93477 - 1-20-05

Lack of Jurisdiction, Delucca Fence #32047 - 9-30-04

Lack of Jurisdiction, Modern Continental #33157 - 5-25-06

Lack of Jurisdiction, Renz Painting #97421 - 9-30-04

Remand to Claims Committee, Roads Corp #99042 - 9-9-08

APPENDIX A-1

DECISIONS/RULINGS

Claims re: Changes to Scope

To: Secretary Daniel A. Grabauskas, EOT

Through: Commissioner John Cogliano, MHD

From: Stephen H. Clark, Administrative Law Judge

Date: November 30, 2004

Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

The appeal of Bardon Trimount, Inc. doing business as Aggregate Industries (Aggregate) in Contract #99080 for $3,555.00 for the work of fine grading, shaping and compacting gravel in place under bid Item 170 at the price of $4.50SM for 790 SM should be allowed because (1) the Contract requires payment for that work and (2) the Board of Contract Appeals twice decided that such work should be paid under Item 170 and (3) the Department's consistent policy, as expressed in amendments to its Standard Specifications in 1999, was to pay for such work under Item 170.

INTRODUCTION

This appeal arises out of a construction contract (Contract) between Bardon Trimount, Inc., doing business as Aggregate Industries (Aggregate) and the Massachusetts Highway Department (Department). The parties disagree about whether the Department should pay $3,555.00 to Aggregate for fine grading and compacting an area of 790 square meters (Area) on a road reconstruction project on Rte. 119 in Acton and Littleton. Because I find that the grading work Aggregate did was under an alteration order by the Engineer and that it was performed on a "subgrade area," I conclude that under the Contract the Department should pay Aggregate $3,555.00.

BACKGROUND

The record before me discloses the following facts, which I recommend that the Commissioner adopt.

Statement of the Appeal

Aggregate entered into Contract #99080 with the Department on August 13, 1999 at the bid price of $1,543,099.70, with an original completion date of May 31, 2000. On August 2, 2000 Aggregate filed a claim under Subsection 7.16 with the District Highway Director for payment for grading, shaping and compacting sub-grade area gravel ordered left in place. The District denied the claim and Aggregate appealed to the claims committee, which on October 2, 2000 refused relief. Aggregate appealed to the Board of Contract Appeals (Board) from that refusal on November 13, 2000. Aggregate filed its Statement of Claim on November 28, 2000.

The Contract incorporated the Department's Standard Specifications, 1995 Metric Edition (Specifications). The Department's Standard Supplemental Specifications, in

effect on September 22, 1998, and Standard Special Provisions, dated July 2, 1998, were expressly incorporated.

On April 30, 2002 a hearing was held before Chief Administrative Law Judge Peter Milano. Present and participating in the hearing were

Peter Milano	Chief Administrative Law Judge
Kevin Martin	Aggregate Industries
Greg MacKenzie	Aggregate Industries
Isaac Machado	Deputy Chief Counsel, MHD
Cameron Smith	Assistant Construction Engineer, Dist. 3

The following documents were admitted as exhibits in evidence:

Exhibit #1	Contract #99080
Exhibit #2	Statement of Claim

The matter was taken under advisement at the end of the hearing. In July 2003 Chief Administrative Law Judge Peter Milano resigned. At the time of Judge Milano's resignation no report had been made to the Board. On March 1, 2004 the undersigned was appointed Chief Administrative Law Judge. On April 8, 2004 the parties stipulated that they were content to have the undersigned make a report and recommendation without further hearing. On July 21, 2004, through St. 2004, c. 196, s. 5 (Act), the Legislature abolished the Board and, so far as is pertinent here, conferred its prior functions on the Secretary of Transportation and the Commissioner of the Department (Commissioner). See G.L. c.16, s. 1(b), as appearing in the Act. This report and recommendation is made through the Commissioner to the Secretary.

Findings of Fact

Under the Contract Aggregate was to repair, reconstruct and resurface a section of Route 119 in the towns of Acton and Littleton. In designated areas of the roadway, shown on the plans, Aggregate was to perform "full depth reconstruction" of the

roadway, which consisted of the removal of pavement surface, excavation of the roadway base course to the sub-grade elevation and then reconstruction of the same. See plan at Contract page A00801-110 (Typical Section for "Full Depth Reconstruction"). Aggregate bid $4.50 per square meter for the work of "fine grading and compacting -- sub-grade areas" included in payment Item 170.

While performing full depth reconstruction work in a particular location,[1] the Engineer ordered an alteration in the work under Section 4.02 ("Alterations"). That subsection provides that the Engineer "may order [ ] alterations in the form, character, or detail of any of the work [ ] to be done … and the alterations shall be made accordingly." Subsection 4.02 goes on to provide "[t]he Contractor shall accept as full compensation for work performed under an alteration order the contract unit prices stipulated in the Contract for the actual quantity of work performed in an acceptable manner."

Under the alteration order, the Engineer directed Aggregate to stop full depth reconstruction work and grade and shape the existing gravel in place in the Area. Pursuant to his directives, Aggregate then shaped the existing gravel to a true surface conforming to the proposed cross section of the roadway, in conformance with the requirements of the work described in Section 170 ("Grading").

Subsection 170.20 ("[Grading] General") provides that "[t]he shaping, trimming compacting and finishing of the surface of the <u>subgrade</u>, [ ] shall be constructed [ ] in close conforming with the lines, grades and typical cross sections shown on the plans or established by the Engineer." (Emphasis added.)

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[1] Between stations 36 + 16 and 36 + 95.

Subsection 170.61 (“Fine Grading and Compacting”) provides “Before surfacing or sub-base is spread, the subgrade shall be shaped to a true surface conforming to the proposed cross section of the highway and compacted in accordance with the provisions [governing that work].” (Emphasis added.)

The measurement of the grading work for payment purposes is governed by Subsection 170.80, which provides that “[t]he grading and compaction of the subgrade will be measured by the square meter at the bottom of the subgrade in all areas where a subgrade was placed.” Additionally, the basis of payment provision provides that payment is to be made under Item 170 (“Grading and Compacting –Subgrade Area”) and that “[g]rading and finishing other than subgrade areas will be included in the price of the other respective items of work involved.” (Emphasis added.)

The Contract fails to define the word “sub-base.” But Subsection 1.40 defines the word “sub-grade” as “that plane at the bottom of the sub-base.”

Aggregate adduced evidence that the existing gravel in the Area was a sub-grade area. See Statement of Claim, attachment A. The Department’s witness did not rebut that evidence. Its sole witness testified that he “did not know” what the Area looked like because he “wasn’t there.” It is undisputed that the Department’s refusal to pay Aggregate $3,555.00 was based on its characterization of the existing gravel in Area as “sub-grade,” not “sub-base.”

After grading, shaping and compacting the existing gravel in place, Aggregate placed a 100 mm layer of dense graded crushed stone sub-base on the existing gravel. That work was done under a provision providing that “dense graded crushed stone for

sub-base" be "placed on the sub-grade or sub-base," as directed by the Engineer. Subsection 402.20 ("DESCRIPTION, General").[2]

I also take official notice of two Department actions bearing on this appeal.

First, the Board on two recent decisions ruled on the same issue raised here. See reports of P. Caliacco Corporation (October 8, 1997) (allowed payment for fine grading under Item 170 after 8" gravel subbase was eliminated from the Contract) and L.A.L. Corporation Construction Co., Inc. (March 4, 1998) (allowed payment of $20,990.54 for fine grading of borrow left in place under Item 170 when the Engineer directed that work). Common to both decisions appears to be the fact that, as here, the Engineer ordered alterations in the work under Subsection 4.02 ("Alterations"). In the L.A.L. report Judge Milano noted that Item 170 should be revised to "reflect the majority of situations where the borrow is being left in place." Report, page 4.

Second, following the L.A.L. decision, the Department on March 16, 1999 amended the language of both Section 170 ("Grading") and payment Item 170 ("Fine Grading and Compacting –Subgrade Areas") to include express language that shaping existing gravel left in place should be paid under item 170.[3]

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[2] Aggregate's claim here does not include the work of placing and grading dense crushed stone sub-base. The work of grading the dense crushed stone--as well as supplying and laying it--is expressly included within Item 402. See Subsection 402.81 ("Basis of Payment"). Aggregate was paid in full for that work.

[3] The 1999 changes to the Department contract are shown by the following underlined words. Section 170 was amended to read: "The shaping, trimming, compacting and finishing of the surface of the subgrade or existing gravel base [ ] shall be constructed [in] "typical cross sections shown on the plans"[ ]." Subsection 170.60 ("[Grading] General" was changed to clarify that "material may remain in place if so directed by the Engineer." The measurement and payment subsections of Section 170 were likewise amended. "The grading and compacting of the existing gravel material to remain in place shall be measured by the horizontal square meter." Subsection 170.80 ("Method of Measurement"); "Payment for the shaping and compacting of the subgrade or the existing gravel materials as specified herein shall be included in the Item for Fine Grading and Compacting." Subsection 170.81 ("Basis of Payment"). Payment Item 170 was re-captioned, after deleting the words "sub-grade areas," to read "Fine Grading and Compacting." After March 16, 1999 the amended language was incorporated into Department contracts through standard special provisions.

DISCUSSION

The question for decision is whether the work of shaping, grading and compacting the existing gravel ordered by the Engineer to be left in place in lieu of full depth reconstruction should be paid under the Contract, and if so, under which provision.

The Legal Standard

The construction of a contract with unambiguous terms is a question of law. See Freelander v. G. & K Realty Corp., 357 Mass. 512, 516 (1970). Here, although the parties disagree as to the meaning of the Contract, neither contends that it is ambiguous. Where the claim turns solely on contract interpretation. it is appropriate for this office to construe the language in dispute. Id.

In interpreting the contract the judge must consider "the particular language used against the background of other indicia of the parties' intention," and must "construe the contract with reference to the situation of the parties when they made it and to the objects sought to be accomplished…. Not only must due weight be accorded to the immediate context, but no part of the contract is to be disregarded." Starr v. Fordham, 420 Mass. 178, 190 (1995) (citations omitted). A contract "should be construed to give it effect as a rational business instrument and in a manner which will carry out the intent of the parties." Id. at 192, citing Shane v. Winter Hill Fed. Sav. & Loan Ass'n., 397 Mass. 479, 483 (1986). Where a contract consists of separate parts or sections, all of them must be considered together so as to give reasonable effect to each. See S. D. Shaw & Sons, Inc. v. Ruggo, Inc., 343 Mass. 635, 640 (1962). The principal guide to contract interpretation is the language of the contract itself. "Words that are plain and free from ambiguity must be construed in their usual and ordinary sense." Citation Ins. Co. v. Gomez, 426 Mass.

379, 381 (1998); see Forte v. Caruso, 336 Mass. 476, 480 (1957) (plain meaning of words to control where no inconsistency results).

Positions Of The Parties

According to the parties, the critical issue in dispute is whether the existing gravel ordered left in place was "sub-grade" or "subbase." Aggregate claims that under the Contract's definition the gravel left in place in the Area is "sub-grade," as its witness testified. According to Aggregate, because it is "sub-grade," the fine grading work it did is included within Section 170 and must be paid for by the square meter under Item 170 ("Fine Grading And Compacting – Sub-Grade Areas"). Aggregate contends the Department should pay it for fine grading and compacting 790 SM at the unit price of $4.50SM, or $3,555.00.

The Department contends that the existing gravel left in place is "sub-base," and, as a result, the work of "grading and finishing" of the gravel left in place can not be paid under Item 170, which only applies to "sub-grade areas." See Subsecton 170.81 ("Basis of Payment"). The Department maintains that payment for grading the existing gravel subbase must be paid--if at all--under an item governing the placing and grading of subbase materials, such as Items 151 (graded borrow) or 402 (dense grade crushed stone). Payment for grading and compacting sub-base gravel "complete in place" is made by the cubic meter of gravel borrow supplied, under Item 151. See Subsections 401.81 and 150.81 ("Basis of Payment"). Similarly, the placement and grading of "Dense Graded Crushed Stone" sub-base material is paid by the cubic meter, "complete in place." Subsection 402.81 ("Basis of Payment").

Here, the existing gravel was not placed during the Contract work; it was simply left from the old roadway. For that reason, the Department contends, grading that "sub-base" gravel cannot be paid under Items 151 or 402. Because the grading of the "sub-base" Area cannot be paid under Item 170, which applies only to "sub-grade areas," the Department concludes that the Contract nowhere allows payment for the fine grading and shaping of the gravel left in place.

Analysis

Both parties ignore the significance of the fact that the Engineer ordered Aggregate to alter the specified work under the authority of Subsection 4.02 ("Alterations"). The Engineer determined that full excavation was not necessary. He ordered Aggregate to stop full depth excavation of the existing gravel level and then ordered Aggregate to fine grade, shape and compact the existing gravel. Aggregate did that work in the manner prescribed by Section 170 ("Grading") –that is, it graded and shaped the roadway to the cross-section required. Once this work was completed, the Engineer directed Aggregate to place and compact the dense graded crushed stone subbase material. Finally, three courses of paving were placed to finish to roadway.

The ordered alteration was the reason that Aggregate fine graded and shaped the existing gravel surface and not the underlying soil, as originally specified. Whether underlying soil or existing gravel in place, there is no doubt that reconstruction of the roadway could not proceed with laying of dense graded crushed stone sub-base until either the underlying soil or the gravel left in place had been first shaped to the cross section required.

In the appeal of P. Caliacco Corporation (October 8, 1997) the Board approved payment for fine grading under Item 170 after placing and grading 8" gravel subbase was eliminated from the Contract by the Engineer. In L.A.L. Corporation Construction Co., Inc. (March 4, 1998) the Board allowed payment of $20,990.54 under Item 170 when the Engineer directed fine grading and shaping of subbase material left in place.[4] In both cases the fine grading and shaping work took place after the Engineer had ordered alterations in the work. And in both the Board approved payment under Item 170 ("Fine Grading and Compacting –Subgrade Areas").

The Contract here defines the word "sub-grade" as "the plane at the bottom of the subbase." Subsection 1.40. The word "subbase" is not defined. Where existing gravel is left in place, the bottom of the added layer of dense graded crushed stone sub-base material becomes the "plane at the bottom of the subbase."[5] Thus, by definition the existing gravel was "sub-grade."

When the Engineer ordered an alteration in the work here, he did so because he determined that the existing gravel, when shaped to conform to the cross section of the roadway, would function properly in lieu of fine graded and shaped soil sub-grade. The Department treated the existing gravel in place as if it were soil "subgrade" material.

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[4] In the L.A.L. report Judge Milano noted that the Department should consider revising the language of Section 170 to make plain that grading material left in place could be paid under Item 170. Judge Milano noted that the Department more and more frequently eliminated the work of removing "sub-base" gravel in projects originally specifying full depth reconstruction.

[5] Aggregate testified that "after excavating to existing gravel we fine graded [to a typical cross-section] and compacted the gravel prior to placing dense graded crushed stone for sub-base." See Statement of Claim and Exhibits and testimony of Greg McKenzie. The Department presented no evidence at the hearing concerning the gravel within the Area. Its only witness stated in response to a question by Judge Milano that he "did not know" because he "was not at the site."

Only after grading, shaping and compacting could the existing gravel be covered with dense graded crushed stone sub-base.[6]

As the Engineer's directives constituted an "alteration order" within the meaning of Subsection 4.02 ("Alterations"), it follows that Aggregate should be paid as Subsection 4.02 provides. The Contract provides that when alterations are ordered, the contractor shall "accept as full compensation" "the contract unit prices stipulated" "for the actual quantity of work performed." Subsection 4.02. Here, the "quantity" of work performed was "shaping" "grading" and "compacting" of 790 square meters. As the bid unit price was $4.50SM, I conclude that compensation under the Contract for the work is $3,555 ($4.50 X 790).

My conclusion is supported by the fact that the Department amended Section 170 in 1999. It did so in response to the Board's decision in the L.A.L. report, which expressly noted the need for the Department to make the words of the Section 170 conform to its existing practices. On March 16, 1999 the Department adopted language amending Section 170 ("Fine Grading …") to make plain that payment for grading "existing gravel base" was paid under Item 170. See infra at 5 n.3. Thenceforth, Department contracts contained standard special provisions setting forth the amended Section 170.

The 1999 amendments merely memorialize what the Board had already found the meaning of Section 170 to be in Caliacco and L.A.L. Thus, the amended language is instructive of the meaning of Section 170 at the time the Department and Aggregate entered into the Contract, even though the formal amendments did not become effective

[6] One consequence of the alteration order was that the Department saved money since it did not have to pay for the excavation of the roadway to the underlying soil and the attendant reconstruction.

until later.[7] See Commissioner of Corporations & Taxation v. Dalton, 403 Mass. 147, 150 (1939) (intent of existing statute clarified by amendment that restated existing practice but did not expand scope).

For all the above reasons, I conclude that the Contract requires payment for Item 170 work performed on the 790SM subgrade area on a unit price basis of $4.50/SM. [8]

RECOMMENDATION

The appeal of Aggregate for $3,555.00 ($4.50SM X 790 SM) should be allowed.

I recommend that payment to Aggregate be made in the amount of $3,555.00.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

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[7] The Board decided L.A.L. on March 4, 1998; bids were received on the Contract September 22, 1998; the Standard Special Provisions amending Section 170 were incorporated from and after March 16, 1999.

[8] The Department's argument that the Contract does not permit it to pay Aggregate for grading, shaping and compacting the existing gravel under Item 170 is anomalous. Nothing in the Contract supports the concept that the Department can order work done under an alteration order by the Engineer and then fail to pay. That would be the result here if grading work could only be paid after subbase material was first placed. See e.g. payment item 402. Instead, Subsection 4.02 ("Alterations") requires compensation for alterations ordered at "at the original contract unit prices." Because the Department ordered grading and shaping work as an alteration, it is obligated to pay Aggregate at the original contract unit price.

To: Secretary Daniel A. Grabauskas, EOT

Through: Commissioner John Cogliano, MHD

From: Stephen H. Clark, Administrative Law Judge

Date: August 30, 2004

Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

> **AGM Marine Contractors, Inc. (AGM) MHD contract #98032 (claim for extra work of $19,996.00 to splice additional lengths of pile to 18 previously driven piles to achieve a total pile length satisfactory to the Department). Recommendation: The Commissioner should allow AGM's claim for extra work for 519,996.00.**

INTRODUCTION

AGM Marine Contractors, Inc. (AGM) appealed for claimed extra work of $19,996.00 to splice additional lengths of pile to 18 previously driven piles to achieve a total pile length satisfactory to the Massachusetts Highway Department (Department) under modified specifications to contract # 98032 (Contract).[1] AGM asserts that, because the Department ordered pile splicing to achieve a modified design and load capacity never contemplated in the original specifications, pile splicing was extra work. The Department contends that splicing work was within the contract, as express language required AGM to bear all risk and cost of pile splicing within the unit price it bid.

I recommend that AGM's claim of $19,996.00 be allowed. The original Contract specification required piles to be driven to a depth of 15.76 meters, not more or less. Furnished piles were to be supplied in a single length. The Department approved a pile length of 18.54 meters, which length would have satisfied all Contract requirements had the Department's original specifications for pile length and bearing capacity been correct. The need for pile splicing only arose after the Department ordered field-tests during performance. The results of such tests caused the Department to modify its original Contract specifications. The modified specification revised the load bearing capacity of the piles as driven so that the driven length did not have to exceed 36 meters. The Department accordingly ordered AGM to splice an additional 18.54-meter pile length to each 18.54-meter pile originally approved.

AGM's contention that splicing was extra work under the Contract has merit. Although the Department correctly recognized its obligation to pay AGM on a unit price basis for the additional twenty 18.54-meter piles it supplied, it was incorrect in denying

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[1] G.L. c. 16, s. 1, inserted by St. 2004, c.196, s.5 provides

AGM's claim for the cost of splicing. Splicing work was required to incorporate the extra pile lengths into the work.

Where the original Contract did not contemplate pile splicing, and where AGM was not required to drive test piles or itself determine the pile length needed to meet the specified load bearing capacity, the cost of splicing additional pile lengths to satisfy the modified Contract specifications is extra work. Under the original Contract AGM was not required to bear the risk that pile splicing might become necessary. The Contract only required AGM to include the cost of splicing work in its bid where the specifications contemplated that pile splicing would be needed. See Glynn v. City of Gloucester, 9 Mass App. Ct. 454, 461 n. 9 (1980) (the purpose of changed conditions and extra work clauses is to "strip" unknown risks from competitive bidding). Accordingly, the Commissioner should allow AGM's appeal from the denial of its application for extra work in the amount of $19, 996.00.

STATEMENT OF THE CASE

On February 11, 1999, before proceeding with splicing and additional pile driving ordered by the Department, AGM gave written notice to the Department that it claimed pile splicing to be extra work.

AGM submitted to the Department its total claimed costs of $23, 328.95 for pile splicing work, which was done in two phases (phase I $12,178.00 + phase II $10,150.95).

The district highway director rejected AGM's claims for extra work on both phase I and phase II and ordered the resident engineer to keep force account records with respect to all claimed extra work.

AGM appealed the district highway director's rejection of claimed extra work for pile splicing to the claims committee. The claims committee denied AGM's claim on the basis that Subsection 940.81 ("Basis of Payment") states, in part, "all costs for splicing piles shall be included in the contract unit price per linear foot for the respective pile item." AGM then appealed to the Board.

Administrative Law Judge Peter Milano held a hearing on December 12, 2000. The following were present:

Peter Milano	Chief Administrative Law Judge
Kathleen Pendergast	MHD Deputy Chief Counsel
Robert Struzik	MHD District #5 Construction
John Mikutowicz	President, AGM Marine
Mark Timmerman	Project Manager, AGM Marine
Suzanne Geoffrion ………	Office Manager, AGM Marine

Two exhibits were admitted:

Exhibit #1 – MHD Contract #98032

Exhibit #2 – Amended Statement of Claim of AGM Marine

At the conclusion of the hearing, Judge Milano requested that AGM file an amended Statement of Claim. Thereafter, on December 15, 2000, AGM filed a restated claim for the extra work of pile splicing in the amount of $19,996.

FINDINGS OF FACT

Substantial evidence on the record, consisting of oral testimony and the two exhibits admitted into evidence, supports the following findings of fact, which I recommend the Secretary adopt.

1. The Department and AGM entered into Contract #98032 on August 15, 1997. The bid price was $1,198,203.00. The work was the reconstruction of a bridge on Quaker Road over Herring Brook in Falmouth, which required

demolition of an existing bridge and the construction of a new bridge. The completion date was November 30, 1998.

2. The Contract was to be performed in accordance with the Department's *Standard Specifications for Highways and Bridges, 1995 Metric Edition* (Standard Specifications), *Plans* and *Special Provisions.*

3. In the design phase of the project prior to competitive bidding, the Department in three locations sampled the soil beneath the proposed new bridge abutments to a depth of 26 meters. Bidders for the work were provided with Department boring logs that depicted the Department's soil samples taken to a depth of 26 meters. The Contract documents did not require bidders to conduct any independent soil testing at the site.

4. The *Plans* required 20 H-piles, 10 supporting each new bridge abutment. A detail on a plan sheet titled "Steel Pile Detail" expressly provided that each of the H-piles was to be driven to a specified depth of 15.76 meters, installed (measured from the tip of the pile to the cut off elevation). The Department set forth the specified pile depth of 15.76 meters without qualification.

5. The Contract documents estimated a total of 316 linear meters of total pile length (20 piles X 15.76) for payment Item 942.142.

6. AGM bid a $170/meter under payment Item 942.142.

7. On January 12, 1999 AGM submitted a pile schedule that showed AGM planned to supply 20 piles with a length of 18.54 meters to use in driving each pile to the specified depth of 15.76 meters. The Department approved a minimum length of 18.54-meters for the piles.

8. The Contract required AGM to drive the 20 piles in two phases, 10 in phase I and another 10 in phase II.

9. The Contract did not require the AGM perform pile load tests and did not require AGM to perform tests of any kind to determine the pile length at which the bearing capacity originally specified would be achieved.

10. During the work on phase I, after driving 10 piles to a depth of 15.76 meters, AGM and the Department evaluated pile hammer blow counts and determined that the specified bearing capacity of 645kN had not been achieved.

11. Thereafter, in late January 1999, the Department directed AGM by an approved extra work order to conduct a PDA (pile driving analyzer) test to determine the depth to which the piles should be driven to achieve the required bearing capacity. Two piles (S-4 & S-5) were selected for use as test piles. AGM spliced on the work site an additional 18.54-meter pile length onto the original 15.76-meter driven length of piles S-4 and S-5. Those two piles were then redriven to determine whether the test piles, as spliced, would achieve the originally specified bearing capacity of 645kN. The test piles as redriven did not achieve the specified bearing capacity of 645kN.

12. The Department interpreted the PDA test performed to mean that none of the 20 piles would achieve the bearing capacity originally specified.

13. As a result of PDA test conducted by AGM, the Department modified the Contract specifications in two respects: (1) it reduced the bearing capacity of the piles as driven from 645kN to a lesser number and (2) it changed the depth

to which piles were to be driven from 15.76 meters to a depth between 33 and 36 meters, as satisfactory to the Engineer.

14. The Contract modifications ordered by the Department required AGM to splice an additional 18.54-meter pile to each of the piles already driven in phase I and to splice an additional 18.54 meter pile to each of the 10 piles to be driven in phase II. The cost of the splicing piles S-4 and S-5 was paid for under the extra work order the Department issued to AGM for PDA testing. AGM's claim for the cost of splicing is 18, which is the number of splices net of S-4 and S-5 ordered in Phase I and Phase II combined .

15. After receiving the PDA test results, the Department considered but rejected a design modification that would have doubled the number of piles driven to a depth of 15.76 meters under each abutment from 10 to 20. Had that design modification been adopted, no pile splicing would have been necessary.

16. The design modification the Department adopted required AGM to splice and drive 18 piles to a minimum depth of 33 to 36 meters. On February 11, 1999, before proceeding with the work of pile splicing, AGM notified the Department in writing that it claimed pile splicing was extra work.

17. On February 12, 1999 the Department responded to AGM in writing that it did not consider pile splicing to be extra work. The Department instructed the resident engineer to make daily force account reports of time and materials used in splicing all remaining piles in Phase I.

18. AGM timely claimed extra work for the piles spliced and driven on Phase II. The Department likewise denied that splicing was extra work on Phase II and likewise ordered time and materials reports made.

19. In both Phase I and Phase II AGM drove 18 spliced piles to the newly specified depth of between 33 and 36 meters in accordance with the Department's modified specifications. (Two piles had been spliced, driven and paid for as extra work during the PDA testing.) In all, AGM used 662.19 linear meters of pile length in achieving the specified depth for all 20 piles. The work ordered by the Department required AGM to utilize an additional 346.19 meters (or 209% of the Contract estimate) of H-pile length (662.19 minus 316).

20. *Standard Specification* Subsection 940.66 ("Basis of Payment") provides "Butt-weld splicing of piles other than as shown on the plans will not be permitted without the express written consent of the Engineer." The original Contract *Plans* show no "butt-weld" pile splice detail. Once the Department determined that pile splicing was necessary, it required AGM to develop both a proposed splicing detail and splicing procedure for the Department's approval.

21. The Contract *Special Provisions* relating to the pile driving work contained no reference to pile splicing or the possible need for pile splicing.

22. *Standard Specification* Subsection 940.40(B)(1) ("Basis of Payment") provides in pertinent part: "[w]hen the proposed length [of the pile] is 20 meters or less, the pile shall be furnished in a single piece of the <u>required</u>

length." (Emphasis added.) Under the original Contract specification, the Department required AGM to utilized piles of 18.54 meters in length, as approved by the Department in AGM's pile schedule.

23. The Contract provides through Subsection 940.81 ("Basis Of Payment") "all costs for splicing piles shall be included in the contract unit price per linear foot for the respective pile item."

24. Under the Contract as modified, the Department paid AGM the unit price of $170/linear meter for each meter of installed pile length, or $112,572.30. Under the Contract as modified, the Department paid AGM for 662.19 linear meters of pile installed, which included 316 meters as originally estimated and an additional 346.19 meters to achieve the revised depth requirement.

25. AGM utilized the Department's force account documentation in presenting its claim. The value of the AGM pile splicing work for 18 piles is $19,996.00.

DISCUSSION

The question presented is whether the splicing of additional H-piles, ordered by the Department as part of work done under modified specifications during AGM's performance of pile driving work, was extra work under the Contract.[2]

Subsection 1.10 of the Contract defines "extra work" as work that

1. was not originally anticipated and/or contained in the contract: and therefore
2. is determined by the Engineer to be necessary for the proper completion of the project: and
3. bears a reasonable subsidiary relation to the full execution of the work originally described in the contract.

[2] The Contract provides that the Department is not liable for any payment in addition to the Contract amount, except where an express provision authorizes additional compensation. Subsection 7.16. Additional compensation is permitted if contractor makes a valid claim for "extra work." Id.

The Original Specifications

An analysis of the Contract documents reveals that the parties did not originally anticipate a need for pile splicing. No splicing work was specified in the Contract. The original specifications (1) provided without qualification that 20 H piles should be driven to a depth of exactly 15.76 meters; (2) estimated the total pile length quantity to be 316 meters, a number consistent with driving 20 piles to a depth of 15.76 meters each (20 X 15.76M = 315.20M); (3) contained no plan, drawing, detail or specification relating to splicing work or splicing procedure, (4) recited that the Department, before it drew up the original specifications, did soil borings to a depth of 26 meters; and (5) did not require AGM to conduct any PDA or Static load tests in situ. The absence of an affirmative requirement of splicing work, combined with clear statements that AGM was to drive all piles in phase I and phase II to the exact depth of 15.76 meters, belie any inference that the original specifications contemplated splicing work.

The fact that the installed pile depth shown on the plans was 15.76-meters had particular significance. The Contract provided that where the length of pile installed was less than 20 meters the contractor must furnish all piles "in a single piece of required length." Subsection 940.40(B)(1). Under that subsection AGM could reasonably believe that it would not be permitted to use spliced piles in the work. Similarly, Subsection 940.66(C) of the Contract provided "butt-weld splicing of piles other than as shown on the plans will not be permitted." (Emphasis supplied.) As no plan detail showed "butt-weld splicing of piles," AGM might reasonably be reinforced in a belief that no pile splicing was permitted.

When performance began AGM submitted a pile schedule to the Department for approval. The Department approved AGM's proposed use of a single pile length of 18.54 meters to achieve the required 15.76-meter installed depth. The proposed 18.54-meter length was 15% longer than the specified pile length of 15.76 meters, installed. The Department affirmatively approved a schedule where AGM would use 20 piles of 18.54 meters in length, a length that made splicing unnecessary. Thus, during performance of the work both AGM and the Department acted in a manner consistent with an understanding that the Contract did not require splicing work. See Lembo v. Waters, 1 Mass. App. Ct. 227, 233 (1973) (conduct of a parties during performance is significant in determining the meaning of contract term). Those actions stand in contrast with the Department's subsequent contention that Subsection 940.81 requires AGM to bear all splicing costs

Determination By The Engineer

Unilateral actions taken by the Department during performance show that it modified the Contract specifications in mid-stream. During performance the Engineer discovered that the Department's original specifications for the load-bearing capacity of the piles could not be met at an installed pile depth of 15.76 meters. Since the Contract did not require AGM to perform PDA or Static Load testing, the Department ordered that AGM perform PDA tests, which was paid for as extra work.

The purpose of the PDA tests was to determine the length to which the H-piles had to be driven to achieve the specified load bearing capacity. AGM used as "test piles" two piles already driven to a depth of 15.76 meters. For the test the Department ordered an additional 18.54-meter length to be spliced onto piles S-4 and S-5. The splicing cost

was included in the extra work order for testing. Each of the two test piles was then redriven to a depth of 36 meters. Additional PDA tests demonstrated that the specified load bearing capacity of 645kN could not be achieved even when the total pile length was effectively doubled to an installed length of between 33 and 36 meters.

The Modified Specifications

The Department, confronted with the PDA test results, considered how best to modify the original Contract specifications.

One option the Department considered, but did not adopt, was to change the specifications by doubling the number of 15.76-meter piles under each bridge abutment from 10 to 20. That solution would not require pile splicing. The Department ultimately modified the Contract to reduce the specified load bearing capacity to a number less than 645kN. It also modified the specifications by increasing the installed depth of driven piles from 15.76 to between 33 and 36 meters, the depth at which the new, reduced load bearing capacity could be achieved.

The modified plans and specifications required the 18.54-meter piles to be spliced. Two 18.54-meter piles spliced together could achieve the newly required maximum 36-meter length installed (2 X 18.54 = 37.08 meters).

By ordering PDA tests as extra work and reducing the originally specified bearing capacity, while simultaneously doubling the installed pile length to between 33 and 36 meters, the Department ordered extra work to be performed in order to fully execute "the work originally described." Subsection 1.10 (definition of "extra work"). There is no doubt that the Department modified the original Contract specifications and no doubt that splicing was needed to implement the modified specifications. Thus when the Engineer

ordered AGM to perform one splice on each of 18 piles that was extra work.[3] AGM protected its rights under the Contract by promptly notifying the Department that it considered the splicing to be extra work; the Department properly responded by ordering time and materials records kept. See Subsections 7.16 and 9.03.

The evidence at the hearing supports the following ultimate findings of fact: (1) pile splicing was never originally anticipated in the Contract specifications, (2) pile splicing was determined to be necessary during the performance of the work and was ordered by the Engineer and (3) the pile splicing ordered bore a reasonable subsidiary relation to the Contract work. Thus splicing was "extra work" within the meaning of Subsection 1.10. AGM correctly so characterized it.

The Department argues, however, that Subsection 940.81 ("Basis of Payment"), which applies to Section 940 ("Driven Piles"), should be construed to mean that AGM must bear all risk that pile splicing may be needed on the project, whether or not splicing was originally anticipated in the work. Subsection 940.81 provides, in part

> All costs for splicing piles shall be included in the contract unit price per meter for the respective pile item, which prices shall also include full compensation for delays incurred by splicing of piles or by any other operations in connection with the work on piles.

Construing Subsection 940.81 as the Department contends is contrary to the policy of Massachusetts law. In public bidding, "the adjustment remedies [of changed condition and extra work clauses] benefit both the contractor and the public agency." Glynn v. City of Gloucester, 9 Mass App. Ct. 454, 461 n.9 (1980). As the Supreme Judicial Court explains,

[3] Two of the twenty piles had been spliced as part of the PDA testing—e.g. S-4 and S-5. The splicing for piles S-4 and S-5 was paid for as extra work as part of the extra work order the Department issued for PDA testing.

> [T]he [public] agency customarily relies on the changed conditions and extra work clauses to remove unknown risks from competitive bidding and to obtain favorable bid prices stripped of such risk factors. Such a policy benefits the agency by keeping costs down and benefits bidders by assuring them that they can be compensated by formulae for overcoming sub-surface conditions and for extra work not anticipated in their bid estimates, or suggested by available data or by site inspection. The purposes of these safety valve provisions are discussed in Kaisers Indus. Corp. United States, 340 F.2d 322, 329-330 (Ct. Cl. 1965) and Foster Constr. C.A. & Williams Bros. v. United States, 435 F. 2d 873, 887-888 (Ct. Cl. 1970).[4] Id.

The original Contract specifications "stripped" all risk of splicing work from the Contract. It did so by only requiring pile work where splicing was unnecessary.

The meaning of the language in Subsection 940.81 that "all costs for splicing piles shall be included in the contract unit price per meter" is to be determined not in isolation but as it relates to the intention of parties in light of the entire contract. Lembo v. Waters, 1 Mass App. Ct. 227 (1973). The scope of AGM's obligations here cannot "be delineated by isolating words and interpreting them as though they stood alone." Commissioner of Corporations & Taxation v. Chilton Club, 318 Mass. 285, 288 (1945). The legal meaning

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[4] The Foster case, cited with approval by the Supreme Judicial Court, contains the following legal analysis of the changed condition clause.

"The starting point of the policy expressed in the changed conditions clause is the great risk, for bidders on construction projects, of adverse subsurface conditions: 'no one can ever know with certainty what will be found during subsurface operations.' [Citation omitted.] Whenever dependable information on the subsurface is unavailable, bidders will make their own borings or, more likely, include in their bids a contingency element to cover the risk. Either alternative inflates the costs to the Government. The Government therefore often makes such borings and provides them for the use of the bidders …. Bidders are thereby given information on which they may rely in making their bids, and are at the same time promised an equitable adjustment under the changed condition clause, if subsurface conditions turn out to be materially different than those indicated in the logs. The two elements work together: the presence of the changed conditions clause works to reassure bidders that they may confidently rely on the logs and need not include a contingency element in their bids. Reliance is affirmatively desired by the Government, for if bidders feel they cannot rely, they will revert to the practice of increasing their bids.

"The purposes of the changed conditions clause is thus to take at least some of the gamble on subsurface conditions out of bidding. Bidders need not weigh the cost and ease of making their own borings against the risk of encountering an adverse subsurface, and they need not consider how large a contingency should be added to the bid to cover the risk. They will have no windfalls and no disasters. The Government benefits from more accurate bidding, without inflation for risks which may not eventuate. It pays for difficult subsurface work only when it is encountered and was not indicated in the logs." 435 F.2d. 873, 887 (C. C. Cir. 1970).

of Subsection 940.81 must be qualified by the "context in which it appears, by the general purpose manifested by the entire contract, and by the circumstances existing at the time of execution." Fay, Spofford & Thorndike v. Massachusetts Port Authority, 7 Mass. App. Ct. 336, 342 (1979).

Both at the time of bid and at the commencement of the Contract work neither the Department nor AGM anticipated splicing work. In that context the meaning of Subsection 940.81 would appear to apply only where splicing was contemplated, since Subsection 940.81 is addressed to contingencies that could arise only when pile-splicing work is required. Accordingly, Subsection 940.81 imposes on a contractor "all costs for splicing piles" and "full compensation for delays" only when splicing was specified in the work on which it bid. So construed, Subsection 940.81 is consistent with the Department's ability to rely on extra work clauses to exclude risks from the Contract at the time of bidding. See Glynn v. City of Gloucester, 9 Mass App. Ct. 454, 461 n.9 (1980).

In light of the original specifications, I also find that AGM was not required to include in its bid a remote contingency that the Department might later modify the specifications. AGM could hardly be expected to build into its bid a rational contingency for splicing costs when the original contract specifications made it clear that 20 H piles were to be driven in single lengths to an exact depth of 15.76 meters in one piece, without splicing.

The Department cannot both "strip" risk factors from the Contract and then later contend that contingent costs of splicing should have been included in the bid for the work. That is especially the case when the Department itself unilaterally changed the

Contract specifications. To impose splicing costs never contemplated at the time of bid is tantamount to whipsawing the contractor. Compare Farina Bros. v. Commonwealth, 357 Mass. 131, 138-39 (1970) (awarding authority can not "whipsaw" contractor by insisting on strict adherence to specification and then take inconsistent action to contractor's detriment).

FINDINGS

The work of pile splicing performed by AGM is extra work within the ordinary meaning of the Contract. Pile splicing work was not "anticipated" or "contained" within the original Contract work. The pile splicing required during performance is properly deemed extra work where the Department materially modified the Contract specifications during performance.

Subsection 940.81 contemplates imposing the costs of pile splicing on the contractor only where the original Contract specifications reasonably contemplate that work will take place. Subsection 940.81 does not transfer all unknown risks of pile splicing costs to be imposed on AGM where such work was not within the scope of its bid and became necessary only during performance.

RECOMMENDATION

The Commissioner should adopt the findings of fact set forth above.

The Commissioner should order that AGM's claim for extra work in the amount of $19,996.00 be granted.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: August 30, 2004

To: Secretary Bernard Cohen, EOT

Through: Undersecretary/General Counsel Jeffrey Mullin, Esq., EOT
Commissioner Luisa Paiewonsky, MHD

From: Stephen H. Clark, Administrative Law Judge, EOT

Date: April 27, 2007

Re: Report and Recommendation

I am pleased to submit for your consideration the attached report and recommendation.

Fiore Construction Co., Inc. (Fiore), the general contractor on MassHighway contract #30040 (Contract) for a bridge replacement project in Orange, seeks payment of $57,007.06 for supplying foreign manufactured steel.

The Contract contained a "Buy America" clause, which required Fiore to use domestic steel. Fiore failed to order domestic steel sheeting in time for the 2000 construction season. It then asked MassHighway to seek a waiver of the Buy American provision from the federal highway administration (FHWA) on its behalf. MassHighway compiled the information necessary to apply for a waiver. Fiore began to install steel sheeting, using foreign manufactured steel, before FHWA knew of the waiver application. FHWA informed MassHighway that no waiver could be granted because Fiore's own scheduling error had caused the necessity for the waiver application.

Fiore's appeal has no merit. It knowingly breached the Contract when it ordered and supplied foreign steel. Because of its willful breach it has no right to be paid for foreign steel sheeting. Fiore's argues that the steel sheeting was "temporary" not "permanent" and so outside the scope of the Buy America clause. Section 950 of the Contract by definition provides that steel sheeting under pay Item 952 is "permanent" and that the "temporary" steel will not be compensated.

I recommend that Fiore's appeal be denied.

INTRODUCTION

Fiore Construction Co., Inc. (Fiore), the general contractor on Department contract #30040 (Contract) for a bridge replacement project in Orange, appeals from the decision of the Department's claims committee on December 19, 2001, which denied payment of $57,007.06 for both temporary and permanent steel sheeting used at or incorporated in the work.[1] The Department asserts that Fiore is not entitled to compensation because it willfully breached the Contract when it knowingly used foreign steel sheeting in direct contravention of the Contract's "Buy America" clause. Fiore used foreign steel after failing to timely order domestic steel in time for the 2000 construction season.

Fiore is not entitled to any compensation for the steel sheeting. Fiore willfully breached the Contract by using foreign steel in the work. Although it knew in late May 2000 that it would need a waiver of the Buy America clause from the federal highway administration (FHWA), Fiore waited until July 20, 2000 to notify the Department of that need. The FHWA refused to consider a waiver because it was based solely on Fiore's scheduling error.

Fiore's argument that the Buy America clause did not apply because the steel sheeting was "temporary," not "permanent," is without merit. By definition the steel sheeting was "permanent." Subsection 950 provides for payment of only permanent steel sheeting incorporated in the work. Subsection 950.81 is in accord: temporary steel

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[1] Fiore attempts to raise two other claims here: (1) for payment of $18,102.00 for costs associated with "three" floods in July, 2000, December, 2000 and April, 2001 [Ex.#3]; and (2) for payment of $9,722.00 for costs resulting from flooding on September 26, 2000 [Ex.#4]. District 2 correctly rejected both claims as untimely filed. See Standard Specifications Subsection 7.16. I do not address the substance of either claim. See infra page 11.

sheeting is unpaid since it is incidental to the payment for permanent steel. Accordingly, Fiore's argument ignores the Contract and cannot prevail.

BACKGROUND

The Department awarded Fiore Contract #30040 on August 18, 1999. The Contract was executed on August 31, 1999 and the notice to proceed issued the same day. The scheduled completion date was November 4, 2000. The office estimate for the Contract was $318,576.00; Fiore was the low bidder at a price of $416,272.00.

The Contract required Fiore to dismantle an existing bridge over the Tully River in Orange and build a new bridge of pre-cast concrete. The work was to be performed under the terms of a permit issued by the Army Corps of Engineers, which required that construction in the river be done between July 15 and October 1.

The abutments of the existing bridge were to be used in the new construction. The Contract required Fiore to build a temporary earth support and/or cofferdam system of steel sheeting surrounding the abutments and wing walls. The plans required the temporary sheeting to be cut off and remain part of the bridge foundation.

Contract Provisions

<u>The Steel Sheeting</u>

The Standard Specifications required that Fiore "shall commence work within 15 days after the mailing of the executed Contract" unless otherwise ordered. Standard Specifications, Subsection 8.03 ("Prosecution of the Work"). Fiore was responsible to supply all materials needed in the work. Among such materials was the steel in pay Item 952 ("Steel Sheeting") for the earth stabilization/cofferdam containment structure. Fiore bid $1.90/kg for Item 952 based on an estimated quantity of 17,000 kgs. Contract

B00420 –7. The Contract Plans showed that much of the steel sheeting was to be permanently incorporated in the work. *See* Project File No. 601288, General Plan, Profile & Locus, Sheet 6 (1/16/99).

The "Buy America" Clause

The Contract was a federal aid project and included a Special Provision that required all steel permanently incorporated in the work be fabricated in the United States.

The Special Provision, which supplemented Subsection 6.01, stated in part

> Federal law [23 C.F.R. § 635.410] requires that all manufacturing processes for steel and iron to be permanently incorporated in Federal-aid highway construction projects must occur in the United States. Foreign Steel and iron can be used if the cost of the material does not exceed 0.1% of the total contract cost or $2,500 whichever is greater.

Section 635.410 of the Code of Federal Regulations (Regulation) requires that steel "permanently incorporated" in the work be manufactured in the United States. Foreign manufactured steel may not be used unless the state obtains a waiver. The FHWA may grant a waiver if application of the Buy America clause "would be inconsistent with the public interest" or steel is not domestically "produced" "in sufficient and reasonably available quantities." 23 C.F.R. § 635.410.

A waiver request is made by the state to the regional administrator of the FHWA on behalf of a contractor for a specific project and must be "accompanied by supporting information" and "submitted sufficiently in advance of the need for the waiver in order to allow time for proper review and action on the request." The Department does not have authority to grant such permission; it can only be obtained from the FHWA. *See* 23 C.F.R. § 635.410.

Contract Performance

Ordering The Steel Sheeting

Fiore did not order steel sheeting in 1999 after it executed the Contract on August 31, 1999. Fiore first attempted to order domestic steel sheeting in "late" May 2000. K.S. Chee Testimony. At that time Fiore learned that it had missed the "May 15 rolling date" for new domestic steel sheeting called for by Item 952. Ex. #2. The next rolling date was in October, 2000. Id.

Fiore did not notify the Department until July 20, 2000 that it could not obtain domestic steel sheeting. Fiore told the Department, on August 3, 2000, "We did not place a 1999 order for this material since we knew that we could not gain access to the river until July 15, 2000." Id. Fiore's explanation for waiting to order steel was that (a) it wanted a rolling date as close as possible to the construction date and (b) it knew it would not "get into the river to work until August [2000]." K.S. Chee Testimony. Fiore ordered the foreign steel sheeting on August 3, 2000.

Construction

The foreign steel was delivered on or about August 9, 2000 and the installation of the earth support/cofferdam system started immediately. It was substantially complete by August 30, 2000. The foreign steel sheeting installed was suitable for the work.

Waiver Request

On July 20, 2000 Fiore wrote to District 2: "Please grant us permission to use foreign steel sheeting as the rolling date for this type of sheet by a domestic manufacturer

is not till late October seriously impacting the schedule for this project. Please note that there is only one domestic manufacturer." Ex. #2.

The Regulation provides

> A request for waiver and an appeal from a denial of a request must include facts and justification to support the granting of the waiver…. In determining whether the waivers will be granted, the FHWA will consider all appropriate factors including cost, administrative burden, and delay that would be imposed if the provision were not waived. 23 C.F.R. § 635.410

On July 24, 2000 the Department asked Fiore for a letter from its steel supplier confirming that "domestic steel sheeting" is "not available at this time" and giving the technical specification of the "proposed" foreign steel. On August 3, 2000 Fiore supplied that information and told the Department that it could procure foreign steel by August 9, 2000 "if we get permission to use Frodingham 2N." Ex. #3.

On August 8, 2000 the District wrote Fiore that its "request [for a waiver] has been forwarded [to the Department's Boston office] for approval" and asked Fiore "to provide this office with your credit offer for this foreign-made sheeting." On the same day Fiore told District 2 that it would offer a credit of $1,900 for the cheaper foreign steel, based on a quantity of 17,000 kg. The parties then agreed on a unit price reduction in price of 11.22cent/kg for Item 952, for which Fiore had bid at $1.90/kg.

Sometime after August 8, 2000 a Department official telephoned the FHWA to inquire about a waiver of the Buy America provision in Fiore's circumstances. The FHWA responded on or before August 25, 2000 that a waiver would not be granted due to a contractor's "scheduling error." Ex. #7.

On August 25, 2000 the head of the Department's Bridge Section, Mr. Alex Bardow, told "District 2 Construction" that "the Federal Highway Administration will not approve of the use of foreign steel due to a contractor's scheduling error." Ex. #7. On September 18, 2000 the District 2 Highway Director notified Fiore in writing that "[y]our request for a substitution of steel sheeting on the subject project has been denied." Ex. #2.[2] The Department acknowledged that the "sheeting substitution has already been installed, therefore, your corrective action procedure must be submitted to the District Office as soon as possible…." Ex. #2.

Payment For Sheeting

Contract pay records demonstrate that the Department paid for the steel sheeting (Item 952) on periodic estimate No. 002 dated September 1, 2000 through which the Department paid Fiore $57,007.60 for Item 952 work. After the FHWA had effectively denied the waiver request, the Department recouped the $57,007.60 paid by a credit to the Department on periodic estimate No. 010 dated June 15, 2001.

Fiore Claim and Appeal

Fiore filed a claim at District 2 seeking payment of $57,007.60 for both temporary and permanent steel sheeting. District 2 denied the claim and forwarded it to the claims committee for review. On December 19, 2001 the Department's Engineer notified Fiore that its claim was denied, stating, "[t]he preclusion of foreign steel on this project is clearly detailed in the contract's Special Provisions." Ex. #2. On January 2, 2002 Fiore filed a notice of appeal at the office of Administrative Law Judge; on January 17, 2002 Fiore duly filed its statement of claim.

[2] At the hearing Fiore did not adduce evidence to show in detail what the Department did to seek the waiver from FHWA or what the Department did after learning from the FHWA that the waiver request would be denied. It makes no argument about the legal significance of the actions the Department took.

On May 30, 2002 Judge Milano heard the appeal. Present at the hearing were:

K. S. Chee	Fiore
Peter Amorello	Fiore
Steven Doyle	MHD
Donna Feng	MHD
Isaac Machado, Esq.	Deputy Counsel, MHD
Peter Milano	Administrative Law Judge

The following exhibits were admitted in evidence

Ex. #1	MHD Contract #30040
Ex. #2	Fiore Statement of Claim (January 17, 2002)
Ex. #3	Fiore Statement of Claim (Flood) (3/14/02)
Ex. #4	Fiore Statement of Claim (Flood) undated
Ex. #5	Dist 2 Response to Statement of Claim (3/12/02)
Ex. #6	Memorandum of A. Bardow (3/14/02)
Ex. #7	Memorandum of A. Bardow to M. McGrath (9/7/00)

Judge Milano took the matter under advisement, but resigned in July 2003 before making a report and recommendation. Acting Administrative Law Judge John J. McDonnell, who served from July 2003 to March 1, 2004, took no action.

On March 1, 2004 the undersigned was appointed Administrative Law Judge. On July 21, 2004, the Legislature abolished the Board of Highway Commissioners and conferred its prior functions on the Secretary of Transportation (Secretary) and the Commissioner of the Department (Commissioner). *See* G.L. c.16, §1(b), as amended by St. 2004, c. 196, §5. This report and recommendation is made to the Secretary.

DISCUSSION

It is settled law in Massachusetts that those who engage in the work of public contracts are "to act in strict accord with their undertakings." Albre Marble & Tile v. Goverman, 353 Mass. 546, 549 (1968). By statute a contractor performing work on a public contract must strictly adhere to the requirements of the plans and specifications. G.L. c.30, § 39I provides

> Every contractor having a contract for the construction of … any …public works … shall perform all the work required by such contract in conformity with the plans and specifications contained therein. No willful and substantial deviation from said plans and specifications shall be made unless authorized in writing by the awarding authority ….

A contractor that performs work contrary to the plans and specifications of a public contract does so "at [his] peril." Albre Marble, 353 Mass. at 549. A contractor "in *willful* violation of the contract" cannot recover its expense for faulty performance Id. (Emphasis supplied.) "If any claim arises from the contractor's willful and substantial deviation from the plans and specifications, there can be no recovery without a showing of compliance with the requirements of G.L. c.30, § 39I." Glynn v. Gloucester, 9 Mass. App. Ct. 461, 454 (1980). The underlying reason for the rule is that "an intentional departure from the precise requirements of the contract is not consistent with good faith in the endeavor fully to perform" the contract. Andre v. Maguire, 305 Mass. 515, 516 (1940). [3]

Fiore knowingly and willfully breached the Contract. The Buy America clause was plainly mandatory, as required by federal law. The Contract clearly set forth the requirements of the Regulation in a special provision. Fiore's delay in ordering domestic steel sheeting in "late May" 2000 shows a belated attempt to meet the requirements of 23 CFR § 635.410.

The work under the Contract was to be completed by November 4, 2000 and could only take place in the river between July 15 and October 1 by terms of the Army

[3] A construction contract not subject to G.L. c.30, § 39I because it involves only private parties is subject to a similarly strict rule where the breach goes to the essence of the contract. "Where a contractor commits a willful default and yet claims the contract price, he in effect claims that he has a right to break his contract. But he has no such right." Sipley v. Stickney, 190 Mass. 43, 47 (1906)

Corps permit. Accordingly, when Fiore discovered that it had missed the May "rolling date" for ordering domestic steel sheeting and that the next rolling date would not be until October, it knew that it had placed the Contract completion date at risk. Fiore did not act immediately to seek a waiver of the Buy America clause to buy foreign steel. Although it learned in "late May" that it could not obtain domestic steel, it did not request the Department to process its application for a waiver until July 20, 2000.[4] The Department cooperated with Fiore to complete the waiver application. Fiore placed its order for foreign steel just as it gave the Department the information needed to process the waiver application.

Fiore ordered and used foreign steel at its own risk, with no assurance that the FHWA would grant the required waiver. Fiore's dilatory conduct led it directly to a willful and knowing breach of the Buy America clause in an effort to keep on schedule. In doing so Fiore ordered and used foreign steel at its own "peril" in willful violation of the Contract. It cannot recover its costs. *See* Albre Marble & Tile v. Goverman, 353 Mass. 546, 549 (1968).

In reaching this conclusion I note that one state court of last resort has strictly construed the Buy America clause mandated by 23 C.F. R. § 635.410. In Southwest Marine, Inc. v. State of Alaska, Department of Transportation et als., 941 P.2d 166 (1997), the court upheld the denial of any compensation to a contractor that had used foreign steel in certain doors and prefabricated toilet/shower modules in the refurbishment of a ship used as a ferry in the state highway system. In Southwest Marine

[4] Fiore admitted that it failed to timely order the domestic steel. "[P]lease note that we place our order for the domestic sheets in late May 2000 only to discover that we had missed the May 15 rolling date. We did not place a 1999 order for this material since we knew that we could not gain access to the river until July 15, 2000." Ex. #3.

the contractor, knowing that it was required to use domestic steel or obtain a waiver, ordered and used foreign steel in the doors and modules. The FHWA denied later applications for waivers on the grounds that (1) the contractor had ignored the waiver requirement when it ordered the foreign steel for the modules; and (2) no waiver could be granted for the doors because suitable domestic steel doors were available. The court ruled that the Buy America clause was mandatory and that contractor was required to follow it, even though it resulted in the contractor's failure to meet the contract schedule and the imposition of liquidated damages of $850,000. 941 P.2d at 179. In Southwest Marine it was no defense that the state allowed the contractor to install the doors before the FHWA had acted to deny the waiver request.

Fiore's argument that the steel sheeting was "temporary" not "permanent" must be rejected.[5] The Contract plans make clear that the steel sheeting here was to be incorporated "permanently" in the work. *See* Project File No. 601288, General Plan, Profile & Locus, Sheet 6. Moreover, Item 952 under which Fiore bid for steel sheeting applies only to permanent steel. Two Subsections of the Standard Specifications governing Pay Item 952 make plain that steel sheeting was "permanent." Subsection 950.80 (Method of Measurement) expressly provides that a pay item for steel sheeting will only be paid for sheeting "left in place … as a permanent part of the foundation."[6]

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[5] Fiore's Statement of Claim states: (1) "…it was our understanding that the bulk of the sheets were temporary and were to be removed at the end of the job except for that portion of the cofferdam under the bridge which were to be left in place. It is not possible to remove the sheets after the bridge was erected.…"; and, (2) "sheets were used as a cofferdam to facilitate dewatering and hence was temporary. Only the section under the bridge stayed because it was not possible to remove them, hence they were cut off at the mud line."

[6] Section 950.80 provides in pertinent part

> The item[ ] of…Steel Sheeting will be a pay item only if indicated on the plans or in the Special provisions to be left in place … as a permanent part of the foundation. [ ] Steel sheeting, when

Subsection 950.81 (Basis of Payment) states that sheeting "to be left in place as a permanent part of the foundation" will be paid "per kilogram." It further provides that no payment will be made for steel sheeting not permanent, which "will be considered as incidental work necessary for the proper prosecution … of the work during construction…."[7] The two subsections are consistent and the provisions are unambiguous. Fiore's argument that it only used "temporary" steel has no merit.

The Miscellaneous Claims

Fiore attempted to file two additional appeals. On March 14, 2002, after the hearing in this appeal had been scheduled, Fiore filed two additional appeals: (1) for costs of flood damage, $18,102.00, and (2) for costs to repair the cofferdam, $9,722.00. District 2 refused to consider these "claims" because they were not timely filed.

Each claim was in fact filed after the time the Contract permitted for filing claims. To assert a claim a contractor must follow the procedures set forth in Subsection 7.16 of the Standard Provisions. Subsection 7.16 requires a contractor (1) to file a claim within

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> indicated on the plans or in the Special Provisions to be left in place…will be measured by the kilogram.

[7] Subsection 950.81 (Basis of Payment) provides in pertinent part:

> Steel sheeting, when indicated on the plans, in the Special Provisions, or when ordered by the Engineer, to be left in place as a permanent part of the foundations will be paid for at the contract unit price per kilogram under the item for Steel Sheeting.
>
> No direct payment will be made for any sheeting not indicated on the plans or in the Special Provisions or not ordered in writing by the Engineer to be left in place as a permanent part of the foundation. Such sheeting will be considered as incidental work necessary for the proper prosecution and protection of the work during construction operations and compensation therefore shall be included in the prices bid for the various items of work for which the sheeting was used.
>
> For purposes of partial payment, except as noted below, the sheeting items will be considered 90 percent done when the sheeting has been completely driven and the area within the sheeting is ready for such work as may be required to be done therein. The sheeting item will be considered completed when the sheeting has been cut at the required elevation.

“one week” after sustaining injury or damage, and, separately, (2) to file an “itemized statement” of the claim by the fifteenth day of the next month.

On June 4, 2001, Fiore filed claims for compensation of its costs due to flooding and cofferdam damage. The events giving rise to those claims took place in July 2000, December 2000 and April 2001. Each claim was filed far after the time permitted by Subsection 7.16. If a contractor fails to file a timely claim or itemized statement, Subsection 7.16 provides that the contractor’s right to seek additional compensation is “forfeit.” *See* Marinucci Bros. v. Commonwealth, 354 Mass. 141, 144-145 (1968); Glynn v. City of Gloucester, 21 Mass. App. Ct. 390, 392-93 (1986). Fiore lost its right to seek additional compensation and District 2 correctly rejected both claims as untimely filed. Accordingly, the appeals to this office should be dismissed.

In sum, Item 952 steel sheeting relates only to “permanent” steel, which falls within the requirements of the Buy America clause. Fiore installed the foreign steel “at its peril” after it breached the Contract. The FHWA did not grant a waiver and the Department did not give Fiore written authorization to modify the Contract under G.L. c.30, s.39I. Fiore is not entitled to compensation for work done in willful disregard of the Contract specifications.

CONCLUSION

Fiore’s claim for payment of steel sheeting under Item 952 should be denied. The appeals of Fiore’s miscellaneous claims should be dismissed.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: April ___, 2007.

To: Secretary Bernard Cohen, EOT

Through: Undersecretary/General Counsel Jeffrey Mullin, Esq., EOT
Commissioner Luisa Paiewonsky, MHD

From: Stephen H. Clark, Administrative Law Judge, EOT

Date: April 27, 2007

Re: Report and Recommendation

I am pleased to submit for your consideration the attached report and recommendation.

Tilcon Capaldi, Inc. (Tilcon), a general contractor under MHD contract #31089 (Contract) engaged to perform road construction on I-195 in Seekonk and Rehoboth, appealed from the Department's refusal to pay it more than $3,983.38 for work performed. Tilcon argues that, after the Federal Highway Administration (FHWA) issued a new safety standard, the work of building approach pads at the treatments to guardrails was an extra.

The appeal is without merit. The work of building gravel approach pads was in the original contract. The Contract obligated Tilcon to build approach pads 3 feet beyond the first post of each guardrail. Tilcon did not complete that work in a satisfactory manner and the Department ordered corrective action. Before Tilcon acted to cure the defective work the FHWA issued a new safety standard, which required approach pads to extend 5 feet beyond the first guardrail post. Extending the length of the incomplete approach pads required a mere increase in the quantity of gravel used. There was no extra work.

I recommend that Tilcon's appeal be denied.

INTRODUCTION

Tilcon Capaldi, Inc. (Tilcon), the Massachusetts Highway Department (Department or MHD) general contractor on contract #31089 (Contract) for road/ramp construction on I-195 in Seekonk and Rehoboth, appeals the determination by the Claims Committee that denied Tilcon additional compensation in excess of $3,983.38 for the work of installing approach pads to the end treatments of new guard rails.

The Contract was awarded to Tilcon on January 17, 2001; the Notice to Proceed was issued on April 1, 2001. The Contract involved federal funds. During the performance of the Contract, the Federal Highway Administration (FHWA) implemented a revised federal highway standard that required the guardrail approach pads extend five feet—not three feet—beyond the first guardrail end-post. See Fax from Ken Coelho, FHA, to John Burns, Resident Engineer, *Federal Highway Administration New Standard* 1 (Oct. 29, 2002). Tilcon had not installed approach pads at the time the FHWA issued its new safety standard. The Department requested Tilcon to install the approach pads to comply with the new FHWA standard. Tilcon did so but then filed a claim for extra work. Ltr. from Gregory Bowles, Construction Manager Tilcon, to Bernard McCourt, District Highway Director, *Claim Letter* 1 (Nov. 21, 2002).

The Claims Committee reviewed Tilcon's claim for $25,039.41[1] in additional compensation for the work of upgrading the guardrail approach pads and recommended a payment of $3,983.38 in full settlement. Ltr. from Thomas F. Broderick, Chief

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[1] Tilcon reduced its extra work claim on appeal by a letter to Acting Chief Administrative Law Judge, John McDonnell. Tilcon wrote it "would amend the amount of [its] claim to $21,151.33 considering the payment on Estimate # 034 of $3,888.08 for Item 150." Ltr. from Gregory Bowles, Construction Manager Tilcon, to John McDonnell, Acting Chief Administrative Law Judge, *Additional Documentation for Claim on Contract #31089* 2 (Nov. 4, 2003). The Department's offer of $3,983.38 and the subsequent payment of $3,888.08 both related to the additional quantities of gravel borrow paid under Contract pay Item 150.

Engineer, to Gregory Bowles, Construction Manager Tilcon, *Claims Committee Determination* 1 (Apr. 11, 2003).

Tilcon's appeal should be denied. The work of extending the gravel approach pads beyond the guardrail end posts was in the original Contract. The Contract required Tilcon to construct the approach pads at the guardrail end treatments in a satisfactorily manner but Tilcon did not do so. The Department then ordered Tilcon to take corrective action. Tilcon was mobilized to perform corrective work when the FHWA issued its revised safety standard.

The work Tilcon did to assure that the guardrail end treatments complied with the new FHWA standards was not "extra work." Complying with the new FHWA standard merely required laying an increased quantity of ordinary borrow. The FHWA directive did not alter the original Contract work; it merely increased the quantity of ordinary borrow needed. Tilcon was only entitled to compensation for the ordinary borrow used to extend the end pads. Tilcon's claim for extra work is without merit.

I recommend that Tilcon's amended appeal for $21,151.33 be denied.

BACKGROUND

The Contract

Tilcon was awarded Department Contract #31089 for resurfacing and other related ramp work on Interstate 195 in Seekonk and Rehoboth at the bid price of $4,316,863.00. The Contract's original completion date was November 30, 2002.

The pay item for ordinary borrow in the Contract was Item 150 ("Ordinary Borrow"). Ordinary borrow was the material used to construct the gravel approach pads at the end treatments of guardrails. The original quantity estimated for Item 150 at the

time of bid was 545 CY, for which Tilcon bid $ 7.00/CY. After the promulgation of the FHWA standard, the quantity of borrow needed to meet the new safety standard increased to 732.24 CY. The Department paid Tilcon for all ordinary borrow used to complete the approach pads at the Contract price. See supra page 1, n. 1.

The Contract is governed by the *Standard Specifications for Highways and Bridges* (1988 Metric Ed.) and incorporates the *Supplemental Specifications* promulgated on December 23, 1998. The Contract provisions governing this appeal are subsections 1.20, 4.03, and 4.05 of the Standard Specifications (all relating to extra work), subsection 5.10 ("Removal of Defective or Unauthorized Work") and subsection 4.06 ("Increased or Decreased Contract Quantities").

Statement of the Appeal

Tilcon timely filed a claim at MHD District 5, where it was denied and forwarded to the Claims Committee. The Engineer offered Tilcon $3,983.38, the price of the increased quantity of ordinary borrow used. Tilcon rejected the offer and filed a timely notice of appeal in this office. On May 30, 2003 it filed a statement of claim for "extra work" in the amount of $25,039.41.[2] Tilcon's statement of claim asserted that it had completed all the original contract work before it was requested to lay additional gravel to complete the guardrail end treatments in the manner required by the newly promulgated FHA safety standard. See Statement of Claim, at 1-2 (May 30, 2003). In essence, Tilcon's extra work claim is for mobilization costs. John McDonnell, the Acting

[2] Tilcon reduced its claim on appeal to $21,151.33 after receiving a payment of $3,888.08. See supra page 1, n.1.

Administrative Law Judge when Tilcon filed its appeal, held a hearing on October 23, 2003.[3]

Present at the Hearing were:

John McDonnell……………....	Acting Chief Administrative Law Judge
Gregory Bowles………………	Constr. Mgr. Tilcon Capaldi, Inc.
Gerald Bernard……………….	MHD
Isaac Machado, Esq.………..	Counsel, MHD
John Burns……………………	MHD

At the Hearing, the following documents were admitted into evidence:

Ex. #1………………………...	Statement of Claim
Ex. #2………………………...	Contract #31089

At the close of the Hearing, Judge McDonnell asked the parties to provide documents that showed (1) the quantity of Item 150 borrow installed and the dates MHD measured and paid for such borrow, (2) the daily project diaries MHD kept on and after August 2002, and (3) any record that demonstrated when the guardrail end treatments were completed.

FINDINGS

Based on the testimony at the hearing, the exhibits in evidence and the documents produced after the hearing, I find the facts recited above and following.

During performance of the Contract, John Burns, the Department's resident engineer (RE), received a fax from Ken Coelho, an administrator in the FHWA, Massachusetts Division, which described a new federal highway safety standard requiring all the approach pads for guardrail end treatments to extend 5 feet beyond the first guardrail post. The previous pad length was 3 feet. The new FHWA safety standard

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[3] On March 1, 2004 the Governor appointed the undersigned Administrative Law Judge pursuant to G.L. 16, s.1. Because Acting Judge McDonnell had not submitted a report and recommendation, I reviewed the record and tape recorded testimony of the hearing. I make this report and recommendation based on the record as a whole.

went into effect November 1, 2002 as an amendment to the NCHRP Report 350 Standards. On November 15, 2002 Tilcon had not completed the guardrail end treatments in a satisfactory manner and was subject to a Department order for corrective action under Subsection 5.10 of the *Standard Specifications* ("Removal of Defective or Unauthorized Work").

DISCUSSION

Extra Work Claim

Tilcon asserts a claim for increased costs due to extra work performed under the Contract. It is Tilcon's burden to prove by substantial evidence that it is entitled to additional compensation.

Subsection § 1.20 of Standard Specifications defines extra work.

> Extra Work [is] Work which: (1.) *was not originally anticipated and/or contained in the contract*: and therefore (2.) is determined by the Engineer to be necessary for the proper completion of the project: and (3.) bears a reasonable subsidiary relation to the full execution of the work originally described in the Contract. (Emphasis added.)

Tilcon's "extra work" claim is principally a factual dispute about when Tilcon satisfactorily completed the guardrail work and whether it had completed all work and demobilized when the FHWA issued its new safety standard.

Tilcon contends that it completed the work required under the Contract prior to the passage of the new FHWA safety standard. In support, it offered the testimony of its general manager, Mr. Gregory Bowles. Mr. Bowles testified that he did not "think there was anything left to be done, other than punch list work." Gregory Bowles, hearing testimony, Oct. 23, 2003. Mr. Bowles testified that "to [his] knowledge" the Contract

requirements regarding "shoulder work, fill, approach pads, 3 ft. length of guardrail end treatments, etc… were completed between June and July of 2002 prior to the resurfacing work." Id. Tilcon did not introduce in evidence any written record to corroborate Mr. Bowles's sworn testimony. On cross-examination Mr. Bowles stated he had no personal knowledge "that the shoulder work had not been completed"; nor had he received any information from "any individual stating that the subject guardrail work was not finished correctly." Id.

The Department contends that the guardrail work was not completed when the FHWA standard was implemented and that Tilcon did not satisfactorily complete the end treatment work until December 15, 2002. The Department relies on the testimony of Mr. John Burns, its resident engineer on the project, and contemporaneous records. Mr. Burns testified that the original contract work was not completed prior to the release of the new FHWA safety standard and that Tilcon was then subject to a Department order to install approach pads and cure defective road shoulder work.[4] Mr. Burns testified that he spoke with Mr. Frank Gammino, Tilcon's project superintendent, about the need to comply with the new FHWA standard. According to Mr. Burns, Mr. Gammino asked Mr. Burns if the guardrail end treatments could be added to the project punch list but Mr. Burns told him it could not because "this is a safety issue."

Mr. Burns testified that when Mr. Coelho of the FHWA told the Department that the new safety standard had to be complied with on the Contract work Tilcon had not yet

[4] If the Department finds original work unsatisfactory or incomplete the Contract allows it to order corrective action. See Subsection § 5.10 of the 1988 Standard Specifications ("Removal of Defective or Unauthorized Work"). It is the government, not the contractor, that determines if the work has attained satisfactory, substantial completion. But see G.L. c. 39, § 39G (failure of the "awarding authority" to respond to a contactor's written declaration of substantial completion within twenty-one days is equivalent to acceptance and work is deemed substantially complete).

completed the original approach pad guardrail end treatments. Mr. Coelho told Mr. Burns that "instead of doing [the end treatments] to extend to three feet, they need to now extend five feet." Hearing, Oct. 23, 2003. To corroborate Mr. Burns's testimony the Department produced the project diary and the Contract payment records for Item 150 ("Ordinary Borrow")[5] both of which were contemporaneous records.[6]

Tilcon's evidence is insufficient to prove that the approach pad work was complete prior to the issuance of the new FHWA safety regulation. Mr. Bowles's testimony does not constitute substantial evidence to prove its claim. At best, Tilcon's evidence merely shows that to "the best of his knowledge" Mr. Bowles himself did not know anything that informed him that the work was not complete "in June or July." The absence of evidence, however, does not equate to evidence. See New Boston Garden Corp. v. Bd. of Assessors of Boston, 383 Mass. 456, 472 (1981). Mr. Bowles' incomplete knowledge—without more—is not evidence of much probative force. The lack of any documentary evidence to corroborate Mr. Bowles's version of events detracts from the probative force his testimony may have.[7]

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[5] The *Standard Specifications* III.3 § M1.01.0 indicates that "Ordinary Borrow shall consist of a material satisfactory to the Engineer and not specified as gravel borrow, sand borrow, special borrow material or other particular kind of borrow. This material shall have the physical characteristics of soils . . . [and] shall have properties such that it may be readily spread and compacted for the formation of embankments."

[6] The Project Diary indicates on November 25 & 26, 2002: "Tilcon—Item 150 Ordinary Borrow placed for approach pads for guardrail ends Rte I-195 E[astbound] and W[estbound] various locations—Superintendent Gammino 'OK to pay ordinary borrow' since *corrective action was required prior to new specification*." John Burns, *Project Diary for Contract #31089* at 74 (Nov. 25-26, 2002) (emphasis added).

[7] Mr. Bowles did not refer to any document that corroborated his testimony or independently substantiated that Tilcon's work was substantially and satisfactorily completed before the FHWA issued its new safety standard. Tilcon did not call Mr. Gammino as a witness at the hearing. It was Mr. Gammino, not Mr. Bowles, who spoke with the resident engineer, Mr. Burns; and it was Mr. Gammino who offered on behalf of Tilcon to perform the pad work called for by the FHWA requirement at the cost of the increased quantity of ordinary borrow. Mr. Gammino was knowledgeable about the project and the details of the work. He spoke directly with Mr. Burns about the FHWA requirement. Mr. Burn's testimony concerning his conversations with Mr. Gammino, which is both credible and corroborated by documents, stands

By contrast, Mr. Burns's testimony, together with MHD's project diaries and records, provide a "rational articulable basis in the evidence" to support a finding that Tilcon was mobilized and performing corrective work when the new FHWA standard came into effect. See New Boston Garden, 383 Mass. at 473. I think the record as a whole, including "whatever in the record fairly detracts from [the] weight" of the Department's evidence, proves the Department's factual contentions. Id. at 466.

Complying with the new FHWA standard required laying additional quantities of ordinary borrow to extend the approach pads 2 additional feet beyond the first end post. The Department compensated Tilcon for constructing the gravel pad end treatments at the Contract price Tilcon bid for Item 150 ("Ordinary Borrow") under subsection 4.06 ("Increased or Decreased Contract Quantities").[8] In ruling on a cognate provision in another public contract, the Supreme Judicial Court in M. De Matteo Constr. Co. v. Commonwealth, 338 Mass. 568, 588 n.2 (1959) construed an increased quantities provision:

> "An increase in quantities of work to be performed . . . will be paid for at the contract unit prices for the actual work done, in the same manner as if such work had been included in the original estimated quantities. No allowance will be made for anticipated profits or underruns in quantities."

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uncontradicted and unrebutted on this record. I credit Mr. Burns's testimony that Mr. Gammino agreed that it would be "OK [with Tilcon for the Department] to pay Ordinary Borrow" for the pad work. Tilcon introduced no credible evidence to show that the end treatment work was satisfactorily completed before the FHWA issued the new safety standard. There was no written declaration here.

[8] In pertinent part that subsection provides: "The Department reserves the right to increase or decrease the quantity of any particular item of work. [] In this regard, no allowance will be made for loss of anticipated profits suffered or claimed by the contractor resulting directly or indirectly from such increased or decreased quantities or from unbalanced allocation among the contract items from any other cause."

CONCLUSION

I conclude that the approach pad end treatment work Tilcon performed was work originally anticipated in the contract. Tilcon was still mobilized and had not completed work on approach pad end treatments to the guardrails before the FHWA standard was implemented. Laying additional quantities of ordinary borrow to extend gravel pads 2 feet to comply with the new FHWA regulation was not extra work. It was work within the original Contract specification that required additional quantities of ordinary borrow to complete. The Department paid Tilcon the compensation the Contract required.

RECOMMENDATION

I recommend that Tilcon's claim of $21,151.33 for extra work to upgrade the approach pads be denied.

Respectfully Submitted,

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Stephen H. Clark
Administrative Law Judge

Dated: __/__/2007

APPENDIX B-1

DECISIONS/RULINGS

Claims re: Delay Damages

To: Secretary Jeffrey B. Mullan, MassDOT
From: Stephen H. Clark, Administrative Law Judge
Date: May 4, 2011
Re: Report and Recommendation

I respectfully submit for your consideration and approval the attached report and recommendation.

B&E Construction Corporation (B&E), the general contractor in MassDOT contract #34574 (Contract) to reconstruct five bridges in Millville, claims $548,243.91 for "home office overhead" and "project superintendent salary" costs due to substantial delays admittedly caused by MassDOT because of unforeseen site conditions and needed redesign of work. MassDOT approved thirteen extra work orders valued at $714,970.25 in order to complete the project. As a result there were 116 days of project shutdown and 552 days of extended contract duration.

The delays caused by MassDOT were not at the fault of B&E. MassDOT has therefore already paid B&E's claims for its increased "actual costs" of demobilization, escalation and stand by equipment.

B&E's present claim for additional compensation for overhead and superintendence costs is without merit. Subsection 8.05 of the Contract expressly excludes "overhead" (which includes "home office overhead") from payable "actual costs." Subsection 9.03B expressly disallows "general superintendence" (which includes the "project superintendent salary").

B&E did not state a claim upon which relief may be granted under the Contract.

I recommend that B&E's appeal be dismissed.

INTRODUCTION

This is the final report and recommendation for the disposition of the claim on appeal of B&E Construction Corporation (B&E) in MassDOT contract #34574 (Contract).

On February 11, 2011 MassDOT moved to dismiss B&E's claim to recover overhead and superintendence costs (Claim) attributable to delays in contract performance caused by MassDOT on the ground that B&E did not state a claim upon which relief can be granted. B&E did not file an opposition. I conclude that B&E's Claim should be dismissed because Subsections 8.05 and 9.03B of the Standard Specifications expressly preclude payment of overhead and superintendence.

BACKGROUND

B&E and MassDOT entered into the Contract to reconstruct five bridges along Central Street in Millville on May 5, 2004 at a bid price of $5,172,690.10. After the work began it is undisputed that B&E encountered design defects and unforeseen site conditions that caused substantial delays in its completion of the work. The design defects led MassDOT to substantially redesign work that B&E then performed under extra work orders. The total value of extra work MassDOT approved was $714,970.25.

B&E and MassDOT agree that there were 116 days of project shutdown.[1] In total there were approximately 550 calendar days of extended project duration due to multiple delays, winter shutdown periods, and the substantial extensions of time MassDOT granted B&E to perform the extra work. MassDOT approved 13 extra work orders and granted 2 time extensions totaling 552 days.

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[1] Project shutdown dates were (1) July 15, 2004 to August 4, 2004 (15 days); (2) August 13, 2004 to September 9, 2004 (20 days); (3) December 8, 2004 to March 4, 2005 (63 days); and (4) August 12, 2005 to September 6, 2005 (18 days).

B&E filed claims under Subsection 8.05 for its increased "actual costs" of performance due to the delays caused by MassDOT. MassDOT admitted its responsibility for the delays and for B&E's increased actual costs. MassDOT paid (or approved for payment) those claims.

B&E filed this Claim (#3-34574-04) for $548,243.91 on January 30, 2007. It seeks to recoup B&E's costs of allocated home office overhead (including, B&E says, general administration, company operating costs and unabsorbed overhead expense) and the salary of its project superintendent during shutdowns and extended time to perform. To calculate allocated home office overhead B&E used 722 days; to calculate the project superintendent's salary it used 511 days. [2]

On October 30, 2009 B&E "re-submitted" the Claim, seeking an equitable adjustment of $548,243.91. As justification it stated that the "sheer magnitude of documented interruption, delay, work and shut-downs [were] well beyond our control, well beyond any precedent and certainly beyond any formulation of logical bid pricing." On January 18, 2010 B&E described the re-submitted $548,243.91 Claim as one for "Unabsorbed Overhead Expenses" [3] and "Superintendent Cost[4] and Home Office Overhead Expense." In all, B&E seeks $241,552.90 for the project superintendent, $241,688.96 for unabsorbed overhead expense "plus" $5,428.16 for "1% bond cost."

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[2] MassDOT agrees that B&E experienced 116 days of project shutdown, see supra at 1, note 1. B&E claims 554 calendar days of "extended project duration." MassDOT granted 552 days of extended time. The discrepancy need not be resolved to decide this motion.

[3] Among other things, B&E seeks "unabsorbed overhead expenses" for depreciation; donations; dues and subscriptions; health insurance; licenses and bonds; office salaries; office supplies and expense; officers' salaries; payroll taxes; professional fees; repairs and maintenance; taxes; travel and entertainment; and utilities. B&E's total allocated cost of such overhead in its Claim is $241,688.96.

[4] The project superintendent salary cost is based on 511 days from 2004 through 2008 at a daily rate that varies from $431.69 (2004-2006) to $444.18 (2007) to $594.07 (2008). The salary claim is $241,552.90.

On September 16, 2010 the Claims Committee denied the Claim.[5] The denial was based on language in Subsections 8.05 and 9.03B of the Contract that expressly precludes recovery of overhead and general superintendence costs for claims due to delay or suspension of the work. The Claims Committee letter stated:

> Subsection 8.05 states 'an adjustment shall be made by the Department for any increase in the actual costs of performance of the contract (excluding profit and overhead) necessarily caused by the period of such suspension, delay or interruption.' Also, Subsection 8.05 indicates claim amounts shall be computed in accordance with Subsection 9.03[B] which does not provide any allowance for general superintendence costs. The overhead and superintendent costs are not compensable under the contract.

The Claims Committee concluded that MassDOT was only obligated to compensate B&E for its increased "actual costs" of performance.

On October 6, 2010 B&E appealed the Claims Committee ruling to this office and on November 16, 2010 it filed a Statement of Claim. On February 11, 2011 MassDOT filed the instant motion to dismiss. On February 24, 2011 B&E requested that this appeal "be stayed for the time being" and that "no action … on the Motion to Dismiss" be taken. On March 1, 2011 I found that B&E gave no reason for a stay of all proceedings and denied the request. See Memorandum of Decision of March 8, 2011.

DISCUSSION

The question for decision is whether B&E can maintain its Claim for the costs of office overhead and general project superintendence due to admitted delays in the work caused solely by MassDOT.

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[5] The denial letter stated that MassDOT had already "agreed to process payment for documented demobilization, escalation and stand-by equipment costs [claims]" for B&E's "actual costs." The Claims Committee did not state the amount that MassDOT had paid or agreed to pay B&E.

A motion to dismiss should be granted if B&E can not state a claim upon which relief may be granted. See Iannacchino v. Ford Motor Company, 451 Mass. 623, 636 (2008) (dismissal lies where claimant can prove no set of facts in support of his claim that will entitle him to relief). I accept B&E's factual assertions as true and view them in the light most favorable to B&E. Id. All B&E's factual assertions are directed solely at showing its costs of allocated home office overhead and general project superintendence.

The Contract provides two interrelated remedies for a contractor aggrieved by delays in performance not caused by the contractor or his negligence. Subsection 8.10, "Determination and Extension of Contract Time for Completion," is the exclusive remedy for non-monetary compensation for delays not at the fault of B&E. Such compensation is an extension of time in which to complete performance. The time extensions granted by MassDOT should be "equivalent to the duration of the delay," with an allowance for winter shut down if the approved extended date of completion falls between December 1 to March 15.[6] See Subsection 8.10 (12th Para.)

It is uncontested that MassDOT granted B&E each time extension it requested. In all MassDOT granted 552 additional days through two time extensions. B&E does not contend that MassDOT breached the contract by failing to timely extend the time of performance as required by Subsection 8.10. Compare Farina Brothers Co. v.

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[6] Subsection 8.10 sets forth five circumstances when "the contract time for completion shall be adjusted": (A) a notice to proceed not issued in a timely manner; (B) MassHighway suspends the work "except … by the fault or neglect of the Contractor"; (C) "work in greater quantities" required; (D) "delay occurs due to reasonable causes beyond the control and without the fault or negligence of the Contractor," including Acts of God; (E) work delayed by utility companies or cities and towns. Subsection 8.10(F) requires a contractor to make a timely request to MassHighway: "No extension of time will be granted for any delay or any suspension of the work due to the fault of the Contractor, nor if a request for an extension of time on account of delay due to any of the aforesaid causes [(A) through (E)] is not filed within 15 days of the date of the commencement of the delay nor if the request is based on any claim that the contract period as originally established was inadequate."

Commonwealth, 357 Mass. 131, 138 (1970) (failure to timely extend time of performance in some circumstances may be breach of contract that will support award of damages). MassDOT awarded B&E the additional time required by Subsection 8.10.

Subsection 8.05, "Claim for Delay or Suspension of the Work," is the exclusive contractual remedy for monetary compensation due to delay. [7] If MassDOT makes a finding that a delay is "without the fault or negligence" of the contractor and the work was interrupted for "an unreasonable period of time" by MassDOT's act or failure to act

> "… an adjustment shall be made by [MassDOT] for any increase in the actual cost of performance of the Contract (excluding profit and overhead) necessarily caused by the period of such suspension, delay or interruption."[8] Subsection 8.05 (2nd Para).

Subsection 8.05 also requires that the contractor "submit in writing … the amount of the claim and breakdown of how the amount was computed in accordance with Subsection 9.03B except that no allowance for overhead and profit shall be allowed." Subsection 8.05 (4th Para.). Subsection 8.05 and Subsection 9.03B must be read together. Subsection 9.03B sets forth a detailed formula for calculating allowable costs. The formula expressly provides "No allowance shall be made for general superintendence and the use of small tools and manual equipment." Subsection 9.03B (3rd Para). Hence, the plain language of Subsections 8.05 and 9.03, read together, requires MassDOT to make

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[7] The contractor "shall have no claim for damages of any kind on account of any delay in the commencement of the work or any delay or suspension … [during the work] except as hereinafter provided." Subsection 8.05 (1st Para.) "The Contractor further agrees that the sole allowance for any such delay or suspension, other than as provided above [paragraphs 1 through 4], is an extension of time as provided in subsection 8.10." Id. (5th Para.).

[8] But "No claims shall be allowed under this Subsection for … [MassHighway's] failure to act as required by the Contract … (or if no time is specified, within a reasonable time) for any cost incurred more than two weeks before the Contractor shall have notified [MassHighway] in writing of his claim due to [MassHighway's] failure to act." Subsection 8.05 (3rd Para.).

an "adjustment" in the contract price for the increased "actual costs" of performance for delays caused solely by MassDOT while limiting expressly what costs are compensable.

In Massachusetts, the law is well settled that contract provisions limiting monetary compensation in the event of a delay at the fault of the awarding authority are valid and enforceable. See Charles I. Hosmer, Inc. v. Commonwealth, 302 Mass. 495, 499-501 (1939) (provision that limits compensation to an award of time equal to the delay upheld); Wes-Julian Constr. Corp. v. Commonwealth, 351 Mass. 588, 594-597 (1967) (contract provision that no monetary compensation allowed for delay upheld where the contract awarded an extension of time for completion); Joseph E. Bennett Co. v. Commonwealth, 21 Mass. App. Ct. 321, 329-330 (1985) (Bennett) (provision limiting compensation for delay can not be read out of the contract where the language is strong, broad and unambiguous).

B&E's Claim fails because it seeks costs that are expressly excluded by two subsections of the Contract. Subsection 8.05 "excludes" "overhead" from costs that may be included in the "adjustment" MassDOT shall make "for any increase in the actual cost of performance." The word overhead is defined as "the general cost of running a business." Random House College Dictionary (1984). "Home office overhead" is plainly part of the general cost of running a business and so is part of excluded overhead under Subsection 8.05.

Similarly, Subsection 9.03B expressly does not "allow" compensation for "general superintendence." Superintendence" is the "act or process of superintending," which means, in plain English, "to oversee and direct work." Random House College Dictionary (1984). The act of superintending this Contract was performed by the

"project superintendent," who oversaw and directed the work. That the salary of the "project superintendent" is included within the cost of "general superintendence" can not be doubted. B&E's costs of both "home office overhead" and "project superintendent" are not compensable because they are expressly precluded.

The language in the Contract that excludes such compensation is "strong, broad and unambiguous"; it may not be read out of the Contract. Bennett, 21 Mass. App. Ct. at 330. Even though B&E may have incurred costs of overhead and superintendence during prolonged delays, the Contract precludes compensation. Moreover, read properly, Subsections 8.05 and 9.03B do not permit B&E to seek reimbursement for overhead and superintendence because such costs may not be included in its "breakdown" of compensable costs. Since the Contract expressly excludes such costs from the "actual costs" B&E may recover and does not allow them to be stated in the "breakdown" of allowable costs B&E is required to submit, B&E's Claim fails as a matter of law.

B&E nevertheless argues that, because of the magnitude of delays and the length of shutdown that it characterizes as "beyond the precedent" of the Contract's specifications, it is entitled to compensation for both "overhead" and "superintendence."[9]

It argues that the delays it experienced place its overhead costs outside any "meaningful definition of the word 'reasonability' [in Subsection 8.05] with regard to length of delay and/or suspension of work." For the same reasons B&E argues that its allocated cost of the project superintendent's salary is compensable notwithstanding the

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[9] B&E appears to argue that Subsections 8.05 and 9.03B do not apply. Its Statement of Claim states: "We disagree with the Department's decision (making reference to par. 8.05) as it is the overhead costs and Superintendent expense being sought (only) during shutdowns and the substantial prolongation of the project, and not during the actual performance of the contract work." The argument that the Contract does not apply to B&E during shutdowns and project delays is frivolous. B&E does not explain what legal principle allows it to ignore its Contract with MassDOT. It cites no authority in support of its argument.

express prohibition in Subsection 9.03B that "No allowance shall be made for general superintendence…."

B&E's arguments are without merit. B&E misconstrues the express language in Subsection 8.05. The word "reasonability" does not appear in Subsection 8.05. The actual language of Subsection 8.05 states that, for delays attributable solely to MassDOT, a contractor may be compensated if MassDOT "in [its] judgment shall determine that the performance of all or any major portion of the work is suspended, delayed, or interrupted for an unreasonable period of time by an act of the Department…." MassDOT found the delays here "unreasonable" and has already paid B&E an adjustment for its increased "actual costs" of performance based on that finding. B&E points to no facts, argument or case law that explains why MassDOT's judgment that the delay B&E suffered was "unreasonable" is not correct. By failing to address the words in Subsection 8.05 B&E misapprehends its meaning.

B&E next argues that Subsections 8.05 and 9.03B do not apply (or can be ignored) where delays are of "sporadic frequency and uncertainty," where B&E is required to maintain "sufficient operating capacity" by keeping a salaried project superintendent employed during periods of delay and winter shutdown, or where B&E experiences "inefficiencies" resulting from delays. B&E cites no legal authority and points to no provision in the Contract that permits recovery under any of these theories.

Whether or not economic theory may lend theoretical or factual support to B&E's contentions is not at issue. That is because as a matter of law B&E is bound by the plain language of Subsections 8.05 and 9.03B and the exclusive remedy those provisions provide. "When the words of a contract are clear, they alone determine the meaning of

the contract…." Merrimac Valley Nat. Bank v. Baird, 372 Mass. 721, 723 (1977). B&E is entitled to compensation only for its increased "actual costs" of performance, which by definition does not include what B&E's seeks in this Claim.

CONCLUSION

Because the only facts supporting B&E's Claim show non compensable "home office overhead" and "general superintendence" costs, B&E has not and can not assert a claim upon which relief may be granted under the Contract. MassDOT's motion to dismiss is ALLOWED.

RECOMMENDATION

B&E appeal should be dismissed.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: _________

To: Secretary Richard A. Davey, MassDOT
From: Stephen H. Clark, Administrative Law Judge
Date: July 3, 2013
Re: Report and Recommendation

Please find attached my report and recommendation for claim #001 of B&E on MassDOT contract #56482.

MassDOT awarded the contract to B&E Construction Company (B&E) on October 8, 2008 for the reconstruction of a bridge on I-495 northbound in Raynham. The contract contained a lump sum item for the reconstruction of the bridge deck, including the placement of concrete, was to be done in three stages since the contract required that two lanes of traffic remain open at all times. The contract also required that bids include an allowance "for all additional expense, loss, risk and damage due to work being performed at such hours of the day or night as may be necessary."

The reconstruction of the concrete bridge deck was done in three stages. The Engineer instructed B&E to perform the stage I placement of concrete on the night of July 2, 2009. Thereafter, B&E placed concrete in stages II and III outside of normal work hours on two Saturdays (September 19, 2009 and November 21, 2009).

On November 30, 2009 B&E filed a claim for (1) unforeseen site conditions and (2) extra work. It attached a schedule showing its claimed additional costs for doing that work outside of normal work hours in July, September and November.

B&E's claim of November 30, 2009 for stage I and II work was not timely filed. An unforeseen site condition claim must be filed "as soon as possible" after discovery of the site condition; a claim under the contract must be filed within "one week" after the damage suffered. I conclude that B&E's November 30, 2009 claims for work done in July and September 2009 was untimely and are forfeited. See Marinucci Bros. & Co. v. Commonwealth, 354 Mass. 141 (1968).

Assuming that B&E's claim for stage III work was timely filed, it should be denied because it is without merit. Placing concrete on the bridge deck in stage III is not "extra work." No additional compensation can be paid for Saturday work because the specifications expressly required bidders to include an "allowance" for work that might be done in other than normal work hours. Hence, all B&E's costs are deemed included in its lump sum bid.

I recommend that B&E's claim be denied.

INTRODUCTION

This is the report and recommendation for Claim 001 (claim) of B&E Construction Company (B&E) in MassDOT contract #56482 (contract) for the reconstruction of a bridge on I-495 northbound in Raynham.

B&E claims $9,581.33 of its expense for placing a concrete bridge deck in three stages in other than normal work hours. MassDOT opposes because (1) the claim was untimely filed and (2) the contract expressly requires work to be done during other than normal work hours.[1]

I conclude that B&E's claim should be denied because it was filed late and because there is no legal basis to pay any additional compensation.

BACKGROUND

MassDOT awarded the contract to B&E on October 8, 2008 at the bid price of $1,997,799.00. The work was to rehabilitate the bridge on I-495 northbound over the Taunton River in Raynham and included traffic control, the reconstruction of the approaches, substructure modification, placement of concrete on the refurbished bridge deck and the replacement of railings, curbs and guard rails. See Special Provision 992.1 ("Alterations to Bridge Structure") (Item 991.2). B&E bid a lump sum of $725,000.00 for all Item 992.1 work. See contract bid sheet.

I-495 northbound had two travel lanes and a breakdown lane that was to carry traffic during the work. The contract provided, "Unless otherwise directed by the Engineer, two [northbound] lanes of traffic shall be maintained at all times." See contract

[1] "The contractor's attention is hereby directed to the fact that certain work on the proposed bridge may have to be performed *during hours other than the normal work hours* when approved by the Engineer. Therefore, it is understood that the contractor has made allowance in his bid for all additional expense, loss, risk and damage due to work being performed at such hours of the *day or night* as may be necessary." (Emphasis added). See Contract p. A00801-3, ¶6.

p. A00801-3, ¶3. To maintain traffic flow the contract also provided that all bridge deck work be done in three stages. Each stage required closing one lane of traffic where work was to be performed, while accommodating all traffic on the two remaining lanes. See ALJ Ex. #2, p. 2-33. The contract provided that traffic could not be backed up for more than 12 minutes.

On June 23, 2009, B&E and MassDOT held the required pre-placement meeting to discuss concrete placement and traffic control for stage I. See Special Provision 992.1 "Alteration to Bridge Structure" (Item 992.1).[2] To avoid rush hour traffic in Stage I, B&E proposed to place the concrete during the day of July 1st or 2nd after 10:00 a.m. B&E's proposal would have required closing two travel lanes, leaving a single lane open for traffic. B&E asserts that MassDOT agreed to this proposal.

The next day, June 24, 2009, MassDOT directed B&E to place the concrete for stage I at night so that it could maintain two open travel lanes. Under B&E's proposal of June 23rd once B&E began to place concrete all traffic would be confined to a single lane until the concrete dried. The contract provided that "if traffic delays in excess of 12 minutes occur . . . the Engineer will initiate suspension of the work that is causing the traffic delay . . . " See contract p. A00801-3, ¶8.

B&E placed the stage I concrete deck during the night of July 2, 2009. B&E thereafter placed concrete on stages II and III during other than normal work hours on two Saturdays, September 19, 2009 and November 21, 2009. For all three stages, which were done in other than normal work hours, MassDOT permitted B&E to close two traffic lanes, leaving a single open lane.

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[2] Present for B&E were Paul Principi, President, and Ken Antul, Project Engineer. Michael McGrath, District 5 Area Construction Engineer, and Kenneth White, Resident Engineer were present for MassDOT. See ALJ Ex. #1.

B&E's Claim

On September 22, 2009, B&E wrote MassDOT stating it "will be filing a claim" for (1) the lack of a pay item for light towers for night work; (2) overtime pay due to MassDOT's "late notification" on June 24, 2009 that the stage I placement would have to be done on the night of July 2, 2009, requiring its crew to work both during the day and night; and (3) after hours opening fees charged by a concrete plant. See B&E Ex. #3.

On November 30, 2009, B&E filed a claim for $10,497.66.[3] The claim stated that B&E "formally submits its claim for reimbursement of expense incurred for pouring concrete deck in other than normal work hours." Enclosed was a claim calculation recap sheet and other documents. See ALJ Ex. #2, p. 2-25.

Contract Provisions

Two contract provisions are at issue. First, lump sum Item 992.1, which governs alterations to the bridge deck (see contract p. A00801-37 through 57), and, second, the special provision governing traffic control and work performed during other than normal work hours (see contract p. A00801-3) (Traffic Control Provision).

Item 992.1 specifies the whole work of constructing the new bridge deck, including concrete pre-placement meetings. Contract A00801-37 through 57.

The Traffic Control Provision specifies when B&E is allowed to work and how the traffic is controlled. It provides, in part:

> The contractor's attention is hereby directed to the fact that certain work on the proposed bridge may have to be performed *during hours other than the normal work hours* when approved by the Engineer. Therefore, it is understood that the contractor has made allowance in his bid for all additional expense, loss, risk and damage due to work being performed at

[3] B&E unilaterally reduced the amount of its claim on appeal. On November 30, 2009 its claim (on its calculation recap sheet) was $10,497.66; before the Claims Committee and on appeal it seeks $9,581.33.

such hours of the *day or night* as may be necessary. (Emphasis added).
See contract p. A00801-3, ¶6.

B&E's Appeal

On May 31, 2011 the claims committee wrote B&E that its claim was not compensable.[4] The claims committee found that MassDOT's order to do the stage I work in other than normal work hours "had no cost impacts on concrete deck placement performed later that year on September 19, 2009 and November 21, 2009."

On June 10, 2011 B&E filed a notice of appeal. On July 18, 2011 B&E filed a statement of claim. MassDOT filed its response on August 25, 2011. Prehearing conferences were held on September 27, 2012 and December 5, 2012.

B&E's claim was heard on January 9, 2013. Representing B&E were Paul Principi and Ken Antul. Owen Kane, Esq. represented MassDOT. MassDOT's witnesses were Michael J. McGrath and Lawrence Piazza, MassDOT District 5 Claims Engineer. Also present were Lisa Harol, Administrator, and Jeffrey Larnard, Law Clerk.

DISCUSSION

There are two questions for decision: (1) whether B&E timely filed required notices under (a) G.L. c. 30, § 39N (Section 39N) or (b) Subsection 7.16 of the contract ("Claims of Contractor for Compensation") and, if it did, (2) whether B&E has shown any legal basis for the additional payment of $9,581.33.

NOTICE

Section 39N

Section 39N requires a request for an equitable adjustment be made "as soon as possible" after the discovery of a differing "actual subsurface or latent physical

[4] The decision by the claims committee denying B&E's Claim was dated May 31, 2011. I take administrative notice of the May 31, 2011 decision.

[condition].”[5] See Section 39N; see also Sutton Corp. v. Metropolitan Dist. Com’n., 423 Mass. 200, 205 (1996) (“as soon as possible” standard met where contractor discovered the changed condition, ceased operations on Friday and notified the awarding authority the following Monday). Failure to provide the required written notice bars any recovery. See Glynn v. City of Gloucester, 9 Mass. App. Ct. 454, 460 (1980) (failure to invoke its remedies under the agreement will preclude all relief by aggrieved contractor).

B&E’s Section 39N notice was not filed “as soon as possible” after B&E discovered the alleged unforeseen site conditions. On June 24, 2009 B&E discovered that it would have to place the concrete deck in other than normal work hours. B&E performed stage I, II and III work on July 2, September 19, and November 21, 2009, respectively. B&E’s first notice was given on November 30, 2009, after all three stages had been completed. Even assuming the MassDOT order to place concrete in other than normal work hours was a differing site condition, B&E manifestly failed to give timely notice on November 30, 2009, which was more than five months after B&E became aware on June 24, 2009 that it would have to do the concrete placement in other than normal work hours. I conclude that B&E waived any claim it might have asserted. See Glynn v. City of Gloucester, at 460.

Subsection 7.16

Subsection 7.16 requires the contractor to file a claim (1) “in writing,” (2) “within one week after the beginning of any work or the sustaining of any damage,” and then (3) timely file “with the Engineer an itemized statement of the details and amounts of such work or damage.” Failure to meet these procedural requirements results in a “forfeiture”

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[5] I assume without deciding that the conditions of which B&E complains were “actual subsurface or latent physical conditions encountered at the site.” See Section 39N.

of its claim.[6] Subsection 7.16; Marinucci Bros. & Co., Inc. v. Commonwealth, 354 Mass. 141, 145 (1968) (" . . . the failure of the contractor to make a timely claim in writing . . . and an itemized statement setting forth the details of the work done or damage incurred results in a forfeiture of its claim").

It is settled law that public contractors must strictly comply with contract requirements governing the timing of filing claims. "A contractor who fails to adhere to the strict claim provisions of a public works contract forfeits all rights to recovery of damages or extra compensation unless the agency waives compliance therewith or the contractor is excused from compliance." Sutton Corp. v. Metropolitan Dist. Com'n., 38 Mass. App. Ct. 764, 767 (1995) (reversed on other grounds).[7]

B&E completed the stage I concrete deck placement on July 3, 2009 and the stage II placement on September 19, 2009. B&E's first written notice for stage I and II work was filed November 30, 2009. B&E's claim was filed more than five months after the "sustaining of any damage" under the contract due to MassDOT's order to place concrete in other than normal work hours. Subsection 7.16 requires the claim be filed within "one

[6] " . . . All claims of the Contractor for compensation other than as provided in the Contract on account of any act of omission or commission by the Party of the First Part or its agents must be made in writing to the Engineer within one week after the beginning of any work or the sustaining of any damage on account of such act, such written statement to contain a description of the nature of the work performed or damage sustained; and the Contractor shall, on or before the 15th day of the month succeeding that in which such work is performed or damage sustained, file with the Engineer an itemized statement of the details and amount of such work or damage and unless said statement of the details and amount of such work or damage and unless such statement shall be made as required, his/her claim for compensation shall be forfeited and invalidated, and the Contractor shall not be entitled to payment on account of any such work or damage . . . ." Subsection 7.16.

[7] B&E's September 22, 2009 letter stating it "will be filing a claim" can not alter the plain meaning of Subsection 7.16 ("Claims of Contractor for Compensation of the Contract"). The letter is not a notice of a changed site condition or a request for an equitable adjustment under G.L. c. 30, § 39N.

week." B&E failed to comply with Subsection 7.16.[8] B&E admitted as much at the hearing.[9]

Accordingly, B&E forfeited any claim for costs during stage I or II work.

MERITS OF B&E'S CLAIM

Assuming B&E gave timely notice with respect to a claim for stage III work, that claim fails on the merits. B&E seeks recovery under two theories: (1) extra work and (2) defective specifications. Where, as here, the words of the contract are clear and unambiguous, their plain meaning alone determines what the contract provides. See Merrimac Valley Nat. Bank v. Baird, 372 Mass. 721, 723 (1977) ("When the words of a contract are clear they alone determine the meaning of the contract . . . .").

Extra Work

Extra Work is defined under the Contract as work which:

> (1) was not originally anticipated and/or contained in the contract: and therefore (2) is determined by the Engineer to be necessary for the proper completion of the project: and (3) bears a reasonable subsidiary relation to the full execution of the work originally described in the Contract [sic].
> See Subsection 1.20 ("Extra Work").

The stage III placement of concrete was performed under lump sum Item 992.1. That provision states in clear and unambiguous language that " . . . certain work on the

[8] I assume the notice for stage III work was timely filed. Stage III work was completed on November 21, 2009. B&E "formally [submitted] its claim for reimbursement of expense" on November 30, 2009, nine days later. However, three of those days were weekend days; and a fourth day, Thanksgiving on November 26, 2009, was a holiday. It is unnecessary to decide whether "one week" contemplates calendar or business days because the claim for stage III extra work is without merit.

[9] At the hearing, Mr. Principi was asked to read for the record the language of Subsection 7.16. Attorney Kane then asked Mr. Principi if he had done what was required by Subsection 7.16. Mr. Principi answered "No." Principi Testimony. Attorney Kane then asked, "In fact you submitted [your first notice] on September 22?" Mr. Principi answered "Correct." Id. Lastly, Attorney Kane asked, "What is your understanding of what happens if you don't file something on time?" Mr. Principi responded, "Sometimes it gets thrown out." Id.

proposed bridge may have to be performed during hours other than normal work hours . . . ." See contract p. A00801-3, ¶6.

Before it bid B&E knew that some Item 992.1 work would have to be done in other than normal work hours. See ALJ Ex. #1, Attachment A. On its statement of claim B&E admitted that it knew the work under Item 992.1 might have to be done at night.[10] Id. What B&E in fact thought at the time it bid is not the standard to be applied. Rather, the standard is what a reasonably skilled contractor would find the plain words of the contract to mean. See Merrimac Valley Nat. Bank v. Baird, 372 Mass. 721, 723 (1977).

Because the contract required that two lanes be open at all times on a two-lane bridge,[11] any skilled contractor should have anticipated that concrete placement on an interstate highway might have to performed during other than normal work hours and should have formulated its bid on that basis. The contract itself made plain that any work—including concrete placement—that caused delays greater than 12 minutes, would have to be stopped and additional traffic lanes be reopened. See Traffic Control Provision, contract p. A00801-3, ¶8.

I conclude that the work of placing concrete during other than normal work hours is contained in the contract, and is not extra work under Subsection 1.20.

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[10] "B&E Construction carried in our estimate of the project, the cost of doing some work during hours other than normal hours (Traffic control, some demolition, barrier installation & removal . . . . . We did not plan on pouring concrete for the deck in other than normal work hours. Because we were directed to do so by MassDOT, it is our contention that we be compensated for this work. (Plant openings and overtime costs)[.]" See ALJ Ex. #1, Attachment A.

[11] The Contract did allow for the closings of an additional lane with the Engineer's approval. MassDOT had allowed for such closures at other times during this project. Those additional lane closings were limited to times when the Engineer could stop the work and could open up the closed lane if delays in excess of 12 minutes occurred. See Contract p. A00801-3, ¶8. For the concrete placement, it was not possible to open the lane back up until the concrete dried, which could be from six to eight hours later.

Defective Specification

B&E argues that the Traffic Control Provision is defective because it is ambiguous. B&E asserts that it "shouldn't be penalized for non-assumptions relative to the ambiguity/inadequacy of specifications . . . ." See ALJ Ex. #1, Attachment A. B&E's argument is without merit.

To find a specification defective on the grounds of ambiguity requires something more than a mere disagreement between the parties about what each thought the words meant. "Genuine ambiguity requires language 'susceptible of more than one meaning [so that] reasonably intelligent persons would differ as to which meaning is the proper one.' " Basis Technology Corp. v. Amazon.com, Inc., 71 Mass. App. Ct. 29, 36-37 (2008) (internal citation omitted). Where, as here, more than one provision is to be construed, they are to be read together in light of the purpose and intent of the contract as a whole. See Sherman v. Employers' Liability Assur. Corp. Limited, 343 Mass. 354, 357 (1961) ("An interpretation which gives reasonable meaning to all of the provisions of a contract is to be preferred to one which leaves a part useless or inexplicable.").

Neither of the two contract provisions at issue here are ambiguous. The Traffic Control Provision plainly puts bidders on notice what they must do. First, "two [northbound] lanes of traffic shall be maintained at all times"; second, "certain work . . . may have to be performed during hours other than the normal work hours . . . . "; and third, "It is understood that the contractor has made allowance in his bid for all additional expense, loss, risk and damage due to work being performed at such hours of the day or night as may be necessary." Contract p. A00801-3, ¶3, 6. The traffic control provisions make sense in a bridge reconstruction project on a two-lane interstate highway.

Nor is Item 992.1 ambiguous. That lump sum item is a specification governing the planning and performance of the whole work of refurbishing the bridge, including the placement of concrete on the bridge deck. See Item 992.1. Because B&E bid Item 992.1 as a lump sum, it is deemed as a matter of law to know that it obligated itself to complete all the work at the price it bid. A lump sum bid means that a bidder's price covered all specified and associated work necessary to complete all needed tasks. See New England Insulation Co. v. Beacon Const. Co. of Mass., Inc., 342 Mass. 407, 411 (1961) (in a lump sum contract "a contractor can recover nothing beyond his contract price, notwithstanding an unexpected difficulty in the performance of the work").

Read together the Traffic Control Provision and Item 992.1 unmistakably convey the intent of the contract: namely, that all work specified in Item 992.1 be done with two travel lanes kept open and be done in such a manner that the lump sum bid included within it "allowances" to account for "all additional expense" of "work being performed at such hours of the day or night as may be necessary." That B&E failed to include increased labor expense for night or weekend overtime wages and failed to include the fee for the cement plant, were at its sole risk. Each bidder was bound by Item 992.1 and the Traffic Control Provision to include all such costs in its bid.

B&E did not proffer evidence of any of the "non-assumptions" to which it refers. It nowhere cites any particular "non-assumption" in the contract and does not make any argument based on that supposed ground. By submitting its bid B&E provided *prima facie* evidence that it had examined the plans and specifications. See Subsection 2.03 ("Examination of Plans, Specifications, Special Provisions, and Site of Work"). If B&E did not understand what the plans and specifications called for it was bound to seek

clarification before it bid, as MassDOT correctly pointed out. See Subsection 5.04 ("Coordination of Special Provisions, Plans, Supplemental Specifications and Standard Specifications"). B&E's claim for stage III concrete placement is without merit.

CONCLUSION

B&E's claim with respect to stages I and II fails because it did not timely file those claims. Assuming that B&E timely filed its claim for stage III work, that claim is without merit because the costs incurred are neither extra work nor the result of an ambiguous specification.

RECOMMENDATION

B&E's appeal should be denied.

Respectfully submitted,

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Stephen H. Clark
Administrative Law Judge

Dated: July ___, 2013

B&E Construction, Inc. (Contractor or B& E), aggrieved by the denial of its claim before the claims committee of the Massachusetts Highway Department (Department or MHD) for the cost of rental of a temporary bridge for $41,640.00 under MHD contract #98442 (Contract) appealed to the Board of Contract Appeals (Board) on February 9, 2001.

I find that B&E's appeal has no merit. B&E's rental of a temporary bridge for 1.5 months was part and parcel of its contractually mandated expense to correct its own admittedly defective work. I therefore recommend the Board deny B&E's appeal.

STATEMENT OF THE CASE

The Contractor's appeal was heard June 12, 2001. A tape recording was made of the hearing. Present were

Peter Milano	Chief Administrative Law Judge
Isaac Machado	Deputy Chief Counsel
Cameron Smith	MHD, District #3
Wayne Eng	President, B&E

The following exhibits were admitted into evidence.

Ex. #1	MHD Contract # 98442;
Ex. #2	B&E Statement of Claim, 2/14/01, and 8 attachments;
Ex. #3	Memorandum of John Blundo, 2/20/01, to Judge Milano, with 3 attachments; and
Ex. #4	Memorandum of Thomas Waruzila, District #3 Highway Director, 3/5/01, to Judge Milano.

Renewed hearings were scheduled for June 18, 2002, and then July 9, 2002. No renewed hearing was ever held.

In July 2003 Chief Administrative Law Judge Peter Milano resigned. On March 1, 2004 the undersigned was appointed Chief Administrative Law Judge.

On March 16, 2004 I conducted a conference on the record. Present were Mr. Wayne Eng, Mr. Isaac Machado, and Ms. Mary L. Bearse, Fiscal Management, MHD. I informed the parties that, in light of the resignation of Judge Milano, the appeal could either be reheard or decided on the existing record, if the parties so agreed. B&E and MHD stated they were content to have the appeal so decided. B&E and MHD argued their respective positions at the conference, but the administrative record was not reopened to take evidence.

FINDINGS OF FACT

Substantial evidence in the record, which consisted of tape recorded testimony and the four exhibits admitted by Judge Milano, supports the following findings of fact, which I recommend the Board adopt.

1. The Department awarded Contract # 98442 to the B&E Construction (Contractor or B&E) on July 22, 1998. The work was to reconstruct a bridge (by continuous steel stringer) over the Nashua River on the Groton/Pepperell line on Routes 111/119. B&E bid $1,996,747.22 for the work.

2. Item 993.3 of the Contract was for the rental of a temporary bridge needed to carry traffic over the Nashua River during the work. The bid documents required the Contractor to state a unit price per month for an estimated time of 15 months. B&E bid a unit price of $27,760/month for a total bid of $416,400.00 (15 X $27,760.00) on Item 993.3. The Department testified that 15 months was a "a conservative estimate intended to envelope [sic] reasonable temporary bridge use scenarios."

3. The work under the Contract was to be in conformance with the *Department's Standard Specifications For Highways and Bridges* (1988 ed.) (Standard Specifications) and the *Supplemental Specifications* (November 30, 1994) as amended by the *Standard Special Provisions* (February 19, 1998), and other standards set forth, including without limitation the Contract *Plans* and *Special Provisions*.

4. The Notice To Proceed was given on October 14,1998 with an original completion date of July 17, 1999. B&E made three requests for extension of time, all of which were duly granted by the Department. The time for completion was ultimately extended to December 15, 2000.

5. B&E entered into a contract with Acrow Corporation of America (Acrow) to supply the temporary bridge. The contract was not offered into evidence.

6. The Contract specifications called for a lightweight, steel reinforced concrete deck on the new bridge. B&E made a concrete pour in late June (or early July) on the new bridge deck after steel reinforcement rods (rebar) had been fitted. The specifications provided that the concrete should cover the rebar by a specified depth so that road salt would not contaminate the rebar and cause it to deteriorate.

7. MHD measured the thickness of the concrete overlay with a non-intrusive concrete depth-measuring device (Measuring Device). The Measuring Device readings of late June (or early July) showed that the concrete pour did not cover the rebar to the depth specified.

8. The Department ordered B&E to take corrective action. B&E disputed the need for corrective action, claiming that the Measuring Device was not accurate. The Department and B&E then conducted field testing. The results showed that the depth of the concrete overlay recorded by the Measuring Device correlated very closely to overlay depth measured by field testing. B&E conceded that corrective action was necessary.

9. B&E proposed a plan for corrective action to MHD on July 13, 2000, which called for B&E to chip away the original concrete overlay to expose the rebar. The rebar would then be cleaned, coated and covered by a new cement overlay. The Department approved B&E's plan with minor modifications on July 17, 2000.

10. Three to four weeks elapsed from the time of the original concrete pour until the Department approved B&E's plan for corrective action.

11. B&E began the corrective work in August 2000. It was completed by Labor Day. The temporary bridge was removed in early September 2000.

12. Six to eight weeks elapsed between the discovery of the defective work and B&E's completion of the corrective work.

13. B&E paid Acrow for 14.4 months of bridge use. The Department paid B&E for 12.9 months of temporary bridge rental under Item 993.3. As a result of the need to correct the work, B&E paid Acrow additional rent for 1.5 months, which the Department refused to pay. B&E claims the Department must pay it $41,640.00, based on the unit price in Item 993.3 ($27,760 X 1.5).

14. The temporary bridge was removed in early September 2000 after B&E completed the remedial work.

15. Had B&E not been required to perform corrective work, B&E would not have paid Acrow the additional 1.5 month's rent.

DISCUSSION

It is a familiar principle that public contractors must strictly comply with project plans and specifications. See Albre Marble & Tile Co. v. Goverman, 353 Mass. 546, 549 (1968). B&E admits by word and action that it failed to pour concrete over the rebar on the bridge deck to the depth specified. B&E does not claim that the Department or anyone else contributed to B&E's failure to correctly perform the bridge deck work.

The Contract expressly addresses the obligations of the contractor when its work fails to meet the governing specifications. Subsection 5.10 of the Standard Specifications entitled "Removal of Defective or Unauthorized Work" provides, in pertinent part,

> All defective work shall be removed, repaired or made good….
> If the work or any part thereof shall be found defective at any time before the final acceptance of the whole work, the Contractor shall at his own expense make good such defect in a satisfactory manner.

Subsection 5.10 governs the result here. The Department discovered the defect after the original concrete pour. It never accepted the work. B&E, once it had no choice but agree that the readings of the Department's concrete Measuring Device were accurate, did not contest its responsibility to "remove" the non conforming cement cover, "repair" the work and "make good" its performance. B&E thus performed the corrective work that Subsection 5.10 required within eight weeks.

Subsection 5.10 in broad, clear and unambiguous language provides that the Contractor "shall at his own expense make good such defect." Where the wording of a

contract is found to be unambiguous, the contract must be enforced according to its terms. See BayBank Middlesex v. 1200 Beacon Properties, Inc., 760 F. Supp. 957, 963 (D. Mass. 1991). The phase "shall at his own expense make good such defect" plainly means that the financial onus to cure falls on the contractor alone. Part of B&E's "own" expense to cure was its cost to rent a temporary bridge for 1.5 additional months. Under the Contract that cost is properly charged to B&E alone in the circumstances here.

B&E makes three arguments contending that the Department, not B&E, must pay 1.5 months of extra rent under Item 993.3. None has merit.

B&E first claims that, because Item 993.3 specifies a unit price/month for temporary bridge rental, the Contract imposes upon the Department a separate obligation to pay for bridge rental. As B&E puts it "The rental of the bridge is not related to the corrective action of the work. The state used the bridge for the 1.5 months in question." But it is uncontradicted that the public used the temporary bridge only because use of the new bridge was delayed. Thus, the corrective action and the extended use of the temporary bridge are not separate but inextricably linked.

B&E next claims that the Department must pay under Item 993.3 because the Contract estimate of 15 months was not exceeded. However, B&E erroneously supposes that the Department's estimate of 15 months "guarantees" payment to B&E no matter the circumstances. Here had B&E's work not been defective the temporary bridge would only have been used for 12.9 months. Item 993.3 is not a guarantee of payment for use for an estimated time of 15 months in all circumstances.

Third, B&E argues that the Department should pay for the temporary bridge rental because it failed to notify B&E that it would refuse to pay B&E under Item 993.3

as B&E hoped. The Contract does not obligate the Department to notify B&E how it will rule on a claim B&E had yet to file.[1] B&E had the obligation to present the Department with a plan to fix the work. The use of the temporary bridge was part of its plan and thus it is part of B&E's "own expense."

FINDINGS

I find that Subsection 5.10 requires B&E to bear the full expense necessary to correct its own defective work, of which increased bridge rental expense was an integral part.

RECOMMENDATION

The Board should adopt the findings of fact set forth above.

I recommend that the Board deny B&E's claim.

Respectfully submitted,

Stephen H. Clark
Chief Administrative Law Judge

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[1] The Department did not defend this appeal on the grounds that B&E failed to timely file its claim for compensation. The Standard Specifications require, among other things, that "all claims … must be made in writing to the Engineer within one week after the beginning of any work or the sustaining of any damage …." Section 7.16. B&E's claim letter to the Department was dated October 20, 2000, which appears to be more than one month after B&E had fully performed the work to make good the defect.

To:	Secretary Jeffrey B. Mullan, MassDOT
From:	Stephen H. Clark, Administrative Law Judge
Date:	April 8, 2010
Re:	Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

Electrical Contractors, Inc. (ECI) seeks $131,598 for Claims #13, #14 and #15 for its actual costs of additional supervision incurred because of delays in the work.

Subsection 8.05 of the Standard Specifications For Highways and Bridges Subsection provides that MassHighway may adjust the contract price for the increased actual cost of performance (but not profit or overhead) for costs of delay not caused by the contractor or its negligence. To pursue that remedy ECI was required to file a claim and a breakdown of the calculation of the amount claimed not later than 30 days after the termination of a delay.

ECI did not timely file any claim, notice of claim or breakdown of the calculation of the amounts claimed on Claims #13, #14 and #15.

A contractor must follow contractual procedures before unilaterally accruing expenses to be pursued later through claims. D. Frederico Co. v. Commonweath, 11 Mass. App. Ct. 248, 253 (1981).
Where a contractor fails to follow the procedures required to pursue contractual remedies, it waives and forfeits its rights to make a claim. See Marinucci Bros. v. Commonwealth, 354 Mass. 141, 144-145 (1968).

ECI Claims #13, #14 and #15 should be dismissed.

RECOMMENDATION AND REPORT
ON MASSHIGHWAY'S
MOTION TO DISMISS

MassHighway[1] moves to dismiss three claims of Electrical Contractors, Inc. (ECI), arguing ECI waived its rights to have MassHighway adjudicate those claims when it failed to give timely notice under Subsection 8.05 (4th Para) of the Standard Specifications. ECI seeks additional costs of project supervision because the work was substantially delayed at various times between 2003 and 2007.[2]

ECI opposes the motions arguing it satisfied the procedural requirements of Subsection 8.05 by sending MassHighway thirteen letters before, during and after the delays and by filing claims on April 14 and 19, 2007, after substantial completion.

I conclude that all three claims should be dismissed. ECI did not timely file any "delay claim" under Subsection 8.05, the exclusive remedy under the Contract for recovery of "actual costs" due to delay. ECI waived its rights. Its claims for additional project supervision costs or extra work are barred.

BACKGROUND

The Contract

MassHighway awarded contract #32137 (Contract) to ECI on March 27, 2002 for $2,250,625.00 to upgrade lighting on I-91 in Springfield. The original completion date was November 30, 2002; the final completion date permitted by MassHighway was

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[1] On November 1, 2009, the Massachusetts Highway Department was reorganized as the Highway Division of the Massachusetts Department of Transportation (MassHighway). See G.L. c. 6C, s.40.

[2] In its Opposition ECI states "The basis for the present claim by ECI is that due to the overall delays on the project caused by MHD between 2003 and 2007, ECI was required to perform extra work, by way of additional project supervision, in order to manage and maintain this project during this unanticipated, extended period." Opposition p. 3.

August 28, 2006. Substantial completion was achieved on October 4, 2006 and final completion on December 28, 2006.

From the outset the work was delayed for reasons beyond the control of ECI or MassHighway, primarily because of the need for substantial design modifications, accidents and other unforeseen events. The Contract provided two remedies if performance was delayed at no fault of the contractor: (1) adding days to extend the time of completion (Subsection 8.10); and (2) adjusting the Contract price to add the "actual costs" (except overhead and profit) due to delay (Subsection 8.05).

ECI's Requests For Additional Time For Delay

During performance ECI and MassHighway both treated each delay as a separate and distinct period. Between 2002 and 2007, on ECI's written requests, MassHighway approved twelve (12) extensions of time (Ex. #1 thru Ex. #12) adding 1,366 days to the time allowed for completion, from November 30, 2002 to August 28, 2006.[3]

ECI did not file any claims contesting the decisions MassHighway made in granting extra time on Ex. #1 through Ex. #11.[4] After MassHighway granted only 38 of the 160 days ECI sought on its twelfth request, ECI filed a claim. See ECI Claim #1 on appeal (seeking 122 days and relief from assessment of liquidated damages).

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[3] In 7 of ECI's 12 requests for extensions, MassHighway and ECI agreed on the number of days to be added and agreed on a new completion date. MassHighway did not grant exactly the number of days ECI sought five times, granting fewer days in Ex. #1 (1 day), Ex. #2 (66 days), Ex. #3 (22 days), Ex. #8 (12 days); and Ex. #12 (122 days).

[4] On January 18, 2010 ECI through counsel wrote asserting that all the Contract completion dates "established by MHD commencing with Extension No. 3 [Ex. #3] and thereafter were erroneous—*in seriatim*" because MassHighway "breached the contract" when it "ignore[ed] winter shutdown periods" in ECI Requests # 3, #7 and #9. During performance ECI made no claims for breach due to "erroneous" or incorrect calculations of time. A review of the Contract documents shows that winter shutdown days were accounted for on Ex. #'s 3, 7 and 9. In Ex. #3 MassHighway granted 105 winter shutdown days; on Ex. #7 it granted all 366 days ECI requested (including a winter shutdown); and on Ex. #9 MassHighway granted all 104 days ECI requested, including 8 of 12 days denied in Ex. #8 and winter shutdown days.

ECI's Claims For Actual Costs For Delay [5]

Claim #13: Claim #13, restated on appeal, seeks $3,836.00 for ECI's increased supervision costs between its bid in 2002 and completion in 2006 for supervisors Flynn and Stakowski—2003 (Stakowski & Flynn), 2004 (Flynn), 2005 (Flynn), and 2006 (Flynn). Before the claims committee ECI sought $4,642, which included its claimed costs for overhead and profit that ECI has dropped on appeal.

ECI filed claim #13 on April 19, 2007 as a line item for $4,642 for labor wage rate increase. The April 19, 2007 list gave no other information. At no time in 2003, 2004, 2005 or 2006 did ECI submit a "breakdown" showing how it computed Claim #13. The claims committee denied Claim #13 for an "adjustment" in the Contract price on March 16, 2009 because ECI did not comply with the claim notice and cost breakdown requirements in Subsection 8.05 (4th Para).[6] This appeal followed on March 25, 2009.

Claim #14: Claim #14, restated on appeal, seeks $76,375.00 for "delay/additional costs" for salary paid to the project manager, Mr. Kearny. ECI originally sought $102,780.00, including profit and overhead, but reduced its claim by $26,405 on appeal to exclude those items.

ECI filed Claim #14 on April 19, 2007. On March 16, 2009 the claims committee denied Claim #14, ruling that the "[t]he April 19, 2007 initial submittal of the claim does not meet the notice requirements of Subsection 8.05." The claims committee

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[5] In all ECI asserted 21 claims, of which 15 are now on appeal. Of the six resolved claims, MassHighway paid 2 in full; in 2 others ECI accepted offers of settlement and has now been paid; and on 2 claims ECI did not appeal the adverse decisions of the claims committee.

[6] The denial noted that ECI sought compensation for identical hours in Claim #13 and Claim #15. ECI's Opposition admits the duplication but argues that it cured the problem by giving MassHighway a "credit" of $3,836.00 on Claim #15. See infra, p.4.

also denied Claim #14 since salary is "overhead" not allowed by Subsection 8.05.[7] This appeal followed on April 17, 2009.

Claim #15: Claim #15, restated on appeal, seeks $55,223.00 for ECI's field supervision of a subcontractor's excavation work, which was "delayed by unforeseen and/or misrepresented site conditions and contract information causing disruptions and inefficiencies throughout life the project." ECI originally sought $70,391.00, but reduced its claim on appeal to eliminate $15,168.00—overhead ($4,933.22), profit ($6,399.20) and duplicated supervision costs ($3,836). As restated, ECI now seeks increased salary for 1,281.5 hours for supervisor Flynn in 2004, 2005 and 2006 ($38,285.70), increased by $9,726.50 for benefits (at an "average" rate over three years of 38.57 %), plus $11,046.00 for transportation ("Cube Van"), for a total of $55,222.82.

ECI filed Claim #15 on April 14, 2007. On March 16, 2009 the claims committee denied Claim #15, ruling that Subsections 8.05 and 9.03 "do not allow additional compensation for overhead and general superintendence costs." ECI appealed on March 25, 2009.

ECI Notices For Actual Costs Under Subsection 8.05 for Claims #13, #14 and #15

ECI attaches to its Opposition thirteen letters to MassHighway, dated between 2002 and 2007, which it contends satisfy the procedural requirements of Subsection 8.05. Two were sent before the claimed supervisory work began, six were sent during performance, one in 2006 on ECI's claimed date of substantial completion, and four in 2007. References in the letters to claimed supervisory functions or costs follow.

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[7] The claims committee stated that Claim #14 included a 10% "increase for both profit and overhead on top of the overhead costs for the Project Manager."

A. "Notices" given before the supervisory work began:

(1) Letter: July 15, 2002	No mention of supervisory functions or costs.
(2) Letter: December 4, 2002	No mention of supervisory functions or costs.

B. "Notices" given after claimed supervisory work began (May, 2003):

(3) Letter: November 25, 2003	No mention of supervisory functions or costs.
(4) Letter: May 17, 2004	No mention of supervisory functions or costs.
(5) Letter: June 17, 2004	No mention of supervisory functions or costs.
(6) Letter: June 28, 2005	No mention of supervisory functions or costs.
(7) Letter: September 15, 2005	No mention of supervisory functions or costs.
(8) Letter: December 29, 2005	ECI states that supervision costs are compensable as "direct project related costs."

C. "Notices" given after the Contract completion date (August 28, 2006):

(9) Letter: December 28, 2006	No mention of supervisory functions or costs.

D. "Notices" given after ECI claims full completion (December 28, 2006):

(10) Letter: February 14, 2007	No mention of supervisory functions or costs.
(11) Letter: March 1, 2007	No mention of supervisory functions or costs.
(12) Letter: April 19, 2007	No mention of supervisory functions or costs.
(13) Letter: June 7, 2007	No mention of supervisory functions or costs.

A hearing on the motions to dismiss was held on November 15, 2009.

DISCUSSION

The question for decision is whether ECI waived its rights under the Contract to allow MassHighway to adjudicate its claims for an adjustment in price due to delay.

The Contract provides two interrelated remedies for a contractor aggrieved by delays in performance not caused by the contractor or his negligence. Subsection 8.10, "Determination and Extension of Contract Time for Completion," obligates MassHighway to extend a contract's time to complete performance by the number of

days of the delay, with an allowance for winter shut down if the approved extended date of completion falls between December 15 and March 15.[8]

ECI requested during performance twelve grants of additional time, every one of which MassHighway granted in full or in part.[9] In all MassHighway granted 1,366 additional days. ECI filed one claim challenging MassHighway's partial denial of ECI's twelfth request. See Claim #1 (38 days granted of 160 requested; 122 additional days sought). Because the claims committee did not rule on any Subsection 8.10 issue in Claims #13, #14 and #15, I do not address ECI's belated contentions. See supra p. 2 n. 4.

Subsection 8.05, "Claim for Delay or Suspension of the Work," is the exclusive contractual remedy for monetary compensation for delay.[10] If MassHighway finds a delay "without the fault or negligence" of the contractor and the work was interrupted by "an unreasonable period of time" by MassHighway's act or failure to act

> "… an adjustment shall be made by [MassHighway] for any increase in the actual cost of performance of the Contract (excluding profit and

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[8] Subsection 8.10 sets forth five circumstances when "the contract time for completion shall be adjusted": (A) a notice to proceed not issued in a timely manner; (B) MassHighway suspends the work "except … by the fault or neglect of the Contractor"; (C) "work in greater quantities" required; (D) "delay occurs due to reasonable causes beyond the control and without the fault or negligence of the Contractor," including Acts of God; (E) work delayed by utility companies or cities and towns. Subsection 8.10(F) requires a contractor to make a timely request to MassHighway: "No extension of time will be granted for any delay or any suspension of the work due to the fault of the Contractor, nor if a request for an extension of time on account of delay due to any of the aforesaid causes [(A) through (E)] is not filed within 15 days of the date of the commencement of the delay nor if the request is based on any claim that the contract period as originally establish was inadequate."

[9] ECI treated each of the twelve delays as a separate period. It also filed 18 claims for money during performance at the time it was aggrieved. ECI's actions show it well understood the Contract's claim procedures and the actions necessary to preserve its rights. See Martino v. First National Bank, 361 Mass, 325, 332 (1992) ("There is no surer way to find out what the parties meant when they entered into a contract than to see what they have done.")

[10] The contractor "shall have no claim for damages of any kind on account of any delay in the commencement of the work or any delay or suspension … [during the work] except as hereinafter provided." Subsection 8.05 (1st Para.) "The Contractor further agrees that the sole allowance for any such delay or suspension, other than as provided above [paragraphs 1 through 4], is an extension of time as provided in subsection 8.10." Id. (5th Para.).

> overhead) necessarily caused by the period of such suspension, delay or interruption."[11] Subsection 8.05 (2nd Para).

To avail itself of the remedy for an "adjustment," Subsection 8.05 requires that a contractor give timely notice and breakdown of each delay claim in writing.

> The contractor shall submit in writing not later than 30 days after the termination of such suspension, delay or interruption the amount of the claim and breakdown of how the amount was computed in accordance with Subsection 9.03B [calculation of costs] except no allowance for overhead and profit shall be allowed. Subsection 8.05 (4th Para).

Where a contract provides the contractor with a remedy, he must follow the procedures set forth in order to pursue it. Glynn v. Gloucester, 9 Mass. App. Ct. 454, 460 (1980) (to recover claimed extra costs contractor must follow the contract's claim procedures). If a contract has specific submission requirements, such as a time within which to file a claim, "the contractor must follow the procedures spelled out in the contract … before unilaterally accruing expenses to be pursued later" through claims. D. Frederico Co. v. Commonwealth, 11 Mass. App. Ct. 248, 253 (1981).

Procedural requirements to timely file claims are strictly construed. See Marinucci v. Commonwealth, 354 Mass. 141, 145 (1968) (in public construction contract, failure to timely submit claim and "itemized statement" under MassHighway contract Subsection 7.16 results in a waiver and a forfeiture of claim); compare Chiappisi v. Granger Contracting Co., 352 Mass. 174 (1967) (in private construction contract, timely notice requirement enforced to bar claim for additional compensation). The underlying principle in both cases is the prohibition against a contractor silently accruing

[11] But "No claims shall be allowed under this Subsection for … [MassHighway's] failure to act as required by the Contract … (or if no time is specified, within a reasonable time) for any cost incurred more than two weeks before the Contractor shall have notified [MassHighway] in writing of his claim due to [MassHighway's] failure to act." Subsection 8.05 (3rd Para.).

claims while failing to give timely the required notice. See D. Frederico Co. v. Commonwealth, supra.[12]

ECI has the burden to establish it followed the procedural requirements of Subsection 8.05. See Subsection 8.05 (5th Para). Subsection 8.05 expressly requires ECI to "submit in writing not later than 30 days after the termination of such … delay … the amount of the claim" and to submit a "breakdown of how the amount was computed" in accordance with Subsection 9.03B.[13] ECI did not satisfy either requirement.

Nothing in this record--no notice of claim, no letter written by ECI, no written claim--demonstrates that ECI submitted to MassHighway "in writing" any of these claims "not later than 30 days after the termination" of a delay. Nor did ECI timely submit within 30 days any written "breakdown" showing how the amount of any claim was calculated under Subsection 9.03(B). Although ECI attached thirteen letters to its Opposition none purports to be--or in fact is--either a timely claim or a breakdown of "actual costs" of supervisory work sought in Claims #13, #14 or #15. By failing to follow the procedures set out in Subsection 8.05 (4th Para), ECI waived its rights.

[12] Massachusetts appellate courts strictly construe the notice requirements in all provisions of Chapter 30. See e.g. Reynolds Bros. Inc. v. Commonwealth, 412 Mass. 1 (1992) (only if awarding authority orders work stopped in writing may contractor seek equitable adjustment for suspensions and delay under G.L. c.30, s.39*O*); Glynn v. City of Gloucester, 9 Mass. App. Ct. 454, 461 (1980) (no recovery for work done in deviation from plans unless contractor shows "prior" "written approval" required by G.L. c.30, s. 39I); Skopek Bros., Inc. v. Webster Housing Authority, 11 Mass. App. Ct. 947, 947 (1981) (rescript) (untimely claim for differing condition under G.L. c. 30, s.39N rejected).

[13] ECI argues that the motion to dismiss should be denied because MassHighway's assertion that project supervision costs are non compensable "overhead costs" is "at best a factual dispute…." ECI contends that "No definition of the precluded 'overhead' is set forth anywhere in the Contract Specifications." Opposition, pp. 9-10. MassHighway is correct that "actual costs" of supervision are not allowed under Subsection 8.05. The exclusion is referenced in Subsection 8.05 (4th Para.), which provides a contractor shall submit a "breakdown of how the amount was computed in accordance with Subsection 9.03B except no allowance for overhead and profit shall be allowed." Subsection 9.03B (3rd Para) states: "No allowance shall be made for general superintendence and the use of small tools and manual equipment."

ECI argues that, despite its failure to timely file claims and breakdowns of cost, it nonetheless met its procedural obligations under Subsection 8.05.

First, it argues that the thirteen letters it wrote between 2002 and 2007 "reserv[ing] its rights" "to address any equitable contract adjustments" "encompass[ed] the entire delay period … [that] ran through the end of 2006." ECI cites no authority in Massachusetts or elsewhere that allows a unilateral communication from a contractor reserving rights to override claim procedures in a contract. Its thirteen letters written over a five year period read in the light most favorable to ECI at best notify MassHighway that ECI intends to file claims—at some future time. A reservation of rights can not and does not create contractual rights. None of ECI's thirteen letters, either separately or collectively, supersedes Subsection 8.05's procedures.

Second, ECI argues that five letters[14] should be read to satisfy Subsection 8.05 because "there was no way to specifically quantify [supervisory] damages until the entire delay period had run its course" and because "the specific quantification of [Claims #13, #14 and #15] was required to be submitted within thirty days after **all** of the delays to the job had transpired." Opposition p. 8. (ECI's emphasis.) ECI argues that, since the Contract was infected with delays, performance took place within a single, long delay that ended only when the work was finished. Thus, as "all project work was completed in June, 2007, the outside notice date for quantification of the claim under Subsection 8.05 was toward the end of July, 2007." Opposition pp. 8-9.

[14] One, in 2006, was dated on the day ECI claimed substantial performance was achieved (December 28, 2006); four others were written in 2007, while punch list work was being completed. See ECI letters (9) through (13) supra, p. 5.

Nothing in the Contract or the law allows ECI to first claim additional supervisory costs after substantial performance. Subsection 8.05 requires claims for an adjustment in price be filed within 30 days after each delay terminates. Case law unambiguously precludes claims for expenses unilaterally accrued where notice procedures were not first followed. See D. Frederico Co. v. Commonwealth, 11 Mass. App. Ct. 248, 253 (1981) (claim "barred" when not timely filed). ECI's arguments are without merit.

CONCLUSION

ECI's failure to comply with the procedural requirements of Subsection 8.05 is a waiver and forfeiture of Claims #13, #14 and #15. MassHighway's motions are allowed.

RECOMMENDATION

ECI's claims #13, #14 and #15 should be dismissed.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

April 8, 2010

INTRODUCTION

SPS New England Inc. (SPS or Contractor), aggrieved by the denial of the claims committee of the Massachusetts Highway Department (MHD or Department) to approve its claim for extra work in the amount of $13,333.33 based on an alleged 33% "overrun" in lump sum payment item 851, "Safety Controls For Construction Operations," appealed to the Board of Contract Appeals (Board). The claim arose when the term of MHD Contract #99118 for reconstruction of Main Street in Amesbury was extended more than 200 days after necessary work by the local gas utility company had delayed the SPS work. The extension of time for performance granted by the Department was the cause of the alleged "overrun" for payment Item 851 work.

I find that the appeal of SPS is without merit. In substance SPS's claim is grounded on the delays caused by utility company work, which the Contract expressly precludes. Additionally, there is no "overrun" here. Because Pay Item 851 work is bid and paid for as a lump sum, payment of the lump sum amount is complete payment for all the work.

STATEMENT OF THE CASE

On April 16, 2001 SPS requested additional compensation for the work of Safety Controls For Construction Operations (Safety Controls Work) for the time the Contract term was extended. On May 10, 2001 the district highway director denied the claim, which was duly forwarded to the claims committee on June 12, 2001. On July 20, 2001 the claims committee denied the claim. SPS appealed to the Board. Its completed Statement of Claim was filed on August 1, 2001.

On March 14, 2002 a hearing was held on SPS's appeal. There was a tape recording made of the hearing. Present were

Peter Milano	Chief Administrative Law Judge
Isaac Machado	Deputy Chief Counsel, MHD
Joseph D'Angelo	Asst. Dist. Construction Engineer
Timothy McLaughlin	Vice President, SPS

The following exhibits were entered in evidence:

Ex.#1	MHD Contract #99118
Ex.#2	SPS Statement of Claim
Ex.#3	Memo of Joseph D'Angelo to Judge Milano 11/2/01

The matter was taken under advisement at the end of the hearing. In July 2003 Chief Administrative Law Judge Peter Milano resigned. At the time of Judge Milano's resignation no report had been made to the Board. On March 1, 2004 the undersigned was appointed Chief Administrative Law Judge.

There are no disputed issues of fact. It is therefore appropriate that I make this report and recommendation to the Board based on the administrative record.

FINDINGS OF FACT

Substantial evidence on the record, which consisted of tape-recorded testimony and the three exhibits admitted by Judge Milano, supports the following findings of fact, which I recommend the Board adopt.

1. The Department entered into Contract #99118 for roadway reconstruction on a section of Main Street in the town of Amesbury with SPS New England, Inc. (SPS or Contractor) on November 9, 1998. The SPS bid price for the work was $4,070,235.22.

2. The Contract included by reference, among other things, the *Plans,* the *Special Provisions*; and the *Standard Specifications for Highways and Bridges (1995 Metric ed.).*

3. The original completion date was November 29, 2000. The completion date was extended three times by the Department for reasons beyond the control of either SPS or the Department.

4. The Department granted time extensions to SPS because the local gas utility company had to move and reset its gas services at the project site.

5. The Contract provides at Subsection 5.05, in part:

> "The Contractor shall so carry on his work under the direction of the engineer that Public Service Corporations… may enter on the work to make changes in their structures or to place new structures and connections therewith without interference and the Contractor shall have no claim for, or on account of any delay which may be due to or result from said work of Public Service Corporations ….No allowance of any kind will be made except as provided in Subsection 8.10 [Determination and Extension of Contract Time For Completion]."

6. As a result of time extensions granted by the Department the original Contract term of 741 days was extended to 1,142 days, a 55% increase.

7. Subsection 850.21 of the Contract, captioned "Safety Control for Construction Operations," provides in pertinent part

> Safety Controls for Construction Operations consists of furnishing, positioning, repositioning, maintaining and removing, as needed and/or as directed: traffic cones, high level warning devices, delineators, floodlights, Type I and II barricades, portable flashing and steady burning lights ….

8. The payment item for work done under Subsection 850.21 is specified in Subsection 850.82, "Payment Items," which provides in pertinent part: "851.

Safety Controls for Construction Operations Lump Sum."

9. SPS bid a lump sum price of $40,000 for work included in Payment "Item 851 … Safety Controls for Construction Operations … Lump Sum."
10. The Department required SPS to position "traffic cones" during the original term and during the extended term of the Contract, which work was paid for under Item 851.
11. SPS filed its claim for extra work with the Board on August 1, 2001. On August 1, 2001 the time of Contract performance had increased by 33%. SPS calculated its claim for extra work of $13,333.33 under Item 851 by applying a 33% factor to its original lump sum bid (.33 X $40,000). SPS offered no evidence of its actual costs incurred to perform Safety Controls Work during the time the Contract was extended.
12. The Department denied the SPS claim in part because a Department policy provided, in substance, that lump sum bid items, such as Payment Item 851, are not time dependent, but are instead bid prices in effect for the duration of the Contract.
13. SPS's claim asserts that due to the Contract time extensions it faced "extended [legal] liability" for risks it would not have been subject to but for the delays caused by the utility company in moving gas services.

14. The unit of payment for all work under for Section 850 of the Contract, except for Payment "Item 851, Safety Controls For Construction Operations Lump Sum," is unit price.

15. Subsection 850.81 titled "Basis of Payment" provides in pertinent part:

> The contract prices under these [Section 850] items shall constitute full payment for all material, labor and equipment required or incidental to the satisfactory completion of the work as described above…. Lump sum payments will be made in equal amounts on each estimate based on the number of months estimated to complete the work.

16. The Department calculated the payment of "lump sum" item 851 by following the requirements of Subsection 850.81 under which it found the number of months remaining until completion of the work when it prepared a periodic payment estimate and calculated the amount to be paid by dividing the unpaid balance of the $40,000 lump sum by that number of months. Each time the Contract was extended a new equal amount was calculated in like manner.

17. Subsection 9.01 "Measurement of Quantities," appearing in Section 9.03 "Measurement and Payment," provides

> "The term "lump sum" when used as a unit of payment will mean complete payment for the work described in the Contract."

<u>DISCUSSION</u>

A. Issue Presented and Positions of the Parties

The issue in this appeal is whether SPS may claim extra work for the positioning and repositioning of traffic cones during the time of extended contract performance where delays in the work were caused primarily by a public utility company that had to move and replace its gas services.

SPS argues that, once the term of the contract was extended because of delays attributable to utility work, the Safety Controls Work performed during the extended term is extra work. According to SPS the additional compensation should be paid by the following formula: divide the original lump sum bid price by the original estimated time of completion and multiply that monthly rate times the number of months the Contract was extended.

The Department asserts that Safety Controls Work is bid as a "lump sum," with payments made while the work progresses under an installment payment formula set forth in Subsection 851.81. The Department contends that payment of the "lump sum" amount fully discharges all its obligations under the Contract, even where the time of completion is extended.

B. The Contract Provisions

The issues in this appeal are resolved by construing the provisions of the Contract according to its plain and ordinary meaning. See Thomas v. Hartford Accident & Indemnity Co., 398 Mass. 782, 784 (1986).

1. The No Damage For Delay Provision

SPS claim is in effect a delay damage claim, which is not a compensable claim under the Contract.

SPS's appeals to recover costs for Safety Controls Work allegedly incurred as a result of delays caused by the removal and installation of services by a gas utility company. The delays in the Contract work were substantial and caused SPS to be at the work site longer than the original Contract term of 741 days. There is no dispute that the needs of the gas utility company caused the Department to grant SPS an additional 401

days in which to perform the Contract. At the time it filed its appeal the time allowed for performance had increased by 233 days, or 33%. SPS claims compensation for Safety Controls ["extra"] Work," is calculated by applying a 33% factor to its original lump sum bid for Item 851 (.33 X $40,000). SPS did not offer any evidence of its actual costs to position and reposition traffic cones (or perform other Safety Controls Work) during the extended Contract term.

I find that SPS's claim for extra work is rooted in the delays caused by the gas company. Because the delay in the Contract work was caused by a public service corporation, Subsection 5.05 of the Contract controls the outcome. Under Subsection 5.05 SPS agrees that public utility companies may

> enter on the work to make changes in their structures or to place new structures and connections therewith without interference, and [SPS] shall have no claim for, or on account of any delay which may be due to or result from said work of [utility companies] ….

Subsection 5.05 also provides "No allowance of any kind will be made except as provided in Subsection 8.10." Subsection 8.10 provides that the time for performance "shall be adjusted" … "[I]n case the work is delayed by Public Service Corporations …." Subsection 8.10(E). Here the Department adjusted the time of performance by granting SPS extensions of time for performance by 401 days. That is all SPS was entitled to under the Contract.

SPS may not avoid the "no claim" provision in Subsection 5.05 by calling its claim here one for "extra work" or an "overrun" of Safety Controls Work. As a matter of law, labeling a delay claim something else does not avoid the Contract's prohibition to claims grounded in delays caused by public service corporations. See Reynolds Bros., Inc., v. Commonwealth, 412 Mass. 1, 7 (1992) (prohibited delay damages may not be

pursued under another name). Accordingly, as SPS's claim for extra work claim is in fact a claim based on costs allegedly incurred because of public utility delays, the plain words of the Contract require it be denied.

2. Unit Of Payment: "Lump Sum"

SPS also seeks compensation on the theory that the Contract itself required additional payments for Safety Controls Work during the extended Contract term.[1] The basis of its contention is that Subsection 850.81, the applicable basis of payment provision applying to the Safety Controls Work, requires the Department to pay compensation for each month the Contract was extended.

Subsection 851.81 provides

> Lump sum payments will be made in equal amounts on each estimate based on the number of months estimated to complete the work.

The language instructs how and when lump sum payments will be made; it does not purport to raise or lower the lump sum amount SPS bid for Safety Controls Work under Payment Item 851. The fact that Subsection 850.81 requires that the lump sum price bid for Safety Controls Work shall be paid out in installments does not alter the fact that SPS bid a lump sum price of $40,000 for the Safety Controls Work.

Subsection 851.81 does not expressly address how lump sum payments are made if a contract is extended. It merely requires that "lump sum" payment units, such as Item 851 for Safety Controls Work, be paid out in "equal amounts" "based on" the "estimated" number of months needed to complete lump sum work. This the Department did.

At the time of each estimate, the Department calculated the "equal amounts" to be paid on remaining estimates by dividing the amount of the unpaid balance of the lump

[1] Such work is described in Subsection 850.21 but is paid for in a lump sum under Payment Item 851, as expressly required under Subsection 850.82, "Payment Items."

sum by the estimated number of months remaining for the work. When the contract term was extended, the time estimated to complete the work accordingly changed. The Department then recalculated the "equal amounts" due, which were then paid in future estimates. The Department's method of interpreting the Contract's formula is a rational means to carry out the requirements of Subsection 851.81. It does not violate that provision.

SPS proposed interpretation of Subsection 851.81 would have the effect of transforming the "lump sum" payment item for Safety Controls Work into a "unit price" payment item.

The Contract distinguishes between a "lump sum" and a "unit price" unit of payment. Subsection 9.01 "Measurement of Quantities," appearing in Section 9.03 "Measurement and Payment," provides:

> The term "lump sum" when used as a unit of payment will mean complete payment for the work described in the Contract.

By contrast where a bid is made under a unit price unit of payment, it establishes a unit price for the Contract. Payments are then made to the contractor based on the number of units used in the work multiplied by the unit price bid. For example, Subsection 4.06, "Increased or Decreased Contract Quantities," provides:

> When the accepted quantities of work vary from the quantities in the bid schedule, the Contractor shall accept as payment in full, so far as contract items are concerned, payment at the original contract unit prices for the accepted quantities of work done.

Where the Contract contains a unit price and extra work is ordered, payment for such extra work is to be made at the unit prices bid. See Subsection 9.03(A).

Subsection 850.82 plainly requires that Safety Controls Work, Payment Item 851, shall be bid as a lump sum. Developing a monthly payment amount and applying that figure to each month the Contract is extended necessarily transforms that lump sum into a unit price. SPS offers no support for its proposed interpretation from any part of the Contract. It provides no citation to legal authority.

I find the proposed construction of Subsection 850.81 would re-write, not interpret, the Contract. I find that the proposed formula plainly contradicts the requirement in Subsection 9.01 that payment of the lump sum "will mean complete payment" for the work described. In conclude that SPS's claim is without merit.

FINDINGS

I find that SPS claim is grounded on the delays caused by necessary work of a public service corporation and that the Contract precludes such a claim.

I find that SPS proposed construction of Subsection 851.81 would violate the lump sum unit payment requirements under the Contract and is without merit.

RECOMMENDATION

The Board should adopt the findings of fact set forth.

The Board should deny SPS's appeal.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

APPENDIX C-1

DECISIONS/RULINGS

Claims re: Differing Site Conditions

To: Secretary Jeffrey B. Mullan, MassDOT
From: Stephen H. Clark, Administrative Law Judge
Date: December 6, 2010
Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

AGM Marine Contractors, Inc. (AGM), the general contractor in MassHighway contract #98453 (Contract) to construct a new bridge over a tidal river in Barnstable, seeks its costs to splice 14 driven steel piles.

AGM claims that the $17,296.91 spent to splice new pile to extend the length of 14 original installed piles to achieve the required design load was extra work or resulted from unforeseen site conditions under G.L. c.30, s.39N.

AGM's claim is without merit. Splicing was not extra work since it was expressly anticipated and contained in the Contract, which provides, among other things, "All costs for splicing piles shall be included in the contract unit price per meter." Subsection 940.81 of the Standard Specifications.

AGM failed to prove that an unforeseen subsurface condition existed.

I recommend that AGM's appeal be denied.

INTRODUCTION

On August 19, 1998 MassHighway awarded AGM Marine Contractors, Inc. (AGM) contract #98453 (Contract) for the replacement of a bridge over a tidal river in the town of Barnstable (Barnstable Project). AGM's winning bid was $834,399.00. The bridge abutments were to be supported by 50 driven steel H-piles. After the original piles required splicing to extend their length to achieve the design load, AGM claimed costs of $17,296.91, alleging that splicing was extra work and that the expense resulted from unforeseen site conditions under G.L. c.30, s.39N (Section 39N).

AGM's claim is without merit. Splicing was not extra work; it is expressly within the Contract—viz. the unit cost pay item governing the furnishing and installing of driven steel pile: "All costs for splicing piles shall be included in the contract unit price per meter." Subsection 940.81 of the Standard Specifications. AGM failed to prove that an unforeseen subsurface condition existed. The appeal should be denied.

BACKGROUND

Contract Plans and Specifications: The installation of steel H-piles to support new bridge abutments is work specified in Section 940 of the Standard Specifications (Section 940) and in special provision 942.121 (Special Provision). The plans show that 26 steel H-piles were to be installed for one abutment and 24 for the other. Payment for the driven pile work is on a unit price basis (price/estimated linear feet steel pile installed complete) under pay item 942.121, "Steel Pile," (Item 942.121). The bid sheet estimated the quantity of Steel Pile under Item 942.121 as 3,100 linear feet. The bid package contained the results of soil borings and a geotechnical evaluation of the site.

Section 940 is a comprehensive 15 page standard specification. It governs all aspects of driven pile work, with detailed subsections governing materials, construction methods, pile installation and compensation. The work of furnishing and installing driven piles includes splicing, test piles, pile loading tests, interruptions, delay and cutting, among many other tasks. The pay item here for all driven steel pile work is Item 942.121.[1]

Under compensation, Subsection 940.81 ("Basis of Payment") for Steel Piles provides in part:

> Steel piles will be paid for at the contract unit price per meter under the item for Steel Pile, complete in place.
>
> All costs for splicing piles shall be included in the contract unit price per meter for the respective pile item, which price shall also include full compensation for delays incurred by splicing of piles or by any other operations in connection with the work on piles.

Also under compensation, Subsection 940.80 ("Method of Measurement") provides:

> The length of piles to be paid for shall be the total length in place, measured from the tip of the pile to the plane of the plan cut-off elevation.

The Special Provision incorporated Section 940. AGM's principal obligations are set forth in the Special Provision.[2]

> All pile elevations shall be driven to the minimum safe bearing value indicated on the plans. Piles shall be driven to the depth and resistance, in blows per inch, necessary to achieve the required ultimate axial pile capacity as demonstrated by a wave equation analysis performed for each abutment by the Contractor in accordance with Section 946.1B as amended herein. In any event, piles shall be driven to at least the minimum tip elevation specified on the plans.

---

[1] Except for refusal. Where refusal is encountered in driving pile—that is, when a defined obstruction has to be removed—obstruction removal is paid as extra work. See Subsection 940.65(C)(5).

[2] The Special Provision also contains detailed technical requirements for the Barnstable Project, such as pile size, type of "heavy duty tip," power hammer to be used, methods, equipment and record keeping.

The Special Provision expressly addresses what the Contractor shall do in the event that steel H-piles require splicing. "If pile length requires splices (Section 940.40B) the splicing shall conform to applicable Standard Specification Subsection 940.66 as follows:

> Where these piles have to be extended, the spliced connection shall be a continuous full penetration butt-weld. The butt-welding shall be made to develop the full strength of the pile, both in bearing and in bending. Welding shall conform to the applicable provisions of Subsection 960.61."

The Special Provision further references the eventuality of splicing, stating

> The contractor shall submit shop drawings showing the type of prequalified splice weld(s) and procedures that would be used if required, regardless of whether or not the Contractor anticipates splices to be used.

The plans specified that each pile be driven to a depth of "approximately" "- 60 feet ± "; see plan sheet 5 of 18. Note 1 on plan sheet 6 of 18 states:

> APPROXIMATE PILE TIP ELEVATION - 60± ACTUAL ELEVATIONS MAY BE DIFFERENT.

Subsection 4.06 of the Standard Specifications provide

> When the accepted quantities of work vary from the quantities in the bid schedule, the Contractor shall accept as payment in full, so far as contract items are concerned, payment at the original contract unit price for the accepted quantities of work done.

I find (1) the Contract does not guarantee the length of any of the 50 piles to be installed; rather, it expressly provides that all driven pile lengths are "approximate" and the total quantity of pile in linear feet is "estimated"; (2) the Contract requires that each pile be driven to the "minimum safe bearing value" in the plans, but "in any event" "to at least the minimum tip elevation specified on the plans"; (3) the Contract expressly and by implication notifies bidders that splicing may be required; (4) the Contract contains a single pay item, Item 942.121, for all driven pile work (except obstruction removal); (5) the Contract expressly provides for the cost of

splicing in Section 940.81 ("all costs for splicing piles shall be included in the contract price per linear foot for the respective pile item"), which is paid under Item 942.121; and (6) the Contract in Subsection 4.06 of the Standard Specifications provides that, where quantities "vary," the contractor "accept as payment in full" payment at the "unit price."

AGM's Bid: On the basis of the plans, standard specifications and special provisions, soil studies and the estimated quantity of 3,100 linear feet, AGM bid $55.50/linear foot for Item 942.121 for all driven pile work "installed complete in place." AGM's bid was $172,050.00.

On June 21, 1999, AGM submitted a pile schedule for approval. It proposed to furnish 50 H-piles, namely, "Hp 12 x53lbs/LF; 50 pieces @ 65' each."

Driven Pile Work and AGM Claim:

On November 21, 2000 AGM began installing steel H-piles. The very first 65' pile AGM drove did not reach design load at approximately 61 feet. MassHighway ordered AGM to splice an additional length of pile and continue installation to attain design load. On November 21, 2000, before splicing the new pile length, AGM filed a claim for extra work and unforeseen site conditions.[3] ALJ Ex. #3, Statement of Claim, Ex. A.

District 5 kept contemporary force account records of AGM's splicing work. ALJ Ex# 5, District Response to Statement of Claim. In all, AGM made 14 splices. The total linear feet of driven pile for the Barnstable Project was 3,378.57 feet. ALJ Ex. #3, Statement of Claim, Ex. N. The total of spliced pile length was 265.98 feet, which is 8% of the total of driven pile length (266/3379). Id. The parties do not dispute that AGM's cost of splicing was $ 17,296.91.

[3] The AGM claim letter stated "the piles installed did not reach the required design capacity and it will be necessary to splice additional lengths on these piles. AGM Marine considers all splicing of additional pile lengths to be extra work, in accordance with Section 4.04 of the Standard Specifications [Unforeseen Site Conditions]." G.L. c. 30, s.39N requires that its text be incorporated in every public contract, here Subsection 4.04 of the Standard Specifications. Since Section 4.04 incorporates Section 39N, I refer to the statute in this report.

MassHighway paid AGM $187,510.64 for 3,378.57 linear feet installed on its bid of $55.50 for Item 942.121 (3,378.57 X $55.50).

On September 5, 2006, six years after the pile work was completed, AGM submitted a "formal claim package" to District 5. AGM wrote that MassHighway had agreed that AGM could late-file the splicing cost claim for the Barnstable Project. AGM stated, "You may recall that the exact same set of circumstances occurred" on pile driving work on Contract #98032 in the Falmouth Project. AGM Ex. # 3, Statement of Claim, Ex. A. AGM continued, "It was agreed by both the District and AGM that whatever the final decision was on the Falmouth Project it would be applicable to the [Barnstable] Project." Id.

District 5 concurred that AGM could late file its splicing claim for the Barnstable Project, after AGM's Falmouth claim "was settled." However, "District [5] did not agree with AGM that whatever the decision was on the [Falmouth Project] would be applicable to this [Barnstable] project." ALJ Ex. #5, District 5 Response to Statement of Claim.

MassHighway contract #98032 governed the Falmouth Project. In the Falmouth contract the pile design load specification was modified during performance. The contract did not contain a special provision addressing the possible need for pile splicing; its plans show, without qualification, that each pile be driven to 15.76 meters. ALJ Ex. #5; ALJ Ex. #3, Statement of Claim, Ex. G. On the Falmouth claim the Administrative Law Judge ruled that AGM should be paid $19,996.00 for extra work of pile splicing. Id.

On July 27, 2006 District 5 rejected AGM's instant claim. As grounds, it stated that each contract claim "must be decided on its own merit" and that Subsection 940.81 required "all costs of splicing" to be paid under the unit price bid Item 942.121. ALJ Ex. #3, Statement of Claim, Ex. F.

On December 27, 2006 the Claims Committee rejected AGM's claim. It ruled that a "decision on another contract" was not "relevant" and that Subsection 940.81 controlled the outcome ("cost of the splicing is included with the costs of the installation"). Id., Ex. H.

AGM's Appeal: On January 4, 2007 AGM filed a notice of appeal; on February 5, 2007 it filed a timely statement of claim. On December 5, 2008 I conducted a hearing on AGM's appeal. Present for AGM were John Mikutowicz, President, and Suzanne Geoffrion, Manager. Present for MassHighway were Edmund Naras, Esq., Legal Counsel, and Robert Struzik, Assistant Construction Engineer, District 5. Also present were Nancy Devin, Administrator of this office and Kim Yu, Law Clerk.

The following exhibits were accepted in evidence.

ALJ Exhibits	(1) MassHighway Contract #98453 (Barnstable) (2) Notice of Appeal (3) AGM Statement of Claim (4) MassHighway Contract #98032 (Falmouth) (5) District 5 Response to Statement of Claim (03/01/07)
AGM Marine	(1) Standard Specification Subsection 4.04 (2) Timmerman letter to Mr. McCourt (10/20/00) (3) R. E. Daily Log excerpts (11/21/00 to 12/12/00) (4) Tabulation of Pile Lengths--graphic (5) Tabulation of Pile Lengths--table (6) Annotated Plan Sheets (1, 5 & 6 of 19) Contract #98453 (7) Vollmer Associates LLP Calculation Sheet
MassHighway	(1) MassHighway Contract #98453 (2) Plan Sheets (3, 4, 5 & 6) Contract #98453 (3) Specifications ss. 5.04; 5.05; 5.06; 2.02; 2.03; 2.04; 9.40. (4) Supplemental Specifications (1994) (5) District 5 Response to Statement of Claim (03/01/07)

DISCUSSION

Two questions are presented: (1) Is splicing extra work under the Contract? (2) Did AGM show that it encountered unforeseen subsurface site conditions under Section39N?

AGM's Extra Work Claim

In Massachusetts, a contractor awarded a contract for public work under G.L. c.30 "shall perform all the work required by such contract in conformity with the plans and specifications…." G.L. c.30, s.39*I* (Section 39*I*).[4] Those that perform public contracts are bound to act in strict accordance with their undertakings as set forth in the contract plans and specifications. Albre Marble & Tile Co. v. Governman, 353 Mass. 546, 549 (1967).

Extra work is defined in Subsection 1.20 of the Contract:

> Work which (1) was not originally anticipated and/or contained in the contract: and therefore (2) is determined by the Engineer to be necessary for the proper completion of the project: and (3) bears a reasonable subsidiary relation to the full execution of the work originally described in the Contract.

Claims for extra work are to be considered in light of the obligation of the contractor to strictly adhere to the plans and specifications. Glynn v. City of Gloucester, 21 Mass. App. Ct. 390, 394-95 (1986). Specified or "originally anticipated" work "contained in the contract" is not extra work. Cf. Subsection 1.20. Where quantities are greater than estimated at bid, the Contract provides the contractor to "accept as payment in full … payment at the original [bid] contract unit price for the accepted quantities of work done." Standard Specification 4.06. Where specified work is paid on a unit price basis, item increases are not deviations from the contract and are not extra work. See J. D'Amico, Inc. v. Saugus, 9 Mass. App. 880 (1980).

To determine whether splicing is extra work, the judge should "construe the contract as a whole, in a reasonable and practical way, consistent with its language, background, and

[4] Section 39*I* provides, in relevant part: "Every contractor having a contract for the construction, alteration, maintenance, repair or demolition of, or addition to any … public works for the commonwealth, shall perform all the work required by such contract in conformity with the plans and specifications contained therein. No willful or substantial deviation from said plans and specifications shall be made unless authorized in writing by the awarding authority or by the engineer or architect in charge of the work who is duly authorized by the awarding authority to approve such deviations…."

purpose." USM Corp. v. Arthur D. Little Sys., Inc., 28 Mass App. Ct. 108, 116 (1989). Here, the Contract plans and specifications, read together fairly in the context of all provisions addressing driven steel pile and pile splicing, demonstrate that the cost of splicing to achieve pile length sufficient to support the design load is only paid on a unit price basis by Item 942.121. There is no ambiguity. Section 940 and the Special Provision, read together, require the contractor to include splicing cost within Item 942.121 ("Steel Pile").

The Special Provision provides for the eventuality that original pile lengths may be insufficient and may require splices (1) by referencing the standard specification governing the acceptable method of splicing and (2) by requiring the contractor to submit for approval shop drawings "showing the type of prequalified splice weld(s)" it will use for splicing "if required, regardless of whether or not the Contractor anticipates splices to be used."

Two other requirements in the Special Provision make plain that the Contract anticipates steel pile may be spliced: (1) that the contractor shall drive all piles "to the minimum safe bearing value indicated on the plans" and, (2) that the contractor shall drive pile "to the depth and resistance … necessary to achieve the ultimate axial pile capacity." Thus, the contractor is put on notice that, if the "minimum" length of pile elevation shown on the plans does not attain "safe bearing value," it must splice additional pile length and continue installation to design load.

Figures and words on the plans are consistent with the written specifications. The plans put contractors on notice that pile tip elevations shown are not guaranteed. To the contrary, pile tip elevations--and the length of piles--are estimates, hence "- 60 ±". Written notes on the plans are unambiguous: "APPROXIMATE PILE TIP ELEVATION - 60± ACTUAL ELEVATIONS MAY BE DIFFERENT." Plan sheet 6 of 18, note 1. Read as a whole the Contract does not guarantee the

length of driven pile at any elevation. The Contract plainly states that the total linear feet of pile is "approximate" and "estimated." [5]

Payment for driven pile work is unambiguously on the basis of "contract unit price per meter under the item for Steel Pile, complete in place." Subsection 940.81. "All costs for splicing piles shall be included in the contract unit price per meter for the respective pile item, which price shall also include full compensation for delays incurred by splicing of piles or by any other operations in connection with the work on piles." Id.

Splicing is anticipated work contained in the Contract. MassHighway was obligated to pay for splicing under Item 942.121 by the linear foot of driven pile installed. This it did. AGM has been paid in full. Splicing is not extra work for which additional compensation is due.

AGM's Section 39N Claim

AGM gave timely notice of its Section 39F claim. See ALJ #3, Statement of Claim, Ex. A. AGM argues that it is entitled to additional compensation because an unforeseen subsurface condition was found at the site. [6] The contention is without merit.

AGM adduced no evidence about unforeseen soil conditions. To the contrary, AGM admitted that the subsurface was "fairly homogeneous, just various densities." Testimony of Mr.

[5] AGM's witness, Mr. Mikutowicz, testified without corroboration that "- 60 ±" as appearing on Plan sheet 5 of 18 does not indicate "an unknown quantity or length" and so is not an "open-ended notation." He testified that engineering standards define +/- to mean more or less than the stated number by the next significant number, i.e. the whole number 60 plus or minus 1 foot (59 to 61 feet)." No engineering standard was offered to substantiate his assertion. The basis for his testimony was a textbook he had read in college 35 years ago. I can not give this testimony persuasive weight in light of the word "approximate" appearing on plan sheet 6 of 18, and the word "estimated" on the bid sheet. That pile length is not guaranteed is repeatedly corroborated throughout Section 940 and the Special Provision.

[6] Under G.L. c.39, s.39N "If, during the progress of the work, the Contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which result in an increase or decrease in the cost of the work…."

Mikutowicz. AGM offered nothing to show that the boring log data was erroneous, incorrect or differed from the materials found during the work. Hence, AGM did not prove the existence of an unforeseen subsurface condition that differed "substantially or materially from those shown on the plans." Section 39N. AGM asserts that the Contract guaranteed "by implication" pile length of driven pile at 61.5 feet would attain the design load. Thus, AGM argues, any driven pile elevation exceeding 61.5 feet proves an unforeseen subsurface condition per se because the soil found did not allow design load to be achieved at the "guaranteed" pile length.

AGM asserts these facts support its Section 39N claim: (1) the "bid documents did not anticipate the requirement for splicing piles for longer lengths"; (2) AGM "could not have anticipated the need (or the cost) of pile splicing at the time of the bid"; (3) "the contract documents stated that a 61.5 foot pile was required"; (4) "piles to be supplied in one piece"; and (5) the "project plans did not include any piles designated for splicing or pile splice detail." None of these assertions are supported by the record.[7]

AGM's argument misapprehends the Contract and the facts. The Contract did not guarantee pile length. It provided instead that AGM splice and drive additional pile to achieve design load. As a matter of fact the need to drive additional pile length in conforming subsurface soil conditions is "commonplace," as is splicing. Testimony of Mr. Struzik. "These variations [in pile length] are recognized as inherent to the work rather than unforeseeable." Id. AGM did not prove the existence of an unforeseen subsurface condition under Section 39N.

AGM's claim is in reality a claim for double payment. It has already been paid for splicing under Item 942.121, both for the original length installed and for the additional pile

[7] (1) the bid documents expressly anticipated the need for splicing (supra p.8); (2) AGM was put on notice that splicing might be required and told expressly to include anticipated costs in pay Item 842.121 (Id.,); (3) the pile elevations were "approximate" (Id.); (4) at its own option AGM chose to furnish 65' piles (Section 940); (5) the pile splice detail was to be supplied by AGM (Special Provision).

spliced and installed pursuant to Subsection 4.06 as a quantity overrun at the unit price.[8] AGM's theory, if correct, would require a finding of an unforeseen subsurface condition, and payment for extra work, any time a pile had to be extended beyond an estimated length. That would eviscerate Subsection 4.06, which requires quantity overruns be paid at the bid unit price.

AGM's Section 39N claim is without merit.[9]

The Outcome of the Falmouth Appeal Does Not Control

Finally, AGM argues that the outcome of the Falmouth appeal governs the outcome here. The argument has no merit. First, AGM did not show that a binding written agreement with MassHighway existed.[10] Second, an independent review of the Falmouth contract reveals that it is materially different from the Barnstable Contract—with respect to both contract provisions and project specifications. A critical fact in the Falmouth appeal was that MassHighway unilaterally modified the load bearing specification during performance. Other significant and material differences exist between the two contracts.[11]

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[8] The amount paid does not depend on the number of piles furnished, but on the length installed. AGM confuses the approved pile schedule (showing the length of piles to be furnished) with additional quantity of pile installed (driven pile, spliced, complete in place). The approval of AGM's pile schedule does not alter Subsection 4.06, Subsection 940.81 and Item 942.121, which control the outcome here.

[9] AGM advances other theories of recovery. None has merit. The outcome is governed by plain language in the Contract. Theories based on "reasonableness," "prudence" or what MassHighway "should have known" are misplaced. "When the words of a contract are clear, they alone determine the meaning of the contract…." Merrimac Valley Nat. Bank v. Baird, 372 Mass. 721, 723 (1977). See ante note 8.

[10] Had AGM proved that an oral agreement existed, which it did not, the enforceability of such an oral agreement is highly doubtful since the parties have no power to alter statutory requirements.

[11] Falmouth depicted pile tip elevation to the nearest 1/100 of a meter; Barnstable specified elevations as "approximate" in both words and numbers. Falmouth specified piles of less than 20 meters and required delivery in one piece; Barnstable did not specify pile lengths to be delivered. The Falmouth special provisions did not reference pile splicing; the Barnstable special provisions put contractors on notice that splicing might be needed. During the Falmouth work, MassHighway altered the specification of the bearing load, a significant design change; in Barnstable the design bearing capacity did not change. As installed, the length of pile installed in Falmouth was 200% more than specified; in Barnstable the quantity overrun was 8%.

CONCLUSION

In conclude that the rulings of the District and the Claims Committee were correct.

AGM's claim has no merit and should be denied.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: ________

To:	Secretary Jeffrey B. Mullan, MassDOT
From:	Stephen H. Clark, Administrative Law Judge
Date:	April 8, 2010
Re:	Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

J. Tropeano, Inc. (Tropeano) seeks an equitable adjustment of $96,837.57 in MassHighway contract #33279 (Contract) to relocate 21 water utility services in Salem because of alleged unforeseen site conditions.

On July 30, 2009, while its administrative appeal was pending, Tropeano filed suit against the Commonwealth in Suffolk Superior Court seeking $96,837.57 in contractual damages on a different legal theory based on identical underlying facts. See SUCV 09-3233-G.

Tropeano may not pursue the same claim in administrative and judicial proceedings. Once a suit has been filed against MassHighway the Attorney General has exclusive jurisdiction to conduct the litigation. Because continuation of Tropeano's administrative appeal would interfere with the Attorney General's conduct of litigation in SUCV 09-3233-G, Tropeano's appeal should be dismissed. See 6 Op. Atty. Gen. 1921, p.169; Attorney General v. Department of Public Utilities, 342 Mass. 662 (1961).

I recommend that Tropeano's appeal be dismissed.

INTRODUCTION

The appeal of J. Tropeano, Inc. (Tropeano) seeking an equitable adjustment of $96,837.57 for work done under MassHighway[1] contract #33279 (Contract) should be dismissed because Tropeano has filed an action in Superior Court against the Commonwealth to litigate the same dispute. See SUCV 09-3233-G. Tropeano's lawsuit followed a ruling granting partial summary judgment in favor of MassHighway because Tropeano did not timely file the required statutory notice under G.L. c.30, s.39N (Section 39N) on its unforeseen site condition claim.[2]

Tropeano's action in Superior Court seeks $96,837.57. It is grounded on facts identical to those raised in its pending administrative appeal. The appeal should be dismissed as only the Attorney General may conduct litigation related to Tropeano's claims arising from the Contract.

BACKGROUND

Tropeano's dispute with MassHighway arose during work to reconstruct Marlborough Road in Salem under the Contract, which was awarded May 9, 2003. Tropeano sought an equitable adjustment in price under Section 39N because of an

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[1] On November 1, 2009, the Massachusetts Highway Department was reorganized as the Highway Division of the Massachusetts Department of Transportation (MassHighway). See G.L. c. 6C, s.40.

[2] The factual gravamen of Tropeano's dispute is that MassHighway's plans did not disclose the exact locations of twenty-one water utility services beneath the roadway surface; that the city of Salem did not (or could not) mark those locations; and that MassHighway personnel in the District had actual knowledge of the costs Tropeano was incurring at the time it removed the unmarked services. In ruling on MassHighway's motion for summary judgment, I found as a matter of fact that MassHighway did not "guarantee" the locations of the water services shown on the plans and ruled that Tropeano failed to give written notice "as soon as possible" after it discovered the alleged unforeseen site conditions.

alleged unforeseen site condition. Tropeano argues that twenty-one water utility services it removed and replaced were not correctly located on the Contract plans.

After the Engineer's claims committee denied Tropeano's claim on July 26, 2006, it appealed. MassHighway then moved for summary judgment on the basis that Tropeano had failed to give the statutory notice required by Section 39N and had thus waived its rights to pursue the Section 39N remedy of an equitable adjustment. On September 3, 2008 I found that Tropeano failed to give a notice "in writing" "as soon as possible" after the discovery of the alleged unforeseen site condition when it filed its first written claim on December 16, 2005, sixteen months after the last disputed utility service location was found and more than twenty-four months after the first. See ALJ Memorandum, attached.

Tropeano then moved to amend its statement of claim. On July 30, 2009, while that motion was pending, Tropeano filed a complaint in the Superior Court alleging "design errors" in the Contract, seeking $96,837.57 for (1) breach of contract and (2) quantum meruit.

DISCUSSION

Because Tropeano's action in SUCV 09-3233-G is duplicative of its administrative appeal, the appeal should be dismissed.[3] Only the Attorney General may now conduct litigation on Tropeano's claims.

The Attorney General represents departments of the Commonwealth, including MassHighway, when an action is filed in court. The Attorney General has exclusive jurisdiction to appear for the Commonwealth's departments "in all suits … in which the

[3] In all Tropeano has advanced ten theories of recovery—initially an unforeseen site condition claim under Section 39N; then seven additional theories first raised in a motion to amend its statement of claim on appeal; and finally two additional theories (breach of contract and quantum meruit) in SUCV 09-3233-G.

commonwealth is a party or interested, or in which the official acts and doings of said [department] … are called in question, in all the courts of the commonwealth….All such suits and proceedings shall be prosecuted or defended by him under his direction." G.L. c. 12, s. 3. The Attorney General's obligation has been construed to mean that, once a lawsuit has been filed against the Commonwealth, she is vested with exclusive control over the matter in ligation. See Attorney General v. Department of Public Utilities, 342 Mass. 662 (1961).

Only the Attorney General has the power to compromise or settle civil proceedings in which a department of the Commonwealth is a party. See 6 Op. Atty. Gen. 1921, p.169. See also Feeney v. Commonwealth, 373 Mass 359 (1977) (in the exercise of his statutory and Constitutional powers, the Attorney General assumes primary control over the conduct of litigation that involves the interest of the Commonwealth, and in so doing he decides matters of legal policy normally reserved to a client in the ordinary attorney-client relationship).

The Attorney General's constitutional and statutory powers dictate that Tropeano's pending administrative appeal be dismissed. Otherwise actions taken pursuing or defending the appeal would materially interfere with the Attorney General's functions, since she does not represent MassHighway in Tropeano's administrative appeal. Accordingly, once Tropeano has filed suit against the Commonwealth, the exclusive statutory and constitutional authority of the Attorney General to defend MassHighway requires dismissal of Tropeano's administrative appeal.

Contractors filing appeals in the office of the Administrative Law Judge understand that filing a parallel action in court will result in the immediate dismissal of

an administrative appeal. As stated in the report of the 20th Annual Conference on the Massachusetts Construction Law (at page III-5):

> It should be noted further that where a claim is asserted in a court action, the MHD hearing officer … will refuse to entertain such claim. Accordingly, no action can be brought in court on any claim which is pending before the MHD Hearing Officer or it will be immediately dismissed by the MHD Hearing Officer.

Tropeano, by filing suit in SUCV09-3233-G, elected to pursue its claims arising under the Contract in court.

RECOMMENDATION

The Secretary should dismiss Tropeano's pending appeal.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: April ___, 2010

MEMORANDUM OF DECISION AND ORDER ON MASSACHUSETTS HIGHWAY DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

MassHighway moved to dismiss the appeal of general contractor J. Tropeano, Inc. (Tropeano) on a motion for summary judgment. Tropeano appealed from the claims committee's denial of its request for an equitable adjustment of $96,837 under G.L. c. 30, s.39N (Section 39N) for work Tropeano did to repair or relocate 21 utility service connections it found during the reconstruction of Marlborough Road in Salem.

MassHighway asserts that Tropeano's equitable adjustment claim is barred because it failed to make a "request" "in writing" "as soon as possible" after it found the supposed differing site conditions. See Section 39N. [1] Tropeano opposes the motion contending that it met the notice requirement of the statute because MassHighway had actual knowledge of the differing site conditions and knew exactly what work Tropeano did to remove old services and repair active services. For the reasons set forth below, I find that partial summary judgment should be granted to MassHighway and will so recommend in my final report to the Secretary.

BACKGROUND

The record provides the following factual background. Tropeano was the general contractor in MassHighway contract #33279 (contract) for $1,817,467 for the rehabilitation of Marlborough Road in Salem. The work involved excavation of the old road, replacement of utility infrastructure, grading and repaving. The contract documents disclosed approximate locations of water and sewer utility services connecting main lines

[1] Section 39N is incorporated into the Standard Specifications as a matter of law and appears as Subsection 4.04. See Section 39N (1st para).

to houses on either side of Marlborough Road, but did not purport to map accurate locations.[2] The special provisions imposed on Tropeano the "necessity of making its own investigation in order to assure that no damage [occurred] to existing structures, water lines, drainage lines … and additional facilities…." Tropeano was to notify the city "so that all the City utilities may be located." The special provision warned Tropeano before it bid that the "accuracy and completeness" of the plans with respect to the locations of "known utilities" was not "guaranteed."

On October 20, 2003 Tropeano discovered the first "mis-location" of a utility service connection; the last it found on September 1, 2004. In the ten intervening months Tropeano moved or repaired many utility services, each of which presented unique circumstances.[3] MassHighway's resident engineer was present at the work site daily and recorded the details of each "mis-location" in her project diary. MassHighway's resident engineer had actual knowledge of the site conditions where each utility service was found and the specific work Tropeano did to remove, repair or protect the same.

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[2] The special provision provides in relevant part:

"The Contractor's attention is directed to the necessity of making his own investigation in order to assure that no damage to existing structures, water lines, drainage lines … and additional facilities will occur"; "The Contractor shall … notify the City of Salem so that all the City utilities may be located and all necessary permits may be obtained"; "The Contract Plans indicate the approximate location of known utilities in the vicinity of the work. The accuracy and completeness of the information is not guaranteed"; "It is the intent of these Special Provisions that the Contractor … will safeguard the utilities during construction and shall assume liability for damage, relieving [Salem and MassHighway] from any liability."

[3] Attached to the letter Tropeano wrote MassHighway on January 31, 2005 (see page 3 infra) were descriptions of the "differing site conditions" it encountered between October 20, 2003 and September 1, 2004. Of the 21 instances listed, 14 were water service interruptions to houses, 2 involved excavation around an unmarked water service and a 6" hydrant, 1 involved a water main interruption, 1 a sewer force main interruption, and 1 a relocation of a water service. Tropeano implies that second and third utility services were encountered at many locations. The resident engineer's notes record only 2 cases where a second service was encountered and none of a third service.

Tropeano did not request an equitable adjustment to the contract price "in writing" on or near the dates when it discovered any of the utility service "mis-locations," with one exception.[4] On January 31, 2005 Tropeano first filed a written notice that might be construed as a request for an equitable adjustment in a claim for extra work. That writing was made fourteen months after the first differing site condition incident (October 20, 2003) and five months after the last (September 1, 2004). Tropeano's January 31, 2005 claim specified 21 incidents and sought $96,837.57 in extra work because of "existing subsurface utilities that were unknown in their locations." Tropeano claimed actual costs for removing or protecting utilities and delay costs.

On March 3, 2005 District 4 denied Tropeano's claim citing the special provisions in the contract. On March 14, 2005, Tropeano asked MassHighway by letter to reconsider its denial stating that it had notified the city of Salem "prior to all excavation" and that the city had failed to provide any further direction. Tropeano asserted that the city had failed to mark subsurface utilities and thus Tropeano had "no reasonable expectation that there would be numerous active water services to a single family dwelling." District 4 reviewed and denied the request for reconsideration. It then forwarded the letter to the claims committee, which had the denied January 31, 2005 claim under advisement.

On December 16, 2005 Tropeano presented a "new" claim to MassHighway relating to the removal and repair of the same 21 utility services. The "new" claim was

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[4] Tropeano apparently made a request for extra work related to an incident on June 24, 2004 that MassHighway agreed was appropriate. Tropeano provided an estimate of labor and material costs. On December 23, 2004, Tropeano certified to MassHighway that it had performed extra work of $31,870.91. On January 11, 2005, MassHighway approved the extra work order. On January 19, 2005, MassHighway wrote the city of Salem that it was responsible to reimburse MassHighway the $31,870.91 it paid Tropeano for extra work.

expressly made under Subsection 4.04 (Changed Conditions). See supra p. 1, n. 1. The December 16, 2005 claim was presented to MassHighway 801 days after the first water service interruption (October 20, 2003) and 486 after the last utility service interruption incident (September 1, 2004). [5]

The District rejected the December 16, 2005 "new" claim and forwarded it to the claims committee, which still had the initial January 25, 2005 claim (and its reconsideration) under advisement. The claims committee denied all Tropeano's claims on July 26, 2006. Tropeano appealed the denial to this office within 30 days and filed a statement of claim here on September 14, 2006.

DISCUSSION

Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact and the moving is entitled to judgment as a matter of law. See Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983). Here MassHighway met its burden of demonstrating the absence of a triable issue of fact under Section 39N, see Pederson v. Time, Inc. 404 Mass. 14, 17 (1989), by affidavit testimony affirming that Tropeano did not give it notice "in writing" "as soon as possible" after Tropeano discovered any claimed differing site condition. Tropeano concedes in its brief that it never requested an equitable adjustment "in writing" under Section 39N. But see ante, n.

[5] Tropeano's "new" claim of December 16, 2005 [received December 30, 2005] "present[s] the following claim for extra work in accordance with [Sub]section 4.04 Changed Conditions of the contract documents." The letter is part of the record here because it is attached to Tropeano's Statement of Claim. I think it constitutes a conforming request for an equitable adjustment in the contract price "in writing" under Section 39N. It states: "We believe the actual subsurface conditions encountered at the site differ substantially than those represented on the contract drawings and differ from those normally occurring." The letter was presented to MassHighway some 26 months after the first "undisclosed" water service was found (October 20, 2003) and some 16 months after the last (September 1, 2004). Neither party refers to the December 16, 2005 letter in its papers.

5. In ruling on the motion I resolve factual conflicts and draw all inferences in favor of Tropeano, the non-moving party here. See Willitts v. Roman Catholic Archbishop of Boston, 411 Mass. 202, 203 (1991).

Section 39N

At issue here is the meaning of the notice provision of Section 39N. The statute requires that a "request" for an equitable adjustment "shall be in writing and shall be delivered to the other party as soon as possible after such [differing site] conditions are discovered."

Section 39N provides that a "request" may be made by either the awarding authority or contractor since "an equitable adjustment in the contract price" may be made in favor of either. The request "shall be" "delivered" to the other party after "the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents…." The government then "shall make an investigation of such physical conditions" to determine how site conditions differ from plans or how construction methods might have to be changed. The request may be for either an increase or decrease of the contract price. [6]

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[6] Section 39N provides in pertinent part:

If, during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the contractor or the contracting authority may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an [equitable] adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon the receipt of such a claim from a contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents… and are of such a nature as to cause an increase or decrease in the costs of performance of the work or a change in the construction methods required … the contracting authority shall make an equitable adjustment in the contract price and the contract shall be modified in writing accordingly.

The principal guide to interpret the notice provision is the language of Section 39N itself. See Nationwide Mut. Ins. Co. v. Commissioner of Ins., 397 Mass. 416, 420 (1986). In reading the statute, effect must be given to all its provisions, so that none will be superfluous. See Devaney v. Watertown, 13 Mass. App. Ct. 927, 928 (1982). Legislative intent must be understood in light of the statute as a whole. See Pereira v. New England LNG Co., 364 Mass. 109, 115 (1973). A proper construction will not defeat the statute's utility. See Simon v. Solomon, 385 Mass. 91, 100 (1982).

The terms of Section 39N show that the "receipt" of a request "in writing" triggers a series of acts mandated by the Legislature: investigation, fact finding, comparison of plans to conditions, possible change in construction methods, the determination of an appropriate "equitable adjustment" to the contract (up or down) and, finally, a contract modification "in writing accordingly." One legislative objective is that the government be able to investigate a purported "differing site condition" immediately after discovery—before it is disturbed. This is manifest since the written notice "shall" be delivered "as soon as possible." The requirement that a "writing" be "delivered" to the other party assures that each party knows a request has been made for an "equitable adjustment" under Section 39N, not for some other remedy. The order of the mandated steps evinces intent that only after investigation and findings may the awarding authority exercise the extraordinary statutory power to "modify" the contract price—either up or down. The final step—the modification in the "contract price" "in writing"--mirrors the first step, an unambiguous notice "in writing."

The requirement in Section 39N that a "request" be made "as soon as possible" should be construed according to its plain and ordinary meaning. See Commonwealth v.

Gove, 366 Mass. 351, 354-355 (1974). In the context of Section 39N's scheme, "as soon as" intends that the "writing" be delivered immediately, right away, as soon as may be. That is because the start of the investigation and the need for findings is time sensitive. When delivery is "possible" depends on the nature of the work and the type of differing site condition. See e.g. Sutton Corp. v. Metropolitan District Com'n, 423 Mass. 200, 206 (1996) (contractor found approved sand drain installation method not possible due to unexpected subsurface condition; then "ceased operations [on April 24th] and notified MDC by letter [on April 27th]").

It is settled law that "the contractor must follow the procedures spelled out in the contract … before unilaterally accruing expenses to be pursued later" through claims. Glynn v. Gloucester, 21 Mass. App. Ct. 390, 395 (1986) quoting Glynn v. Gloucester, 9 Mass. App. Ct. 454, 460 (1980) ; Frederico Co. v. New Bedford Redev. Authy, 11 Mass. App. Ct. 248, 253 (1981) (claim "barred" if not made timely in accordance with contract procedures). Notice requirements must be strictly followed. See Marinucci v. Commonwealth, 354 Mass. 141, 145 (1968) (failure to timely submit claim in writing and itemized statement resulted in forfeiture of claim). Massachusetts appellate courts strictly construe the written notice requirements throughout Chapter 30. See e.g. Reynolds Bros. Inc. v. Commonwealth, 412 Mass 1 (1992) (only if awarding authority orders work stopped in writing may contractor seek equitable adjustment for suspensions and delay under G.L. c.30, s.39*O*); Glynn v. City of Gloucester, 9 Mass. App. Ct. 454, 461 (1980) (no recovery for work done in deviation from plans unless contractor shows "prior" "written approval" required by G.L. c.30, s. 39I).

Tropeano did not follow the procedures in the contract or set forth in Section 39N. Instead of notifying MassHighway in writing of differing site conditions and allowing the statutory process to unfold, Tropeano proceeded as if everything were "normal," unilaterally (and secretly) incurring costs it would later claim. Its actions frustrated the fundamental purpose of Section 39N as MassHighway could not conduct inspections of the supposed differing site conditions as soon as possible after they were discovered.

The record shows without doubt that Tropeano failed to request an equitable adjustment in writing as soon as possible after it discovered supposed differing site conditions. At best, Tropeano's January 31, 2005 "request," if assumed conforming in substance, was made five months after the last incident and fourteen months after the first. Its December 16, 2005 new "request," which appears to be a conforming Section 39N notice in substance, was delivered to MassHighway more than two years after the first differing site condition was found.

Tropeano argues that the procedural dictates of Section 39N were satisfied. It contends (i) that the "writing" requirement was met because the resident engineer made written "notations" in her diary; and (ii) that the timing requirement--"as soon as possible"--was met because the resident engineer at the time had actual knowledge of the site conditions and what work Tropeano performed on each utility service.

Tropeano fundamentally misapprehends Section 39N. Tropeano's argument, if correct, would frustrate—even vitiate—the statutory scheme, which plainly intends near-contemporaneous written notice, investigation and findings. Notations by the resident engineer in her diary can not constitute a timely written request of the contractor because that construction would render meaningless the requirement that a "request" be

"delivered by the party making the claim" to the other party.[7] A diary entry made for another purpose, even if it does show actual notice, can not satisfy the timing requirement. Since the diary entry is not a notice "in writing," the clock never starts to measure whether the contractor delivered a notice "in writing" "as soon as possible."

I conclude that Tropeano did not give MassHighway notice "in writing" as soon as possible after finding differing site conditions. It did not comply with the procedural requirements of Section 39N. Accordingly, Tropeano waived any Section 39N claim it might have asserted. See Skopek Bros., Inc. v. Webster Housing Authority, 11 Mass. App. Ct. 947, 947 (1981) (rescript) (request submitted 16 months after differing condition discovered non-conforming); Lawrence-Lynch Corp. v. Dept of Environmental Management, 392 Mass. 681, 396 (1986) (failure to follow procedures to claim equitable adjustment "precludes recovery").[8]

[7] Tropeano cites Sutton Corp. v. Metropolitan District Commission, 423 Mass. 200, 208 (1996) (Sutton) for the proposition that "if the state agency is aware throughout the project of the differing site conditions, then the state agency must demonstrate some prejudice as a result of the contractor's failure to provide written notice." (Tropeano's emphasis). The citation is incorrect. In Sutton the court found that the contractor had in fact supplied a timely written notice under Section 39N. See 423 Mass. at 205. With respect to the MDC's contractual (not statutory) requirement that an itemized statement of damages be filed upon request, the court noted that the MDC apparently never requested an itemized statement but that there was no evidence it "was prejudiced in any way by the lack of an itemized statement of damages." 423 Mass. at 208. Mere knowledge that a contractor is incurring additional costs will not support a finding that an agency waived strict compliance of the contract's provisions. See Glynn v. Gloucester, 9 Mass. App. Ct. 454, 462 n.10 (1980); Skopek Bros., Inc. v. Webster Housing Authy., 11 Mass. App. Ct. 947, 947 (1981). Tropeano's reliance on cases construing the notice requirement of the Massachusetts Tort Claims Act, G.L. c.258, s. 4, is unavailing. In Lopez v. Lynn Housing Authority, 440 Mass. 1029 (2003), and similar cases Tropeano cites, timely written notice was given but to the wrong official. The court held the notice provision satisfied where the proper official, the chief executive officer, had actual knowledge of the claim and the claim had been "investigated, evaluated and eventually denied." 440 Mass. at 1030. Here, Section 39N was not satisfied: no official received written notice; and MassHighway had no opportunity to investigate the differing site conditions when purportedly discovered.

[8] Tropeano proffers affidavit testimony to support its contention that a genuine issue of fact remains to be decided at a hearing—namely, whether MassHighway "waived or excused" compliance with the "writing" requirement of Section 39N through its actions. A waiver must be based on "clear, decisive, and unequivocal conduct on the part of an authorized representative of the agency." Glynn v. Gloucester, 9 Mass. App. Ct. 454, 462 (1980). No facts in Tropeano's affidavit could support a finding of waiver here.

Additional Claims

Tropeano argues that even if summary judgment is granted to MassHighway it may assert other viable theories of recovery under: (1) Subsection 2.03 (failure of MassHighway to prepare adequate plans and specifications; (2) Subsection 4.03 (extra work); Subsection 4.06 (increased quantities); and (4) Subsection 8.05 (discretionary relief for delay). The interests of substantial justice dictate that Tropeano should be able to litigate any claim it properly filed at the district and it should at least be permitted to move to amend its statement of claim.

ORDER

Partial summary judgment should be granted to MassHighway on Tropeano's Section 39N claim and my report to the Secretary will so recommend.

Tropeano shall have 30 days from this date to move to amend its statement of claim. It shall attach to its motion the documents that demonstrate that it in fact properly filed unaddressed claims at the district under Subsection 7.16 and that such claims were before the claims committee. MassHighway may respond to Tropeano's motion to amend within 30 days of filing.

____
Stephen H. Clark
Administrative Law Judge

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Dated

To: Secretary Richard A. Davey, MassDOT
From: Stephen H. Clark, Administrative Law Judge
Date: June 20, 2012
Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

On April 26, 2006 MassDOT awarded to S&R Corporation (S&R) general contract #44341 for demolishing an old bridge and constructing a new bridge over Lancaster Mills Pond in the town of Clinton.

S&R's appeal seeks $23,652.78 for claimed extra work it performed to make water- tight a cofferdam that incorporated part of the existing south abutment wall (Wall). MassDOT designed the cofferdam. Through Addendum No. 4 to the plans and specifications MassDOT required S&R to build the cofferdam according to MassDOT's design. However, the plans and specifications were both inaccurate and misleading because they invited bidders to assume that the Wall was water-tight when in fact it was not.

The contract did not contain a specific requirement that bidders investigate whether the Wall was water-tight. MassDOT's plans and specifications contained no disclaimer that the condition of the Wall was unknown.

In these circumstances general contract language stating that the contractor was "responsible" to build a cofferdam that allowed in the dry construction does not control. S&R is entitled to the cost of its extra work to make the cofferdam serviceable because MassDOT's plans for the cofferdam breached its implied warranty of accuracy and sufficiency. MassDOT's design was not suitable for the intended purpose of constructing a water-tight containment structure. See Alpert v. Commonwealth, 357 Mass. 306, 320 (1970) (contractor entitled to recover costs of increased expenditures caused by defective plans, even if minor); see also Joseph E. Bennett Co., Inc. v. Commonwealth, 21 Mass. App. Ct. 321, 326 (1985) (where plans led bidders to assume certain facts, failure to accurately specify what was in fact at the site caused contract documents to be "misleading").

I conclude the MassDOT should pay S&R $23,652.78 for its extra work of constructing a water-tight cofferdam.

INTRODUCTION

On April 26, 2006 MassDOT[1] awarded S&R Corporation (S&R) contract #44341 (Contract) to replace an existing bridge over Lancaster Mills Pond (Pond) adjacent to the spillway at its eastern end. S&R's winning bid was $4,758,919.00.

The Contract required demolishing the old bridge and constructing a new bridge. The plans required that demolition and new construction be done in the dry; the contractor was required to build a water-tight cofferdam at the south abutment for those purposes. The cofferdam had the shape of a long wall with short legs extending to dry land at each end. The wall to be used in the cofferdam shown on the plans was the south abutment of the old bridge (Wall). One leg consisted of an existing retaining wall extending to land (to the east); the other leg was to be newly driven steel sheeting that also extended to land (to the west).

During construction, S&R found that the Wall leaked to such an extent that the containment structure was not suitable for use as a cofferdam. S&R notified MassDOT in writing that it had encountered an unforeseen site condition and claimed an equitable adjustment in the amount of $23,652.78 to re-design and build a cofferdam that was sound.[2] MassDOT rejected the claim for an equitable adjustment because the Contract provided that any failure of the water-tight containment structure "shall be corrected at the sole expense of the contractor." See special provision 911.1.

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[1] MassDOT is the successor entity to MassHighway. See G.L. c. 6C.

[2] MassDOT and S&R stipulated that the value of extra work performed by S&R is $23,652.78. G.L. c. 30, s. 39N (Section 39N) permits an equitable adjustment to the contract price in favor of either the contractor or the awarding authority if an unforeseen site condition is found. Section 39N is incorporated into the Standard Specifications by Subsection 4.04. Under Subsection 4.04 an equitable adjustment is calculated by the formula to calculate extra work under Subsection 9.03. That S&R claimed "extra work," and not "an equitable adjustment," is inconsequential since the amount of recovery is identical.

I conclude that S&R should recover its extra cost to design and build a serviceable cofferdam. MassDOT's plans required that the Wall be incorporated into the cofferdam. While special provision 991.1 originally specified that S&R was "responsible" for designing and constructing the cofferdam, the final text, amended through Addendum No. 4 just eight days before bid, required that S&R build the cofferdam to the design issued by the government on plan sheet 11 of 37. Addendum No. 4 constituted an implied warranty that the government's cofferdam design was accurate, complete and suitable for its intended purpose.

There was nothing in the Contract that negated the implied warranty since there was no express disclaimer that the Wall's condition was unknown or that contractors were at their own risk should they find the Wall was not water-tight. I conclude that MassDOT breached its implied warranty that the Wall was suitable to use as part of the cofferdam. Plan 11 of 37 was defective and ambiguous because it invited bidders to erroneously assume that the Wall was water-tight. See Alpert v. Commonwealth, 357 Mass. 306, 320 (1970) (contractor entitled to recover costs of increased expenditures caused by defective plans, even if minor: "It is well established that where one party furnishes plans and specifications for a contractor to follow in a construction job, and the contractor in good faith relies thereon, the party furnishing such plans impliedly warrants their sufficiency for the purposes intended").

BACKGROUND

MassDOT awarded the Contract to replace the existing bridge adjacent to the Pond for Routes 62 and 70 in Clinton. The old bridge had been originally built about 1900, "reconstructed" in 1936 and then "rehabilitated" twice, in 1949 and 1961. Ex.1. Phased construction was specified. The old bridge and its replacement were located about 30 feet from the dam and spillway at the east end of the Pond, which was not drained during construction.

Plans 11 & 12 of 37. The design of the cofferdam incorporated the Wall of the south abutment. Ex. 1 (Plan 11 of 37; Addendum No. 4).

Contract Specifications

The original text of special provision 991.1, before Addendum No. 4 was issued, required bidders "to investigate, evaluate, design, construct, maintain and remove a complete temporary control of water structure" to allow the work on the new north and south bridge abutments to be built "in the dry." Special provision 991.1 for the control of water was paid by lump sum "complete and accepted" for

> all tools, material, equipment, labor and work incidental to the construction, dewatering, including pumping, and any related environmental controls used in handling water; handling of the stream flow during construction; the removal and disposal of all protective works or facilities; and the disposal of water removed from the construction.
>
> This work shall be understood to mean any temporary type of protective facility which the Contractor elects to build or use to satisfy, and which does satisfy the condition that the replacement bridge structure be placed and built in the dry. []
>
> Before commencing construction, the Contractor shall furnish the engineer with details of the plan and methods he proposed to use for handling water and accomplishing the work. The furnishing of such plans and methods shall not relieve the Contractor of any of his responsibility for the safety of the work and for the successful completion of the project.
>
> All such temporary structures or facilities shall be safely designed, extended to sufficient depths and be of such dimensions and water-tightness so as to assure construction of the permanent work in the dry.... Movements or failures of the temporary facilities, or any portions thereof, which prevents proper completion of the permanent work shall be corrected at the sole expense of the contractor.

Contract Plans

The Contract contained two plans that show MassDOT's design of the cofferdam. Plan 11 of 37 shows the MassDOT designed cofferdam consisted of the Wall, the existing retaining wall (east side) and the newly-driven steel sheeting to be installed (west side).

Note 1 on plan 11 of 37, "Cofferdam Notes," provides:

> The contractor is responsible for the limits and design of the steel cofferdam required for in the dry construction of proposed substructure. It shall be the responsibility of the contractor to assess the condition of the existing structures and modify the proposed methods of demolition and construction if necessary, as approved by the engineer.

The Standard Specifications require bidders to make a pre-bid site inspection. See Subsection 2.03.[3] Note 1 on plan 11 of 37 required bidders to "assess the condition of the existing structures."

Before S&R bid, Mr. Peter Salinder, vice president of construction operations and the officer responsible for assembling the bid package, visited the work site. From a row boat he made a visual inspection of the Wall. He could see the Wall above water; and he could see the Wall to a depth of about a foot below the surface of the Pond. He observed that the original granite block Wall had been faced with concrete. Mr. Salinder observed the Wall to be in good condition. S&R did not hire a diver to do an under water inspection of the Wall.

The Contract documents did not require bidders to perform any test for water tightness. Each party testified at the hearing that only a pressure grout test could have revealed whether the Wall was water-tight. That test is expensive and required draining the Pond.

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[3] Subsection 2.03 provides in relevant part: "The Bidder is expected to examine carefully the site of the proposed work, the proposal, plans, specifications, supplemental specifications, special provisions, and contract forms, before submitting a Proposal. The submission of a bid shall be considered prima facie evidence that the Bidder has made such examination of the site of the proposed work, plans, proposal, etc., and is familiar with the conditions to be encountered in performing the work …."

Revised Specification 991.1 inserted by Addendum No. 4

On February 14, 2006, eight days before bids were due, MassDOT modified special provision 991.1 by adding additional requirements. None of the original text was deleted. Compare Addendum No. 4 with original special provision 991.1.

In material part, the new text added to special provision 991.1 by Addendum No. 4 provided:

> The proposed method of handling water by installing a cofferdam system as shown on the plans and described below may be modified with the prior approval of the Engineer.
>
> This may include alternative methods of handling water, such as using permanent casing for drilled shaft construction in lieu of temporary casing, or using oversized casing in lieu of an extensive cofferdam system to control water around the proposed drilled shafts.

Addendum No. 4 did not alter Plan 11 of 37, which showed the design of the cofferdam using the Wall. Addendum No. 4 included a revised plan 12 of 37, which plainly altered the design of the cofferdam at the center pier. See revised plan 12 of 37.

After the Contract award MassDOT approved S&R's shop drawing for the cofferdam at the south abutment, as special provision 991.1 required. See Ex. 6. S&R's shop drawing was in all material respects identical to MassDOT's design appearing on plan 11 of 37.[4]

Dewatering Work

S&R began dewatering work at the old south abutment in July, 2007. It first drove steel sheeting in a wrap around configuration to the west of the Wall. After the sheeting was installed, MassDOT and S&R jointly discovered that a substantial amount of water was entering the excavation area from the land side of the Wall. S&R then attempted to dewater using pumps.

[4] S&R's working drawing included new data for work at the south abutment—for example, the specifications for pumps and the construction of a sedimentation basin. S&R's drawings for water containment structures at the north abutment and center pier showed material design changes. Compare Ex. 6 (S&R shop drawing) with Plan 11 of 37.

On July 27, 2007 S&R deployed larger capacity pumps, which lowered the water level slightly (450 MM) though not enough to allow work in the dry.

S&R's Claim

On July 31, 2007 S&R gave a written notice to the district highway director asserting a "claim" for "changed conditions" under the Contract's Standard Specifications.[5] Ex. #7. The notice stated that S&R would continue to perform "operations to control the water above and beyond the scope of the approved plan. The costs associated with this additional water control will be tracked on a time and material basis for reimbursement." Id.

Mr. Baker of MassDOT and Mr. Salinder then jointly inspected the Wall of the south abutment by boat. Mr. Baker found that the Wall was in poor condition but could not tell by visual inspection whether the Wall was permeable. Mr. Baker testified that a visual inspection alone was not a sure means to test permeability. He testified that he was not aware of any test for permeability that could be made unless water was first drained from the Pond. Mr. Salinder did not expect to find that the mortar and joints in the Wall had deteriorated "because the bridge was still in service." Mr. Salinder "assumed" that the Wall had similar water-tight characteristics as the adjacent dam because both structures were constructed of granite block in the same manner at the same time. The dam effectively held back "several feet of water."

In a second joint inspection S&R and MassDOT conducted a dye test to see where water was infiltrating through the face of the abutment Wall. The dye test was conducted after concrete behind the abutment Wall had been excavated. They concluded the Wall was porous but could not determine the rate of water flow.

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[5] S&R's letter stated that the implementation of the approved plan has been unsuccessful because "a substantial amount of water is entering the excavation from areas outside the designed 'control of water' areas. Therefore, in accordance with section 4.04 of the Standard Specifications for Highways and Bridges (1995), S&R hereby provides notice that a changed condition has been encountered."

S&R submitted and MassDOT approved a new design for the cofferdam, which required driving additional steel sheeting to the south of the Wall. When the new sheeting had been installed, dewatering become possible using pumps.

The district highway director denied S&R's claim for changed conditions under Section 39N on August 10, 2007. He found that no actual subsurface or latent physical conditions were found on the site that differed substantially from those shown on the plans. He cited special provision 991.1's requirement that the contractor was responsible to assure the "water-tightness" of temporary structures and to correct "failures of the temporary facilities" at its "sole expense." Ex. 8.

On September 14, 2007 S&R sought reconsideration of the district director's ruling because "a latent physical condition was encountered that differed materially from those shown on the plans or indicated in the contract documents, as evidenced by the lack of design for water control at this location." Ex. 9. On January 11, 2008 the district highway director affirmed his initial denial of S&R's claim and invited S&R to submit a "formal claim."[6] Ex. 10. S&R thereupon submitted two additional letters asserting a Section 39N claim, the first on February 4, 2008, Ex. 11, and the second on November 28, 2008 following a meeting in the District on November 7, 2008. The District denied all S&R's claims. Ex. 12 (restated determination dated January 11, 2008). The District then forwarded the claim to the Claims Committee.

On January 15, 2009 the Claims Committee denied S&R's claim citing the text of special provision 991.1 and the note on sheet 34 of 65 that stated "The Contractor is responsible for the limits and design of the steel cofferdam required for the in the dry construction. It shall be the

[6] In the circumstances of this appeal, I find that S&R's July 31, 2007 written notice under Section 39N was a timely claim under Subsection 7.16. See Sutton Corp. v. MDC, 423 Mass. 200 (1996).

responsibility of the Contractor to assess the condition of the existing structures and modify the proposed methods of demolition and construction if necessary…."

S&R's Appeal

On February 12, 2009 S&R filed a notice of appeal; on March 24, 2009 it filed a statement of claim.

Before the hearing S&R and MassDOT stipulated that the value of the extra work S&R incurred to construct a viable cofferdam was $23,652.78. [7]

On July 22 and September 17, 2009 I conducted pre-hearing conferences. On November 19, 2009 I held a hearing on S&R's appeal. S&R was represented by John Davagian, Esq. S&R's witnesses at the hearing were Mr. Peter Salinder and Mr. Eric Jones. At the hearing MassHighway was represented by Jane E. Estey, Esq. MassHighway's witnesses at the hearing were Mssrs. David Baker, John Cavanaugh, Mike McGinty and Jim Galvin. Also present was Nancy Devin, Administrator of this office and Josh Matloff, Law Clerk.

The parties submitted 16 Joint Exhibits, which were admitted as evidence:

(1) Contract #44341 (including, plans, specifications and addenda)
(2) Parson Quantity Estimate dated 06/13/05
(3) Mark Holcomb email dated 02/14/06 with attachments
(4) S&R photo #3757 dated 02/02/06
(5) MHD photo dated 10/31/06
(6) MHD approval of S&R's water control plan dated 03/27/07
(7) S&R letter of 07/31/07 (notice of changed site condition)
(8) MHD letter 08/10/07 (denying changed condition and any claim for additional compensation)
(9) MHD S&R letter 09/14/07 (challenging MHD's denial of changed condition and requesting extra work order of $25,777.08)
(10) MHD letter 01/11/08 refusing to issue EWO
(11) S&R letter of 02/4/08 submitting claim for $25,777.08 alleging changed condition
(12) MHD letter of 2/20/08 with recommendation of District to Claims Committee that S&R's claim be denied

[7] The additional costs were calculated under Subsection 9.03 for direct labor ($6,515.36), equipment ($7,005.47) and materials ($4,034.96) plus allowable escalation for overhead, indirect labor and profit.

(13) S&R letter of 11/24/08 resubmitting claim in amount of $23,652.78
(14) MHD Memorandum dated 11/26/08
(15) S&R statement of claim on appeal dated 03/24/09
(16) MHD interoffice memorandum dated 05/18/09.

DISCUSSION

Whether S&R may recover its costs to make water-tight the cofferdam it first constructed according to the design on plan 11 of 37 turns on the legal meaning of the Contract documents that describe the water control work. Specifically, the question is the legal meaning of special provision 991.1 and plan 11 of 37.

In public construction contracts it is well settled that the awarding authority's plans and specifications constitute an implied warranty of feasibility, accuracy and completeness. See United States v. Spearin, 248 U.S. 132 (1918) (Spearin). The so-called Spearin doctrine has been incorporated into the law in Massachusetts. "[T]here is implied in a set of construction plans and specifications a warranty that they are accurate as to descriptions of the kind and quantity of the work required." Richardson Electrical Co. v. Peter Francese & Son, Inc., 21 Mass App. Ct. 47, 50 (1985), citing M.L. Shalloo, Inc. v. Ricciardi & Sons Construction, 348 Mass. 682, 686-688 (1965) and Alpert v Commonwealth, 357 Mass. 306 , 321 (1970).

Contractors are required to strictly adhere to project plans and specifications; deviations without the written approval of the awarding authority are at the contractor's peril. See G.L. c.30, s.39*I*. The cost to correct work done not in conformity with the contract documents is borne solely by the contractor. See Glynn v. City of Gloucester, 9 Mass. App. Ct. 454, 461 (19801).

The government's implied warranty of feasibility, accuracy and completeness may be negated by an express disclaimer. For example, a specific disclaimer may "preclude" a contractor's reliance on furnished estimates. See Richardson Electrical Co. v. Peter Francese &

Son, Inc., supra, 21 Mass. App. Ct. at 50-51; see also D. Frederico Co., Inc. v. Commonwealth, 11 Mass. App. Ct. 248, 251-252 (1981) (express disclaimer effective where contract stated that quantities of excavation and fill not "guaranteed"); Daniel O'Connell's Sons, Inc. v. Commonwealth, 349 Mass. 642 (1965) (disclaimer of the accuracy of "limited geologic data" and warning that reliance on information furnished was at the bidder's sole risk).[8] An implied warranty also applies when physical conditions are described in the contract documents or when the government provides the affirmative data intended to be used in formulating bids. Id.

Where contract documents are silent on a material point with respect to plans, that fact combined with other material facts may nonetheless amount to an implied a warranty since "silence … can, paradoxically, speak." See Richardson Electrical Co. v. Peter Francese & Son, Inc., supra, 21 Mass App. Ct. at 51 (although documents silent on how telephone service was to come to the site, inference could be drawn that it would come via contact pole for electric power); see also Joseph E. Bennett Co., Inc. v. Commonwealth, 21 Mass. App. Ct. 321, 326 (1985) (where bidders had a reasonable expectation that electric power would be provided at or near the site, failure of plans and specifications to locate contact point for temporary power caused contract documents to be "misleading").

Unforeseen site conditions are "actual subsurface or latent physical conditions encountered at the site [that] differ substantially or materially from those shown on the plans or indicated in the contract documents…." Section 39N. After timely notice of discovery the government "shall make an investigation of such physical conditions" to determine how site conditions differ from plans or how construction methods might have to be changed. An

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[8] A general disclaimer is not effective to negate the implied warranty of accuracy and suitability. An implied warranty "is not overcome by the general clauses requiring the contractor to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance." Spearin, supra, 248 U.S. at 137.

equitable adjustment may be either an increase or decrease in the contract price. Subsection 4.04 of the Standard Specifications provides the method to calculate an equitable adjustment under Section 39N, which is identical to the calculation of extra work under Subsection 9.03. Id.

Generally, an unforeseen condition claim can not succeed if the "unforeseen condition" should have been discovered before bid in a pre-bid investigation. However, the scope of a site investigation requirement must be reasonable in order to be enforceable, since bidders may not be held to perform expensive, time consuming tests pre-bid unless expressly directed. See Robert E. McKee, Inc. v. City of Atlanta, 414 F. Supp. 957, 959 (1976) ("Certain jobsite investigations are not expected to be performed by each and every bidder; rather, the government performs certain basic tests in order to provide each bidder with some information on which he may rely in his bid. If every bidder were required to perform all the investigations, even though the chance of receiving the bid was remote, the number of bids would decrease and the dollar amount of the bids would increase"); accord Glynn v. Gloucester, supra, 9 Mass. App. Ct. at 461 n.9 (detailed plans and specifications are intended to "strip the risk" of unknown conditions; work outside detailed specifications is properly extra work).

If the contract contains an express contractual disclaimer that puts bidders on notice that all risk of increased costs for a specified unknown will fall on the contractor, it will negate a claim under Section 39N. See Daniel O'Connell's Sons, Inc. v. Commonwealth, 349 Mass. 642 (1965) (express disclaimer of subsurface conditions effective where payment for additional work "precluded"); see also D. Frederico Co., Inc. v. Commonwealth, supra, 11 Mass. App. Ct. at 251-251 (express disclaimer that quantities "not guaranteed" precluded warranty of accuracy).

Here, the government issued final plans and specifications for a water containment structure at the south abutment that were materially misleading because they were both

inaccurate and not feasible. The government affirmatively required that its design, shown on plan 11 of 37, be used unless a modified design had first been approved. But the Contract documents neither disclosed that the Wall was permeable nor required bidders to perform a specific test to assess its suitability as part of a cofferdam. The combination of MassDOT's affirmative representations, shown on the plans, with its silence on the critical condition of the Wall, induced bidders to assume that the Wall was fit to use as a principal component of the water-tight containment structure. Compare Joseph E. Bennett Co., Inc. v. Commonwealth, supra, 21 Mass. App. Ct. at 326.

The Contract plans plainly showed that the Wall was to be a part of the required cofferdam. Special provision 991.1, as appearing in final form in Addendum No. 4, required S&R to construct the cofferdam shown on plan 11 of 37 unless a substitute design had been approved. In these circumstances the final Contract documents constituted an affirmative representation that the Wall was fit for the purpose shown on plan 11 of 37. Accordingly, the government gave an implied warranty of accuracy and feasibility to all bidders. Richardson Electrical Co. v. Peter Francese & Son, Inc., supra, 21 Mass App. Ct. at 51.

The facts reveal that, although accurate, the Contract documents are ultimately misleading. The plans are accurate in the sense that they contain no obvious error to put bidders on notice to seek clarification. Compare John F. Miller Co. v. George Fichera Construction Corp., 7 Mass. App. Ct. 494, 499 (1979) (if error obvious bidder obliged to ask; if subtle government bears risk). But they are ultimately misleading because of material omissions: the

failure to disclose that the condition of the Wall was not known[9] and the failure to state that the impermeability of structures--including the Wall--was not guaranteed.

MassDOT argues that, since special provision 991.1 required that bidders "assess the condition of the existing structures," S&R was obliged to determine whether the Wall was water-tight before it bid. It further argues that, because the plans and specifications did not guarantee that the Wall was water-tight, S&R was on notice that it should have tested for water-tightness of the Wall. It suggests that no specific disclaimer is necessary since the Contract documents included a general statement that a pre-bid site assessment was necessary and the Contract made S&R "responsible" for constructing a water-tight containment structure.

Authority is clear, however, that where the plans include affirmative representations combined with material omissions only an express disclaimer, plainly stated, can shift the risk of additional cost to the contractor. See Richardson Electrical Co. v. Peter Francese & Son, Inc., supra, 21 Mass App. Ct. at 51. By issuing inaccurate and not feasible final plans through Addendum No. 4 without a specific disclaimer, the government invited bidders to assume that the Wall was fit to use in a water-tight containment structure. Its plans thus impliedly warranted its own design, when built, would result in a water-tight containment structure.

Since the government's plans must be followed, only an express disclaimer, properly focused, can relieve the government of the financial risk that may result if the plans are not accurate. Id. Here, general language purporting to make the contractor "responsible" for additional costs, in the absence of a specific disclaimer about the Wall, did not work to shift the risk of the cost of extra work to S&R. Compare Wunderlich v. California, 65 Cal. 2d 777

[9] There is no evidence on this record that the government knew the Wall was defective but failed to disclose that fact. Failure to disclose material knowledge held by the government that causes bidders to read plans incorrectly may be a ground for recovery. See Alpert v. Commonwealth, 357 Mass. 306 (1970).

(1967)[10] and D. Frederico Co., Inc. v. Commonwealth, supra, 11 Mass. App. Ct. at 251-252 (quantities inaccurate but express disclaimer effective where quantities "not guaranteed"). [11]

CONCLUSION

The risk that extra work might result if the Wall was not water-tight properly falls on the government. In the absence of a specific disclaimer, the government's implied warranties and its omission of material facts govern the outcome. Special provision 991.1 modified through Addendum No. 4 carried implied warranties. Where the plans and specifications were not feasible and not accurate, I conclude that the specifications were defective. MassDOT should pay S&R $23,652.78 for its extra work.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: June ___, 2012

[10] The Wunderlich court understood that "it is obvious that a governmental agency should not be put in the position of encouraging careless bidding by contractors who might anticipate that should conditions differ from optimistic expectations reflected in the bidding, the government will bear the costs of the bidder's error….[T]he question is whether, under the circumstances of the indefinite nature of the statements and existence of exculpatory provisions, the bidder could justifiably rely on the statements."

[11] I note that, since the plans and specifications did not state that the Wall was water-tight, the argument that the found condition differed "substantially or materially from those shown on the plans or indicated in the contract documents" is not straightforward. What S&R's employees believed the plans to mean does not control the outcome, since Section 39N requires site conditions that differ from what is stated on the plans.

APPENDIX D-1

DECISIONS/RULINGS

Disputes re: Damage Calculations and Final Estimates

To:	Secretary John Cogliano, EOT
Through:	Commissioner Luisa Paiewonsky, MHD
From:	Stephen H. Clark, Administrative Law Judge
Date:	May 26, 2006
Re:	Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

L.A.L. Construction Co., Inc. (LAL), contractor on Department contract #99231 (Contract) for scheduled and emergency repairs of bridge joints at various locations in District 2, appealed from the refusal of the claims committee to award it $24,117.14 for the extra work of machine cold planing 211 SY of roadway approaches to 6 bridges. LAL and the Department agreed the cold planing was extra work but failed to agree on a lump sum or unit price. Under the Contract LAL was required to perform the extra work at the "actual cost" of its direct labor and equipment used.

LAL did not keep contemporaneous records of labor costs or equipment used but estimated such costs after the work was done. LAL incorporated its estimates costs into a proposed unit price of $114.32/SY. The Department kept contemporaneous records of time and equipment used, which observations formed the basis of calculated "actual costs" of $12,170.73.

I conclude that the Department's method comports with the Contract and that LAL's method does not. The Department's method to determine "actual cost" was based on measurements and observations it made during the work. LAL did not keep records in the ordinary course of business to show the cost of labor and equipment on an hourly basis, as the Contract required. For these reasons I find the Department's calculation of "actual cost" of $12,170.73 more credible and more reliable.

Accordingly, the Department should pay LAL $12,170.73 for the extra work of cold planing.

INTRODUCTION

L.A.L. Construction Co., Inc. (LAL), the general contractor on Department contract #99231 (Contract) for "scheduled and emergency repairs of bridge joints at various locations in District 2," appeals from the denial of the claims committee's determination of the "actual costs" to perform extra work of cold planning on the roadway approaches. Because the Department and LAL did not agree on a lump sum or unit price before LAL began, Subsection 9.03 of the Standard Specifications required the Department to pay LAL the "actual cost" for the extra work. It is undisputed that LAL cold planed 211 square yards (SY) of old pavement on the roadway approaches to six bridges.[1] This appeal must decide LAL's "actual cost" under Subsection 9.03.

LAL claims the Department should pay it $24,117.14 based on its own estimates made after the fact of labor expended and equipment used. It argues that the Department must insert Item 129.0 ("Bituminous Concrete Excavation By Cold Planer") (Item 129) of the Standard Specifications into the Contract and pay LAL as if the extra work were done under Item 129. The Department argues, and the claims committee agreed, that the Department should pay LAL $12,170.73 based on records of labor and equipment kept at the time.

LAL's appeal has no merit. The Contract provides that LAL "accept as full payment" the "actual cost" to perform the extra work. The Department was not required to add a pay item to the Contract. LAL did not keep contemporaneous records of its actual labor and equipment costs. Because it did not keep such records, LAL could not

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[1] Cold planing work done between August 21, 2000 and May 7, 2001 totaled 210.99 square yards (SY).

show at the hearing who did the work (by day and hour) or what equipment was actually used (by day and hour).

The Contract does not require the Department to accept LAL's estimates of "actual cost." The Department kept good (but not perfect) contemporaneous records of the time and equipment expended although not required by the Contract to do so. The Department's measurements, record keeping and method of calculating "actual cost" are reliable for Subsection 9.03 purposes. I recommend that the claims committee's decision be confirmed. The Department should pay LAL $12,170.73 for the cold planing extra work.

BACKGROUND

The Department awarded Contract #99231 on August 11, 1999. The Contract completion date was August 29, 2000; the Notice to Proceed was issued on August 31, 1999. The Contract called for the maintenance of bridge joints and roadway approaches on 13 specified bridges in Deerfield, Greenfield, Springfield and W. Springfield. Old pavement was to be removed on both the bridge deck and roadway approaches.

The Contract Special Provisions

To show where old pavement was to be removed on the joints of the bridge deck, the Contract contained drawings of typical expansion joints. See Contract, pages A00893- 107 through 114 ("Limits of Excavation Expansion Joint w/Angles @ Abutment"). Item 129.3, a special provision (Item 129.3), stated the method by which old pavement was to be removed at the joints.

> The work to be done under this item consists of the excavation of existing pavement to allow for the installation of the bridge joint system. [ ]

> Construction Methods: The pavement shall be excavated using wide-blade pneumatic hammers or by other approved methods. The 'COLD-PLANER' method will not be allowed. (Emphasis in the original.)

Where the contractor was to remove old pavement on the roadway approaches, the schematic drawing showed the typical "limits of old pavement excavation" and the location of saw cuts in the "old pavement." Id. at 114. There was no separate pay item in the special provisions for removal of "old pavement" on the roadway approaches; the Contract did not specify what method LAL should use to remove that old pavement.

During performance LAL and District 2 agreed that Item 129.3 of the special provisions, which limited the method for removing pavement at the expansion joints to "hand work," did not require LAL to remove old pavement from the approaches by the hand method; and they agreed that LAL should use machine cold planing on the approaches as that method gave better result.[2] The parties ultimately agreed that machine cold planing was extra work but failed to agree on a lump sum or unit price basis before LAL began the extra work.

Performance Of The Cold Planing Extra Work

On August 21, 2000 LAL started to remove old pavement from the roadways of the scheduled bridges in what the parties call Phase 1, which took place on 10 working days between August 21, 2000 and September 27, 2000. In all, LAL removed 127.23 SY of old pavement from the approaches in Phase 1.

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[2] On the bridge approaches the pavement to be removed was thicker than the 3" found on the bridge deck, which meant that it could not be "hammered out manually." LAL testimony. In fact, on the approaches some 8" to 10" of material had to be removed. It was this basis that LAL and the District agreed that cold planing machinery was the best and most economical method.

LAL kept no contemporaneous records of the time expended for labor or the specific equipment used during Phase 1. The Department kept records for 5 of the 10 days showing the time taken for the work, which was between 75 minutes and 120 minutes on a given day. In all, LAL removed between 13.65 SY and 14.2 SY of material on days when the extra work was done.[3] On the 5 days on which the District failed to keep contemporaneous records, LAL cold planed a total of 47.69 SY.

During Phase 1 District 2's project records recorded that LAL used "one foreman/Operator and one laborer" for cold-planing (including set up, breakdown and clean up). The District recorded the equipment used as "a skid steer loader and the cold planer attachment." The Department noted that other equipment was occasionally used but was already "on the job site [] when cold planing was not being performed." The District thus deemed such equipment "incidental to other construction operations." Ex. # 3, (Attachment #1).

Phase 2 of the cold planing work took place between November 8 and November 20, 2000 on 8 separate days. Both the Department and LAL recorded the number of minutes LAL worked on cold planing in Phase 2 and agree that the work took 18.84 hours (including set up, breakdown and cleanup). LAL kept no contemporaneous records of the time expended for labor or the specific equipment used during Phase 2. LAL removed 46.61 SY of old pavement from the approaches to 3 bridges in Phase 2. Statement of Claim, Ex. #3, (Attachment #3b).

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[3] For example, on 8/21/00 LAL removed 14.2 SY in 75 minutes; on 9/25/00 it removed 15.77 SY in 110 minutes; on 9/26/00, 13.65 SY in 120 minutes; and on 9/27/00, 18.24 SY in 120 minutes. Ex. #5.

Phase 3 took place between April 24 and May 7, 2001 on 4 separate days. During Phase, 3 LAL removed 37.14 SY of pavement, which took 8.75 hours (including set up, breakdown and clean up), as the Department measured.[4] LAL's records show and the Department does not dispute that the Phase 3 work took 8.75 hours. Ex. #3. LAL kept no contemporaneous records of the time expended for labor or the specific equipment used during Phase 3.

"Actual" Cost Calculations

After Phases 1 and 2 of the extra work was done, the parties attempted--but failed--to reach an agreement on LAL's "actual costs." On January 8, 2001 the District first requested LAL to submit a cost breakdown based on its "actual costs." On January 24, 2001 LAL responded by suggesting that pay Item 129 ("Excavation by Cold Planer") of the Standard Specifications "be added to" the Contract. In the stalled negotiation LAL insisted that the Department agree on a negotiated $/SY unit price while the Department insisted that LAL prove its costs through its own accounting records. LAL thus performed Phase 3 work on a force account basis.

The record on appeal shows that the Department and LAL agree on four material facts, which I accept as true. (1) LAL removed 211 SY of old pavement by cold planing extra work; (2) LAL kept no time records and the District kept incomplete time records for Phase 1; (3) the average productivity for cold planing was 20 minutes for 1 SY (or 3

[4] For reasons unknown the District failed to measure the time LAL took to remove 7.56 SY of material on April 26, 2001. LAL measured the total time expended to be 8.75 hours. Because of the methodology the Department used to calculate costs, District 2's omission is not material.

SY/hour); (4) Phase 2 and Phase 3 time and productivity measurements could reasonably be used to calculate an accurate time estimate for the Phase 1 work.

LAL's Method To Estimate "Actual Cost"

LAL first postulates a daily base labor cost of $135.32 based on a 2.3 hour workday.[5] LAL then sets forth a daily equipment cost of $403.50.[6] LAL then increases both the labor cost of $403.50 and the equipment cost of $403.50 by the undisputed add-ons to yield a total daily cost of $797.96. See <u>infra</u> at 9 n.12.

LAL next derives an average daily productivity rate of 6.98 square yards (or 3 square yards/hour).[7] LAL then derives its proposed unit price of $114.32/SY by simple calculation (797.96/6.98SY = $144.32/SY). To calculate its "actual cost" LAL then multiplies the unit price of $144.32/SY by the total of 211 SY of extra work, which yields a total of $24,117.14 ($114.32/SY x 211 SY). LAL did not use actual contemporaneous records of either labor expended or equipment used as the basis of its "actual cost" calculation.

The Department's Cost Calculations

The District used data it recorded on site during the work to derive LAL's "actual cost" of both labor and equipment. To determine labor costs, the District multiplied the

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[5] The daily labor costs included ½ hour of saw cutting work and 1 hour of prep work and clean up. (2 laborers (4.5 man hours @$19.90/hr) plus 1 foreman (2.3 hours @$19.90/hr).

[6] 7 pieces of equipment for 2.3 hours at various hourly rates; 4 pieces for 4 hours at various hourly rates; and the cold planer itself for 8 hours/day @$18.75/hr. Specifically, Pick up 2.3hr @$10/hr; SM 6 wheeler 2.3 hrs @$10/hr; LG-6 wheeler 2.3hrs @$10/hr; stake body 6 wheeler 2.3 hrs @10/hr; bobcat loader 2.3 hrs @$25/hr; cold planer 8 hrs@$8.75/hr; street saw 4 hrs @$8.75/hr; diamond blade 4 hrs @$6.25/hr; compressor 2.3/hrs @$8.75/hr; 60 lbs hammer 4hrs @$3.75/hr; Bit. Conc. Chisel 4 hrs @$1.50/hr; and 50 ft. air hose 2.3 hrs @$1.25hr.

[7] It does this by adding together the actual square yards extra work done on Phase 2 and Phase 3 (83.74SY) and dividing that number by the 12 days needed for that work (83.74/12 = 6.98).

labor rate/hour times the man hours LAL expended to perform the work. The District's records showed that on average 17 minutes was needed to set up, breakdown and clean up.[8] The District thus added 17 minutes to the time it observed LAL do the extra work during Phase 2 and Phase 3, which then totaled 1,525 minutes.[9] From these observed and calculated data the District found a productivity rate, which it found by dividing 1,525 minutes by 76.19 SY, the extra work done in Phase 2 and 3. The result was 20.0 min./SY (1,525/76.19). The District then calculated the total time in minutes needed to perform the whole extra work by multiplying the productivity rate of 20min/SY times 211 SY, which yielded 4220 minutes (or 70.33 hours).

District 2 then used 70.33 hours as the principal basis to calculate both labor and equipment costs for all the extra work. For "direct labor" it found $2,799.13.[10] For the "actual" cost of equipment used it found $5,058.25[11] To these base figures the district then applied the add-ons required by Subsection 9.03, which after a credit of $326.60, yielded a grand total for labor and equipment of $12,170.73.

The Appeal

LAL notified the Department orally of its claim for extra work on September 11, 2000 and by a letter dated January 3, 2001. On January 8, 2001 District 2 requested "a price and breakdown based on the actual costs associated with the cold planing

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[8] The District observed the actual time needed to set up and breakdown of the cold plane attachment onto the skid steer "bobcat" loader on 7 days. Ex. #5.

[9] It used the actual time measured to do the work on the 11 days of Phase 2 and Phase 3, adding 17 minutes to the time recorded for each day's portion of the extra work.

[10] 2 men (working foreman/operator) @ $19.90/hr X 2 = $39.80/hr X 70.33 hrs = $2,799.13.

[11] (1 bobcat loader @$25/hr X $70.33 hrs = $1,758.25) + (1 cold planer $150/day X 22 days = $3,300.00) = $5,058.25.

operation." On January 11, 2001 LAL purported to submit a formal written "Claim No. 1." On January 24, 2001 LAL resubmitted documents purporting to be an "actual" cost breakdown. The District rejected both methodology and result on February 21, 2001.

On September 21, 2001, after Phase 3 had been completed on a time and materials basis, LAL again submitted proposed "actual" cost breakdowns. On November 14, 2001 the District again rejected LAL's proposed costs and again requested LAL to provide it an "actual" cost breakdown.

On January 2, 2002 LAL submitted a "revised" "actual cost" estimate of $24,117.14 based on a unit cost of $114.32/SY. Once again it claimed the extra work was done under Item 129.0 of the Standard Specifications. The claim was rejected by the District and forwarded to the claims committee, which on April 2, 2002 rejected the estimated "actual costs" of $24,117.14, but approved $12,170.73 in costs as calculated by District 2.

On June 6, 2002 LAL filed a notice of appeal at the office of the Administrative Law Judge. On September 27, 2002 LAL filed a Statement of Claim in support. On February 20, 2003 District 2 filed a response to the Statement of Claim.

On April 15, 2004 this officer heard LAL's appeal. Present were

Philip Louro, project engineer	LAL
Marcello Louro, project engineer	LAL
John Lucey, Esq.	Counsel, LAL
Donna Feng, District Construction Engineer	MHD
Mark Banasieski, Dist. Const. Area Supervisor	MHD
John Donoghue, Acting Dist. Structure Maintenance Supervisor	NHD
Isaac Machado, Esq.	Deputy Counsel, MHD
Stephen H. Clark	Administrative Law Judge

The following exhibits were admitted in evidence

Ex. #1	LAL letter (January 2, 2002)
Ex. #2	Contract Drawing 114 ("Limits of Excavation Expansion Joint with angles at Abutment")
Ex. #3	LAL Statement of Claim (September 27, 2002)
Ex. #4	District 2 letter requesting actual costs (January 8, 2001)
Ex. #5	District 2 time and materials breakdown (undated)
Ex. #6	Contract # 99231
Ex. #7	Claims Committee letter (April 2, 2002)

I took the matter under advisement after the hearing. On July 21, 2004, through St. 2004, c. 196, s. 5 (Act), the Legislature abolished the Board of Highway Commissioners and conferred its prior functions on the Secretary of Transportation (Secretary) and the Commissioner of the Department (Commissioner). See G.L. c.16, s. 1(b), as appearing in the Act. This report and recommendation is made through the Commissioner to the Secretary under authority of the Act.

DISCUSSION

What are the "actual costs" of LAL under the Contract to perform 211 SY of extra cold planing work under Subsection 9.03(B)?

Subsection 9.03(B) of the Standard Specifications provide

> Unless an agreed lump sum and/or unit price is obtained from above and is so stated in the Extra Work Order the Contractor shall accept as full payment for work or materials for which no price agreement is contained in the Contract an amount equal to the following: (1) the actual cost of direct labor … and use of equipment plus [plus labor burden, allowed overhead and other add-ons].[12]

[12] The add-ons, and how they are calculated, are not in dispute. The add-ons consist of (1) "10 percent of this total [of the actual cost of direct labor and equipment use] for overhead: (2) plus the actual cost of Workmen's Compensation and Liability Insurance, Health, Welfare and Pension benefits, Social Security deductions, Employment Security Benefits, and such additional fringe benefits which the Contractor is required to pay as a result of Union Labor Agreements and/or is required by authorized governmental agencies: (3) plus 10 percent of the total of (1) and (2); (4) plus the estimated proportionate cost of surety bonds…." See Subsection 9.03(B).

The Subsection also provides:

> The Contractor shall, when requested by the Engineer, furnish itemized statement of the cost of the work ordered and give the engineer access to all accounts, bills and vouchers relating thereto, and unless the Contractor shall furnish such itemized statements, access to all accounts, bill and vouchers, the contractor shall not be entitled to payment for any items of extra work for which such information is sought by the Engineer.

For "actual" equipment costs Subsection 9.03(C)(2)(a) sets forth the applicable requirements, which, in pertinent part, state

> Actual cost data from the Contractor's accounting and operating records shall be used whenever such data can be determined for hourly ownership and operating costs for each piece of equipment…. Actual costs shall be limited to booked costs … [for] periods during which the equipment was utilized on the Contract, and will not include estimated costs not recorded and identifiable in the Contractor's formal accounting records.[13]

Because LAL and the Department did not reach agreement on either a lump sum or unit price before the work began, the Contract required that LAL be paid on a "force account" basis. Specifically, LAL was required to "accept as full payment for [the] work" "an amount equal to" its "actual costs," as determined under Subsection 9.03(B).

Analysis

Subsection 9.03(B) imposed on LAL the affirmative burden of providing the Department with an "itemized statement of the cost of the work ordered" as well as "all accounts, bills and vouchers relating thereto" when requested. The District repeatedly requested records from LAL evidencing its "actual cost" of the extra work performed in the summer and fall of 2000 and spring of 2001. LAL failed to furnish any such

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[13] Subsection 9.03(C)(2)(a) continues: "The Contractor shall afford Department auditors full access to all accounting, equipment usage, and other records necessary for development or confirmation of actual hourly cost rates for each piece of equipment ….The Contractor's refusal to give such full access shall invalidate any request or claim for payment of the equipment costs. When costs cannot be determined from the Contractor's records, hourly equipment cost rates may be determined under (b) and (c) below."

"itemized statement" until January 2, 2002, which was more than a year after the work was completed. LAL never gave District 2 "accounts, bills and vouchers relating to" the extra work. LAL kept no meaningful records of any "actual" direct labor or hourly costs of equipment used. Because LAL's cost estimates contain both conceptual and factual flaws, I accept the Department's cost calculations as an accurate statement of "actual cost" under Subsection 9.03(B). The factual record supports the ultimate finding that LAL did not meet the Contract's requirement that it demonstrate its "actual cost" by the method forth in Subsection 9.03(C)(2)(a).

Item 129 and LAL's Proposed Unit Price

LAL is incorrect that the Department is obliged to insert pay Item 129 into the Contract or pay it on the basis of a unit price. Nothing in the Contract requires the Department to take either step. The Department was free to order a small quantity of cold planing extra work by machine where that method would produce a better end product than hand work.

LAL also argues that its daily unit price of $114.32/SY should be accepted as the basis of its "actual cost" to do the extra work. LAL obtains a unit price by dividing its daily cost of $797.96 by a daily productivity rate of 6.98 SY. Its "actual cost" is then determined by multiplying $114.32 by 22, the number of days on which extra work was performed. I reject LAL's proposed unit price of $114.32/SY since it does not meet the requirements of Subsection 9.03(B) and is not reliable.

Each of the two components LAL uses to calculate its proposed unit price is an estimate. The first component is a combined estimate of the daily cost of labor and

equipment ($797.96/day); the second, a rough average of daily productivity figure of (6.98SY/day).

The combined daily labor and equipment cost is based on nothing more than estimates. LAL adduced no evidence on this record of its contemporaneously incurred costs of either labor or equipment. It kept no daily log of expenses that it could aggregate to obtain documented costs incurred during the specific times the work was done. Consequently, LAL's daily cost of $797.96 is unsupported by facts. Instead, both labor and equipment costs are essentially based on pro forma statements untied to LAL's detailed records kept in the ordinary course of business. The second component is similarly an estimated average of daily productivity.

LAL submitted its estimated labor and equipment costs for the first time in January 2002, long after the work was done. The basis of its estimated labor cost was the unsupported assumption that four people were needed to do the cold planing work. LAL proffered no document that recorded that assumption. The Department's testimony and observations directly contradicted LAL's assumptions since they showed that two men--not four--were usually employed in the work. LAL's equipment cost estimate likewise only assumed (without supporting documentation) that 4 trucks were needed during each hour that the extra work was performed. That assumption was also directly contradicted by the records the District kept.

The only document LAL submitted at the hearing to prove the costs of "direct labor" was a computer print out of LAL certified payrolls for a single week during Phase 3. The printouts did not show who worked on the cold planing sites, or on what dates or

times. Nothing in the printout itself showed the direct labor cost of any actual cold planing work. I think the payroll records LAL submitted in support of its claim are manifestly inadequate to prove the "actual" cost of "direct labor" that LAL used in its cost calculations.

Similarly, the only document LAL submitted at the hearing to prove the "actual cost" of equipment was inadequate for that purpose. Subsection 9.03(C)(2)(a) provides that records to prove actual cost of equipment should be from a contractor's "accounting and operating records." Such records "shall be used whenever such data can be determined for hourly ownership and operating costs for each piece of equipment." Here, LAL submitted nothing to substantiate the hourly costs it estimated for the equipment it listed in its proposed unit price.

The only document LAL submitted as proof was an invoice from Pleasant Rentals and Sales (Pleasant) dated May 31, 2001, which recorded monthly equipment rental charges on many pieces of equipment from May 2, 2001 through May 31, 2001 during Phase 3. A notation on the face of the invoice says "[check mark] indicates equipment used in the operation." See Ex. #3, Attachment 3(d). No sworn testimony established what equipment was actually used, let alone where or when.

The monthly rents shown on the Pleasant invoice are not substantial evidence of the equipment costs incurred by LAL during Phases 1, 2 or 3 of the extra work. They are not "hourly" costs, as Subsection 9.03(C)(2)(a) requires. The single invoice is dated May 31, 2001 for the period May 1 through 31st. On May 1st all but 22 SY of the 211 SY of extra work had already been done; during May 2001 LAL only performed 5 hours of

extra work (May 4 & 7). Thus, for all Phases 1, 2 and for most of 3, LAL provides no "accounting" or "operating" records at all to show hourly equipment costs. LAL failed to meet the requirements of Subsection 9.03(C)(2)(a).

The fact that LAL refused to provide records the District requested can not be overlooked. The requirement in Subsection 9.03 that "actual costs" be paid for labor and equipment can not be defeated by LAL's refusal to supply the records the Contract requires to evidence costs. Subsection 9.03 does not require the Department to accept mere estimates, whether contained within a unit price or on a summary of "actual costs." The Contract affirmatively prohibits the use of such estimates. See Subsection 9.03(C)(2)(a) ("Actual costs shall be limited to booked costs … [for] periods during which the equipment was utilized on the Contract, and will not include estimated costs not recorded and identified in the Contractor's formal accounting records").

LAL produced no substantial evidence to prove the amounts it claimed as the "actual costs" of "direct labor" or "equipment." Its failures make LAL's suggested unit price of $114.32/SY unreliable to prove "actual costs" under Subsection 9.03(B).[14] I conclude that LAL failed to meet its burden of proving its "actual costs" within the meaning of Subsection 9.03(B).

The Department's calculations more accurately reflect the actual cost of labor and equipment LAL expended. I think that the method used by the Department to determine LAL's "actual costs" is adequate to establish compensation due under Subsection 9.03, at

[14] The fact that LAL did not timely respond to the District's reasonable requests for documents to prove who worked at which location, when, or for how long--or to prove what pieces of equipment were in use at which work sites on which specific days and hours--permits an inference that LAL did not maintain such records or that their contents did not confirm the cost estimates it made to the Department.

least in circumstances where LAL kept no adequate cost records. The data the District used to arrive at "actual costs" were derived from measurements it took of the actual time expended (including set up, breakdown and clean up); its calculation of the cost of equipment relied on the reality of the observations it made.

Because LAL failed to keep any meaningful records I also accept the District's argument that the original bid price included the ancillary costs of saw cutting and removing all old pavement from the job site. LAL's evidence does not provide a factual basis from which the cost of either such detail can be allocated between Item 192.3 work on the bridge deck and the extra work on the approaches.

Accordingly, I conclude that the Department should pay LAL $12,170.73 for the cold planing extra work under Subsection 9.03 (the contractor "shall accept as full payment for work or materials" an amount equal to "the actual cost for direct labor, materials [ ] and use of equipment").

CONCLUSION

The claims committee correctly determined that the "actual cost" of labor and equipment expended by LAL is $12, 170.73. Substantial evidence supports that conclusion. The Department should pay $12, 170.73 to LAL for the extra work.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: May 26, 2006

INTRODUCTION

The Angelo Todesca Corporation (Todesca), aggrieved by the determination of the Finals Section of the Massachusetts Highway Department (Department) reducing the final estimates of Contracts #93286 and #95405, appealed.

I conclude that Todesca failed to provide a "valid written" reason for challenging the adjustments made by the Finals Section as the contracts required. I also conclude that Todesca offered no substantial evidence that tended to show that the Finals Section's adjustments to the final estimates were incorrect. There was therefore no substantial evidence presented at the hearing that would support disturbing the adjustments made by the Finals Section. I recommend that the Secretary disapprove Todesca's appeals and that the final estimates for contracts #93286 and #95405, as adjusted by the Finals Section, be confirmed.

CONTRACT #93286

1. **Background**

Contract #93286 involved the reconstruction of part of Washington Street in Boston. The Contract was entered into on December 22, 1992. The completion date—as extended by the Department—was July 31, 1994.

The final estimate for the Contract was dated July 31, 1994. After making various quantity and item adjustments to the final estimate, on June 30, 1997 the Finals Section of the Department signed the final estimate. On January 8, 2001 Todesca informed the Department "after reviewing these finals [for contracts 93286, 95405 and three others] we are disputing the figures arrived at." Thereafter, on February 28, 2001, Todesca filed a Statement of Claim in which it stated the basis of its claim was "engineer & contractor

agreed with last estimate figures & quantities." In response to a question in the Statement of Claim seeking a breakdown of how the amount of its claim was computed, Todesca stated "Total value of work completed per final estimate." Todesca's claim failed to state a dollar amount.

A hearing was held on Todesca's claim on August 12, 2004. Present and participating in the hearing were

Stephen H. Clark	Chief Administrative Law Judge
Isaac Machado, Esq.	Deputy Chief Counsel
Harold M. Kane	Todesca

The following documents were admitted as exhibits in evidence:

Ex.#1	Statement of Claim
Ex.#2	Final Estimate, as approved 6/30/97

2. Findings of Fact

The Department objected to Todesca's Statement of Claim because it did not specify the payment items adjusted by the Finals Section in dispute.

The final estimate approved by the Contract resident engineer, showed the total value of work done to be $3,263,187.67; however, the total value approved by the Finals Section after reviewing the resident engineer's final estimate was $3,255,196.90. Ex. #2. I find that, as a result of the Finals Section review, the Department over paid Todesca (before credit for retainage of $5,000) by $7,990.77. I find that Ex. #2 shows that Todesca owes the Department $2,990.77 net of retainage.

At the August 12, 2004 hearing Todesca offered no documents in evidence. It relied solely on the oral testimony of Mr. Kane, an accountant. Mr. Kane stated the Todesca disputed three adjustments the Department made to Contract quantities and sought an explanation at the hearing why the Department made them, to wit: a reduction

in Item 120.1 (unclassified excavation) of 147 CY; a reduction in Item 141 (Class A trench excavation) of 30CY; and a reduction in Item 206.01 (drop inlet) of 4 items. Todesca "questioned" these adjustments, but introduced no evidence to show about whether the adjustments were warranted or what the correct quantities were. Instead, Todesca relied on the quantities as measured by the resident engineer as correct. Todesca offered no contract value of the reductions it questioned. However, based on Ex. #2, I find that the total of all quantity reductions have a contract value of $1,133.

Todesca also disputed and "questioned" the Finals Section's adjustments to pay items related to paid police details. Mr. Kane sought an explanation from the Department for the adjustment that reduced the sergeant rate downward to the patrolman's rate. Mr. Kane said that Todesca had been "compelled" to pay the higher sergeant rate. Mr. Kane questioned whether the Department incorrectly refused to pay the administrative fee charged by the Boston Police Department. Mr. Kane testified that payment of the administrative fee charged by the Boston Police Department was discontinued as of May 1, 1993 by a directive of the Department. Mr. Kane's testified that he knew of that fact from an internal Todesca document, not produced at the hearing, relating to another Department contract. Mr. Kane testified that the Department's directive "suggests" that "at some point in time" the resident engineer would have discontinued the fee. Although Mr. Kane did not specifically so testify, I find that the value of these challenged adjustments to be approximately $6,444, if accepted.

Cross-examination of Mr. Kane by the Department, established the following additional facts. Prior to the August 12, 2004 hearing Todesca gave the Department no notice in writing of the substance of Todesca's claim. Mr. Kane was not employed by

Todesca at the time of the Contract work. Mr. Kane had no personal knowledge of the administration of the Contract or the Contract quantity items adjusted by the Finals Section. Mr. Kane had had "general discussion" with Todesca personnel about the Contract. He had not seen the directive of the Department concerning Boston police detail administrative fees. Mr. Kane did not review the Contract or any records kept by Todesca before he testified. He testified that the basis for contesting the Department's adjustments was "the moral principle" that once the Department has approved and the contractor has paid for something (and can not recover the money it has paid) the Department "can't take it back."

The Department called no witnesses. It represented that the project records for Contract #93286 could not be located. It submitted the final estimate as approved by the Finals Section to prove the correct Contract quantities and payments. Ex. #2.

For the reasons stated *infra* at pages 10-12, I conclude that Todesca failed to meet its burden of persuasion because it introduced no substantial, credible evidence that the adjustments made by the Finals Section were incorrect.

CONTRACT #95405

1. Background

The work under Contract #95405 was for improvements to a 9.24-mile section of Route 58 in Carver. The Contract was entered into March 21, 1995. The completion date-as extended by the Department—was October 30, 1995.

The final estimate for the Contract was dated October 30, 1995. On September 9, 1996 the Finals Section signed the final estimates, after first making various quantity adjustments. Ex. #3. Todesca notified the Department on January 8, 2001 that "after

reviewing these finals [for contracts #93286 and 95405 and three others] we are disputing the figures arrived at." On February 28, 2001 Todesca filed a Statement of Claim, the basis of which was that the "resident engineer and the contractor agreed on final quantities" and that "total value of work performed per final estimate." Todesca's Statement of Claim did not specify a dollar amount.

A hearing was held on Todesca's claim on August 12, 2004. Present and participating in the hearing were

Stephen H. Clark	Chief Administrative Law Judge
Isaac Machado, Esq.	Deputy Chief Counsel, MHD
Richard Brodeur	District #5 Finals Engineer
Harold M. Kane	Todesca

The following documents were admitted into evidence as exhibits.

Ex. #1	Contract #95405
Ex. #2	Todesca Statement of Claim
Ex. #3	Final Estimate, as approved 9/9/96

2. Findings of Fact

The Department objected to Todesca's Statement of Claim because it did not specify the payment items adjusted by the Finals Section in dispute.

The final estimate approved by the Finals Section shows the total value of work done to be $765,839.71. Ex. #3. The total value of shown on the last estimate approved by Contract resident engineer's last estimate was $774,121.15. This results in an over payment of $8,281.44 before credit for retainage of $1,935.30. I find that, as a result of the Finals Section review, the Department over paid Todesca (before credit for retainage of $1,935.30) $8,281.44. I find that after the adjustments made by the Finals Section Todesca owes the Department $6,346.14. Ex. #3.

At the August 12, 2004 hearing Todesca offered no documents in evidence. It relied on the oral testimony of Mr. Kane. Mr. Kane testified that Todesca questioned the adjustments the Finals Section made relating to police details and bituminous cement. Mr. Kane questioned why the Finals Section made a downward adjustment of 230-240 man-hours of police detail work, which had the effect of reducing the Contract's compensation for police details by approximately $7,300 to $7,400. Mr. Kane offered no affirmative evidence pointing to how police details should have been paid under the Contract or why the adjustment of the detail hours by the Finals Department was incorrect.

Mr. Kane also "questioned" the adjustment of the Finals Section that netted out the application of a price adjustment factor for bituminous concrete in extra work of berm resurfacing that was paid for on a unit basis. Mr. Kane offered no documents or testimony to show how the price adjustment factor should be applied under the Contract.

Cross-examination established these facts. Mr. Kane was not personally familiar with the Contract work or the administration of the Contract. He had no knowledge of the police detail payment requirements or the extra work order for berm resurfacing. He had no knowledge of the time slips kept by Todesca as back up for the hours worked by police details and admitted he did not know if such slips were produced at the time of initial payment. Mr. Kane did not work for Todesca at the time the price adjustment factor was in use. He did not know that an extra work order for berm resurfacing existed until Department officials informed him at a conference on the day of the hearing. He had no personal knowledge about the extra work order or the work done under it. His basis for the testimony that the price adjustment factor applied to the unit price stated in

the extra work order was that once the extra work order became part of the Contract, the price adjustment applied to it. Mr. Kane offered no reference to the Contract or anything else as support for that conclusion. Mr. Kane admitted that he was not present when the extra work order for the berm resurfacing was executed and could not "assess" the price negotiation that took place at the time.

The Department called Mr. Richard Brodeur, District #5 Finals Engineer. He testified that the Department had originally paid for certain concrete used in the extra work of berm surfacing incorrectly, since it had applied the adjustment factor. He testified the Finals Section correctly adjusted the final payment to reflect the fact that the unit price in the extra work order was a negotiated unit price for all the work stated in the extra work order.

For the reasons stated *infra* at pages 10-12, I conclude that Todesca failed to meet its burden of persuasion because it introduced no substantial, credible evidence that the adjustments made by the Finals Section were incorrect.

DISCUSSION

THE TODESCA APPEALS

Because common procedural and substantive issues are raised in the appeals from the determinations of the Finals Section in both Contract #93286 and #95405 (Contract) I address the two appeals together.

The Contract provides in Subsection 9.05 ("Final Acceptance and Final Payment") that "All prior partial estimates and payments shall be subject to correction in the final estimate and payment." Pursuant to Subsection 9.05 the Finals Section in fact

made adjustments relating to the final estimates initially agreed upon by the resident engineer and Todesca in 1994 (#93286) and 1995 (#95405).

Subsection 9.05 also provides

> If within six months from the date the final estimate is forwarded to the Contractor, the Contractor has not filed a valid (as determined by the Engineer) written reasons(s) for not accepting the final estimate, the final estimate will be considered acceptable to the Contractor and payment of the final estimate made.

The evidence did not establish the date when the final estimates as adjusted by the Finals Section were sent to Todesca for either contract #93286 or #95405. It is thus not possible to know whether the final estimate was forwarded to Todesca "within six months." For both contracts, however, Todesca gave a Notice of Appeal under Subsection 7.16 on or about January 8, 2001. It filed its respective Statements of Claim with the Board of Contract Appeals on February 28, 2001.

In neither Notice of Appeal nor Statement of Claim did Todesca specify any basis for its appeal other than the fact that it had agreed with the resident engineer on the quantities submitted in the final estimate. Contract #93286, Ex# 2; Contract #95495, Ex. 3. At the August 12, 2004 hearings Todesca's witness reiterated that the basis for Todesca's appeals was the agreed upon "last estimate figures and quantities."

I assume here that Todesca both timely filed its appeals and supplied a "written" reason in its two statements of claim. However, that is not the end of the analysis required because the Contract requires that Todesca file "a valid … written reason for not

accepting the final estimate."[1] The question for decision thus becomes whether the written reasons filed were "valid."

At the hearings the Engineer, through Department counsel, contested the validity of the written reasons advanced by Todesca for both contracts. The Department objected to the overly general nature of Todesca's statements of claim. One result of that fact was that the Department only learned at the August 12, 2004 hearings that Todesca had any specific issues—namely, how police detail payments were accounted for and why the Department made certain quantity adjustments. The issues raised by Todesca at the hearing were never reduced to writing. The Department argued in substance that Todesca's statements of claim did not constitute "valid written" reasons for not accepting the final estimates.

I agree with the Department. The general statement that the "[Department resident] engineer and contractor agreed with last estimate figures and quantities" is not a valid written reason for contesting the adjustments made.

Subsection 9.05 of the Contract provides that the Department had the right to correct "all prior partial estimates and payments." In both contracts at issue the Department acted under the Contract to do just that. Todesca had no expectation under the Contract that the preliminary final estimate figures submitted in concert with the resident engineer would not be subsequently adjusted. Because Subsection 9.05 envisioned that the preliminary final estimate would be adjusted, Todesca could not rely on the preliminary final estimate figures as the sole basis to contest the determinations of the Finals Section. Cf. <u>J. F. White Contracting Company v. Massachusetts Bay</u>

[1] Subsection 7.16 states that an appeal of the Engineer's determination should "set forth … the amount of the claim (and breakdown of how [the] amount was computed) [and] a clear concise statement of the specific determination from which appeal is taken …."

Transportation Authority, 40 Mass. App. Ct. 937, 938-939 (1996) (rescript) (the terms of the contract precluded contractor from relying on Department furnished estimates). Merely reciting that it agreed with the unadjusted preliminary final estimate in these circumstances did not set forth a valid reason for an appeal.

Because Todesca did not state any "valid written" reason for its appeal, it did not comply with the requirements of Subsection 9.05 in appealing the final estimates as adjusted by the Finals Section. Todesca's failure to follow the remedies set forth in the Contract precludes relief. See Glynn v. Gloucester, 9 Mass. App. Ct. 454, 461 (1980) (failure to follow the remedies set forth in the contract preclude all relief).

TODESCA'S EVIDENCE

As the party seeking to appeal from the determinations of fact that the Contract permits the Department to make, Todesca carries the burden of persuasion. See General Electric Co. v. Board of Assessors of Lynn, 393 Mass. 591, 598 (1984) (burden of persuasion is from the outset on one party; presumption of validity of government's administrative action means challenging party has burden of proving the contrary). In these appeals Todesca had the burden to present evidence to persuade the trier that the Department's adjustments were for some reason incorrect. It failed to meet that burden.

Todesca's sole evidence concerning contract quantities was the oral testimony of its witness Mr. Kane.

With respect to #93286 Mr. Kane offered no affirmative evidence that the quantity adjustments made were incorrect. Todesca could not shift its burden of persuasion onto the Department by appearing at the hearing to ask the Department to explain why it made certain quantity adjustments.

Mr. Kane testified that according to an internal memorandum the Department would not pay the administrative fee of the Boston Police Department after May 1, 1993. He provided no facts concerning the pay of patrolman and sergeant rates for police details. He testified that once payment had been made by Todesca the Department had a "moral obligation" to reimburse, as Todesca could not recover money paid to Boston.

Detracting from the substance of his testimony were the facts that Mr. Kane had no personal knowledge of Todesca's work or the administration of the contract. He was not employed by Todesca during the times at issue. He had no personal knowledge of the contract quantities, preliminary or final, as agreed to by Todesca and the resident engineer or as adjusted by the Finals Section. On the police detail issues, Mr. Kane did offer any document to support his contention that there was a Department directive that altered the payment of administrative fees. He did not refer to any provision in the Contract provision that governed the payment of police details. He relied on an internal Todesca document not offered in evidence as the basis for his testimony.

I find Mr. Kane's testimony concerning the adjustments made in contract #93286 unsupported, speculative and unreliable. The factors detracting from the substance of Mr. Kane's testimony—the lack of personal knowledge, the lack of familiarity with Todesca's documents, the lack of knowledge of the contract work, lack of any documents relating to police detail payments—outweigh the probative value of his testimony. I find that Mr. Kane's testimony did not offer any facts upon which the trier could support a conclusion that the Finals Section made any error in adjustments made to contract #93286.

With respect to contract #95405, Mr. Kane offered no credible evidence. He offered no testimony at all concerning the adjustments made to police detail reimbursements. With regard to the adjustment that backed out the preliminary estimate's payment based on the price adjustment factor for bituminous concrete used in the extra work order, Mr. Kane offered no testimony based on personal knowledge or from knowledge of the Contract or records kept by Todesca with respect to it (including the terms of the extra work order). He had no knowledge of the extra work order or unit price negotiations. In sum, Mr. Kane's testimony on the issues raised on contract #95405 was not credible. He offered no substantial evidence that could support a finding that the Finals Section made a mistake.

I conclude that Todesca failed to support by substantial, credible evidence its contentions that the preliminary final estimates in #93286 or #95405 were correct. I conclude on this record that Todesca failed to meet its burden of persuasion in both appeals. There simply is no substantial evidence on this record to support the conclusion that the Finals Section made a mistake.[2] The adjustments made to the final estimates in both contracts by the Finals Section should stand as made.

FINDINGS

I find that Todesca failed to follow the remedy set forth in the Contract for not accepting the final estimate on Contract #93286 and Contract #95405. I find that

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[2] Substantial evidence "is such evidence as a reasonable mind might accept as adequate to support a conclusion." New Boston Garden v. Assessors of Boston, 383 Mass. 456, 466 (1981). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Id. Here, the record as a whole shows that Mr. Kane's statements concerning police detail accounting were not supported and his statements doubting the adjusted quantities of materials used by the Department had no basis in fact.

Todesca offered no substantial evidence on which a decision to allow its appeal could be based.

RECOMMENDATION

The Commissioner should adopt the findings of fact set forth above.

I recommend that Todesca's appeal be disapproved and that the Department's final estimates, as respectively approved with adjustments on June 30, 1997 for contract #93286 and on September 9, 1996 for contract #95405, be made final.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: August 30, 2004

In Contract # 93174 Bardon Trimount, Inc. (Bardon)[1], disputes the deduction by the finals engineer of the Massachusetts Highway Department (MHD or Department) of 63 tons of pavement from Item #460.1 with a value of $1,449.00 in the final estimate and further disputes the refusal of the Department to pay interest of $4,713.32 on five (5) alleged late periodic payments.

I find that Bardon's appeal from the Department's determination of the quantity dispute of 63 tons has merit and that the Department should not deduct $1,449.00 from the Department's final estimate. I also find that the Department does not owe interest for late payment on any of the 5 periodic estimates at issue. Under the Contract no payments were "due" from the Department until Bardon submitted equal employment opportunity forms required by law. Where the Department paid periodic estimates within 35 days of the date on which the Department certified that Bardon had belatedly submitted the required forms, no interest was due.

STATEMENT OF THE CASE

Bardon appeals to the Board directly from the determinations of the finals engineer and filed this appeal on April 15, 2002. The appeal was heard on September 11,2003. There is a tape recording of the hearing. Present were

John McDonnell	Acting Chief Administrative Law Judge
Isaac Machado	Deputy Chief Counsel, MHD
Paul Sullivan	Final Engineer, MHD
Mary Bearse	Fiscal Management, MHD
Greg MacKenzie	Bardon

The following exhibits were entered in evidence:

Ex#1	Bardon's Statement of Claim
Ex#2	Notice of Hearing
Ex#3	MHD Contract No. 93174

[1] Bardon is now doing business as Aggregate Industries, Inc.

Ex#4	Quantity Control Sheet for Item No. 460.1
Ex#5	Final Engineer's Tally Sheet for Item No. 460.1
Ex#6	Contract Quantity Estimate Sheets Nos. 4, 5, 6, 24, and 27.

The hearing officer requested additional documentation for the record at the conclusion of the hearing. The Department supplemented Ex. #6 by supplying Bardon and the hearing officer with Quantity Estimate Sheets Nos. 5, 6, 24 and 27. The Department also supplemented the record by submitting a six page Standard Operating Procedure titled "Contract Quantity Estimate." Bardon did not make a post hearing submission. The report and recommendation was written by the undersigned with the participation of Mr. McDonnell, who heard the appeal.

FINDINGS OF FACT

Substantial evidence on the record, consisting of tape recorded testimony and documents, supports the following findings of fact, which I recommend the Board adopt.

1. Bardon is the contractor on MHD contract No. 93174 for work to resurface a section of Interstate Route 395, interchange ramps, and associated work, in Oxford and Auburn (Contract).
2. The Contract was entered into on September 17, 1992 with an original completion date of October 15, 1994. The Contract bid price was $3,551,018.00. The Notice to Proceed issued September 21, 1992.
3. The Contract work was completed on or before November 11, 1994, the date approved by the Department for extended completion.
4. The Contract included by reference, among other things, the *Plans,* the *Special Provisions*; the *Standard Specifications for Highways and Bridges* (1988 ed.) (Standard Specifications), the *Supplemental Specifications*

(August 7, 1991); the *Required Contract Provisions, Federal-Aid Construction* Contracts; *41 Code Of Federal Regulations 60-1 et seq*. (41 CFR 60); the *Standard Federal Equal Opportunity Contract Specifications;* and the *Commonwealth of Massachusetts Supplemental Equal Employment Opportunity Anti-Discrimination and Affirmative Action Program*.

5. Subsection 9.05 of the Standard Specifications, entitled "Final Acceptance and Final Payment," provides in pertinent part

> All prior partial estimates and payments shall be subject to correction in the final estimate and payment.

6. The Department's finals review engineer checked the quantities of materials associated with the pay items and reviewed all prior partial estimates and payments in the Contract.
7. The Department prepared the Final Estimate on February 24, 1999.
8. On December 5, 2000 the Department sent Bardon the First Final Estimate Notice.
9. On January 8, 2002 the Department sent to Bardon The Fourth and Final Estimate Notice, which indicated, among other things, that the department deducted payment for 63 tons of concrete with a Contract value of $1,449.00.
10. On May 1, 2002 Bardon filed its Statement of Claim.

The Quantity Dispute

11. Item 460.1 of the Special Provisions provides that a certain estimated quantity of class I bituminous concrete pavement type I-1 be used on the project.

12. Bardon calculated that it had supplied 37,593 tons of Item 460.1 bituminous concrete.

13. The Department's finals engineer calculated that Bardon had supplied 37,530 tons of Item 460.1 concrete.

14. The amount in dispute between the Department's finals engineer and Bardon was 63 tons.

15. The Department's resident engineer erroneously wrote the number "1,218" tons when attempting to transcribe the number 1,281 from one column to another for Item 460.1 on the final estimate work sheet submitted to the finals engineer. Ex. #4 line 9.

16. The quantity dispute of 63 tons for Item 460.1 is wholly explained by the transcription error by the Department's resident engineer.

17. The transcription error of 63 tons resulted in a proposed reduction in payment under Item 460.1 of $1,449.00 (63 tons times $23/ton).

The Interest Dispute

18. The Department refused to pay five periodic payment estimates submitted by Bardon because forms showing Bardon's compliance with non-discrimination provisions of federal and state law were not timely submitted.

19. G.L. c. 30, s.39G requires that the Contract contain Subsection 7.15 in the Standard Specifications.

20. Subsection 7.15 of the Standard Specifications provides, in pertinent part

> The awarding authority shall pay the amount due pursuant to any periodic, substantial completion or final estimate within thirty-five days after receipt of written acceptance of such estimate from the contractor and shall pay interest on the amount due pursuant to such estimate at the rate hereinabove provided from that thirty-fifth day to the date of payment. [Retainage may be withheld from such payments.]

21. Subsection 9.04 of the Standard Specifications provides, in pertinent part

> The [Department] shall pay biweekly to the Contractor while carrying on the work the balance not retained as hereinbefore provided. No such estimates or payment shall be required to be made when, in the Engineer's judgment, the work is not proceeding in accordance with the provisions of the Contract….

21. Subsection 1.44 defines the term "work" used in the Standard Specifications and provides in pertinent part

> Work shall mean the furnishing of all labor, materials, equipment and other incidentals necessary for or convenient to the successful completion of the project and the carrying out of all the duties and obligations imposed by the Contract. Work shall include in addition to work to be performed on the project location in the actual construction process, necessary shop plans, computations, ordering of materials and equipment, fabrication of material, parts and components, etc."

22. The Contract contains eight pages of "Required Contract Provisions Federal-Aid Construction Contracts," of which Section II, "Nondiscrimination," incorporates by reference the Equal Employment Opportunity Affirmative Action Construction Contract Specifications set forth in 41 CFR 60-4.3 (EEO Specifications).

23. The EEO Specifications require Bardon to "not discriminate on the grounds of race, color, sex or national origin in the selection and retention of subcontractors, including procurement of material and leases of equipment." Section II (4).

24. The EEO Specifications require Bardon to comply with 41 CFR Part 60, Section II (3)(d), to "furnish all information and reports required by Executive Order 11246, Section II (3)(e)."

25. EEO Specifications Section II (4)(b) provides in pertinent part (emphasis added)

> In the event of the contractor's noncompliance with nondiscrimination provision of this Section II, paragraph 4, this contract may be subject to sanctions, <u>including but not limited to the withholding of payment to the contractor</u> under the contract until the contractor complies and/or cancellation, termination or suspension of the contract in whole or in part.

26. The Standard Operating Procedure (SOP) of the Department with respect to the preparation of Contract Quantity Estimates provides, in pertinent part

> If any document required under the contract has not been received within the time limit for each document …. The Resident Engineer shall enter the following statement in the bottom margin of the first part of the Contract Quantity Estimate prior to submission to the Contractor's authorized representative: Approval withheld until [blank space for date] when the Contractor submitted the [list missing documentation].

27. Contract Quantity Estimate No. 4 (CQE 4) was signed by Bardon and submitted to the Department's resident engineer for approval on 5/20/93. CQE 4 has on its face this notation: "Approval withheld until 6-21-93 when contractor and subcontractor submit required EEO Forms. See Attached List." Said attached list is contained on a form dated 5-19-93 which says:

"The following reports are due immediately": [1] "Bardon Trimount" and [subcontractor] "Swank" "Projected manning tables April-June"; [2] Monthly Utilization 257 "Bardon Oct, Nov. Dec. April" and "Swank Oct. Nov."; [3] "Bardon Biweekly training Rpt."; and [4] "Bardon trainee reports 1409 semi annual." [Original emphasis.]

28. Contract Quantity Estimates (CQE's) numbered 5, 6, 24 and 27 have on their face notations made by the resident engineer showing that the Department [1] has withheld approval of the CQE until a date certain [2] after "contractor and subcontractor submit required EEO Forms. See Attached List."

29. Late payment interest, in the amount of $8,675.39 for CQE #26 was paid on CQE #27. CQE #27 shows that Bardon signed the same on 2/17/95 but the resident engineer annotated that he "received back from contractor on 7/26/95."

32. Following MHD's receipt of required EEO Forms, CQE's 4, 5, 6, 24 and 27 were approved and paid by the Department on the following dates, within the number of days shown after the CQE had been approved by the Department:

Estimate No.	Day MHD Approved	Date of Check	Number Days
4	6/21/93	7/16/93	27
5	7/6/93	7/23/93	17
6	7/6/93	7/30/93	24
24	10/12/94	10/28/94	16
26	Interest paid on CQE #27 in amount of $8,675.39		
27	8/4/95	8/24/95	20

32. With respect to CQE's 4, 5, 6, 24 and 27, in each instance the Department paid the full amount due within 35 days after it approved the CEQ.

DISCUSSION

A. The Quantity Dispute

Bardon appeals the Department's deduction of 63 tons from Item 460.1 by the finals engineer. The record shows without doubt that the origin of the Department's 63-ton quantity deduction was in a simple transcription error in the resident engineer's worksheet, which error was carried forward throughout the final estimate process.

Where clear and convincing evidence shows that clerical error is the genesis of the dispute, the error should be corrected and appeal resolved. I find that Bardon's appeal has merit. The Department should not deduct from retainage $1,449.00 (63 tones at $23.00/ton) in the final estimate, which sum should be released.

B. The Claim For Interest For Late Payment

The Contract specifies that biweekly payments to the contractor carrying on the work "shall [not] be required to be made when, in the Engineer's judgment, the work is not proceeding in accordance with the provisions of the Contract." See Standard Specifications, Subsection 9.04. The word "work" is defined in the Contract to include "the carrying out of all the duties and obligations imposed by the Contract as well as the "furnishing of all labor, materials and equipment." Id., Subsection 1.44.

Bardon has the burden to show it was in compliance with all its duties and obligations under the Contract. One such contractual duty was the timely submission of forms to show that it and its subcontractor were in compliance with

express federal and state equal employment opportunity (EEO) regulations. It is undisputed that Bardon failed to submit certain federally mandated forms at various times in 1993, 1994 and 1995, as shown on the face of CQE's numbered 4, 5, 6, 24 & 27. Each of those CQE's is plainly marked that "required EEO forms" are missing. Each CQE states a date certain when the periodic payment will be approved for payment if the missing forms are supplied.

The EEO forms that Bardon failed to timely supply were required by law and by the Contract. See Equal Employment Opportunity Affirmative Action Construction Contract Specifications (Federal Specifications) and 41 CFR 60-4.3. The Federal Specifications themselves provide for the withholding of payment to a contractor not in compliance in certain circumstances.

The resident engineer followed the Department's Standard Operating Procedure (SOP) governing the completion and payment of Contract Quantity Estimates. The relevant SOP provides: "If any document required under the contract has not been received … the Resident Engineer shall enter the following statement: …. Approval withheld until [blank space for date] when the Contractor submitted the [list missing documentation]."

The Department is expressly permitted to withhold periodic payments under the Contract. Because Bardon was not in compliance with the Contract, as expressly noted on the face of the each periodic estimate at issue, the sums otherwise approved by the Department and Bardon never became an "amount due … pursuant to such [periodic] estimate" under Subsection 7.15.

Payment under CQE's 4, 5, 6, 24 and 27 became due when Bardon cured its non-compliance. Bardon did in fact eventually submit the required EEO forms to the Department, as evidenced by the date the district highway director approved each CQE. The Department then paid the amount of the periodic payment estimate due Bardon within 35 days of that approval. Because payment was made within 35 days of the date of such approval, the Department owes no interest.

Bardon's contention that interest runs from the day Bardon itself approved the CQE's without qualification is not correct. The Contract does not require periodic payments be made to Bardon while it was admittedly in non-compliance with federal and state law. To the contrary, the Contract expressly gives the engineer the authority to suspend payments in circumstances where B&E fails to meet its duties and obligations. The Department's obligation to pay Bardon only arises after the engineer confirmed that Bardon had brought itself into compliance. Hence, the date when the Department "received" Bardon's CQE's could not commence the 35 day period for the Department to make the periodic payments. Rather, the time period begins on the date on which the engineer certified compliance.

FINDINGS

I find that a transcription error was the cause of the Department's erroneous deduction of $1,449.00 from the final payment estimate. I further find that the Department owes no statutory interest in the circumstances presented.

RECOMMENDATION

The Board should adopt the findings of fact set forth.

The Board should order $1,449.00 be restored to the final payment owed Bardon.

The Board should deny Bardon's claim for interest.

Respectfully submitted,

Stephen H. Clark
Chief Administrative Law Judge

To:	Secretary John Cogliano, EOT
Through:	Commissioner Luisa Paiewonsky, MHD
From:	Stephen H. Clark, Administrative Law Judge
Date:	August 25, 2005
Re:	Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

Derbes Brothers, Inc. (Derbes), general contractor on MHD contract #98204 (Contract) for roadway reconstruction and related work in Quincy, appeals from the determination on the Engineer's final estimate that Derbes was overpaid (and thus now owes the Department) $3,054.54.

Derbes deliberately failed to appear at a scheduled August 9, 2005 hearing and failed to prosecute its appeal. At the hearing the Department presented substantial evidence to demonstrate that Derbes was in fact overpaid by $3,054.54.

Because Derbes defaulted and because the Department showed its final estimate to be correct, I recommend that Derbes appeal be dismissed and that the final estimate stand undisturbed.

Derbes Brothers, Inc. (Derbes), the general contractor on Department contract #98204 (Contract) for road reconstruction in Quincy at the bid price $487,155.00, appeals from the Department's final estimate issued November 14, 2002. The Department's final estimate determined that Derbes owes the Department $3,054.54. Derbes appealed, claiming it owes nothing. The Department maintains that its final estimate was correct.

I recommend that the Derbes appeal be dismissed with prejudice, for two reasons. First, Derbes, with actual knowledge that a hearing would be held on August 9, 2005, deliberately failed to appear and prosecute its appeal. Second, the Department presented substantial evidence at the hearing that its final estimates was correct and that Derbes in fact owes the Department $3,054.54.

BACKGROUND

Subsection 9.05 of the Standard Specifications for Highways and Bridges (1988 ed.) provides

> All prior partial estimates and payments shall be subject to correction in the final estimate and payment. If within six months from the date the final estimate is forwarded to the Contractor, the Contractor has not filed a valid (as determined by the Engineer) written reasons(s) for not accepting the final estimate, the final estimate will be considered acceptable to the Contractor and payment of the final estimate made.

At the conclusion of the Contract, the Department duly prepared its final estimate after making adjustments it deemed necessary. The Department sent the final estimate to Derbes on or about November 14, 2002. Derbes apparently filed a notice of appeal to this office within the time permitted by the Contract and filed a statement of claim on October 24, 2003. The statement of claim asserted that no money was due because the Department had overpaid one of Derbes's subcontractors by $12,135.52 in a direct

payment made pursuant to G.L. c.30, s.39F and had erroneously subtracted the overpayment from the general contract.

A pre-hearing conference was held on June 7, 2004 following a postponement sought by Derbes. At the pre-hearing conference Derbes, with the agreement of the Department, sought to amend its statement of claim to set forth an entirely new basis of its appeal, namely that the resident engineer's original estimated quantities correctly set forth the actual quantities of materials used in the work. With the agreement of the Department Derbes filed an amended statement of claim setting forth its new theory. A hearing was scheduled for August 9, 2005, a date chosen after consultation with the parties. Notice of the hearing date was sent to Derbes.

On August 4, 2005 Derbes wrote a letter to the Department's counsel in the appeal, Mr. Christian Gonsalves, stating that, "after reviewing all the documentation and speaking to the Resident Engineer on that project, we will not be at the []hearing" on August 9, 2005. On August 5, 2005 Mr. Gonsalves notified Derbes that it intended to "go forward" at the hearing and "recommend that the … [appeal] be dismissed on the grounds of your failure to prosecute this claim."

The hearing was held as scheduled. Derbes did not appear.

The Department introduced the correspondence referenced above in evidence. The Department's counsel represented that he had spoken by telephone with the office of Frank Derbes, the principal of Derbes, to be certain that Derbes knew the Department intended to appear and go forward on August 9, 2005.

At the hearing the Department offered the testimony of the project's resident engineer and his written calculation sheet as evidence that, after the Department made

final adjustments to the quantities included in the work, the final estimate correctly showed that Derbes owed the Department $3,054.54.

DISCUSSION

Subsection 9.05 of the Contract provides that the Department has the right to correct "all prior partial estimates and payments" made during performance. Here, the Department made the corrections it deemed necessary and then notified Derbes that it had been overpaid by $3,054.54 through the preliminary estimates. These acts were expressly authorized and permitted by the Contract.

With respect to the procedural matters raised in this appeal due to the conduct of Derbes, I note first that the Department and this office afforded Derbes ample opportunity to contest the final estimate and the adjustments made. Derbes filed its statement of claim and amended the same; Derbes sought and was granted continuances. Despite agreeing to an August 9, 2005 date to hear its appeal, and despite actual notice that the Department intended to go forward on that date, Derbes deliberately failed to appear. I conclude that Derbes knowingly defaulted and abandoned its appeal.

With respect to the merits, Derbes could have no expectation that the preliminary final estimate quantities submitted in concert with the resident engineer would not be adjusted when the final estimate was prepared. To the contrary, Subsection 9.05 expressly contemplated that the Contract's preliminary estimates would be adjusted on the final estimate. Hence, Derbes had no contractual basis to rely on the preliminary estimate figures it had agreed to with the resident engineer. The Contract required Derbes to present "written reasons(s) for not accepting the final estimate" in order to challenge the final estimate. Derbes's failure to present any such reasons—other than its

assertion that it agreed with the preliminary estimates—means that it failed to follow the remedy provided it in the Contract. Cf. J. F. White Contracting Company v. Massachusetts Bay Transportation Authority, 40 Mass. App. Ct. 937, 938-939 (1996) (rescript) (the terms of the contract precluded contractor from relying on Department furnished estimates).

Derbes, as the party appealing from the factual determinations the Contract permits the Department to make, carried the burden of persuasion. See Subsection 9.05; General Electric Co. v. Board of Assessors of Lynn, 393 Mass. 591, 598 (1984) (burden of persuasion is from the outset on one party; presumption of validity of government's administrative action means challenging party has burden of proving the contrary). By failing to appear at the hearing and by failing to present any evidence that the Department's adjustments were incorrect, Derbes failed to meet that burden. Accordingly, Derbes's appeal fails and the Department's final estimate must stand.

CONCLUSION

Derbes's appeal should be dismissed. The final estimate that shows Derbes owes the Department $3,054.54 stands undisturbed. I recommend that it be approved as final.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: August 25, 2005

INTRODUCTION

The RDA Construction Corporation (RDA), aggrieved by the determination of the Finals Section of the Massachusetts Highway Department (Department) reducing the resident engineer's last estimate for the quantity of emergency welding repair work done on the I-93 Viaduct under Contract #96286, appealed.

I conclude that RDA's appeal has merit. The Department required emergency repairs to arrest cracks in structural steel on two supporting bents for the I-93 Viaduct. The Department ordered wider cuts and more welding repairs than it had anticipated; the wider cuts required additional welds. RDA performed the welding work to repair the wider cuts after the Department assured RDA that, because compensation was based on the quantity of linear-weld inches, the Department would pay for increased quantities.

The Finals Section adjusted downward the number of linear inches welded, reducing the Contract value by $8,611.96. The Department admitted at the hearing that the resident engineer's measurement of linear inches was correct and that the final quantities agreed to by the resident engineer and RDA on the last estimate were "accurate." RDA's met its burden of persuasion through the Department's own evidence. As the Department offered no evidence to support the adjustments made by the Finals Section, which remain unsupported and unexplained, the substantial evidence supporting RDA's appeal was uncontradicted.

On the basis of the evidence, I conclude that the Department should restore to RDA $8,611.96 to the final estimate.

BACKGROUND

RDA filed a notice of claim on November 1, 1999 and duly submitted a statement of claim.

A hearing was held on RDA's claim February 20, 2003. Present and participating in the hearing were

Peter Milano	Chief Administrative Law Judge
Isaac Machado, Esq.	Deputy Chief Counsel
Kevin Stacy	RDA Construction
Richard P. Gunderson	RDA Construction

The following documents were admitted as exhibits in evidence:

Ex.#1	Contract # 96286
Ex.#2	Statement of Claim (including photos)
Ex. #3	Resident Engineer Memorandum (1/4/03)
Ex. #4	Bridge Section Memorandum (1/4/03)
Ex. #5	Final Estimate Review (3/19/98)

At a conference held on August 24, 2004 the parties stipulated that the undersigned as successor administrative law judge make a report and recommendation to the Commissioner.

FINDINGS OF FACT

1. The Contract required emergency repairs to arrest structural cracks on structural steel at bents 16 and 32 on the I-93 Viaduct. The work included cutting and welding, which was paid by the linear inch.

2. At the job site the Department engineer determined that the existing backing bars for the flange to plate weld were not situated as shown on the original plans for the structure. Ex. #4. In order to repair the two cracks at bent 16 and bent 32 properly, portions of the backing bars had to be removed. Id.

3. The Department engineer ordered cuts approximately 3 inches wide (as opposed to the 1 inch cuts originally anticipated) to be made on both columns. The cuts ordered made the weld repair area much wider than originally intended. Ex. #4. More welds were needed to repair the 3-inch cuts than would have been needed to repair a 1-inch cut. The resident engineer stated that the increase in weld quantity was the result of a change in width of the cut. Ex. #3.

4. The total of linear inches of weld increased beyond the original estimates as the number of welds increased to close the 3-inch cuts. At bent 16 the contract quantity estimate of 86 linear inches became in fact 131 inches, an increase of 45 linear inches. At bent 32 the contract quantity estimate of 140 linear inches became in fact 214, an increase of 74 linear inches.

5. As shown on the least estimate, the resident engineer and RDA agreed that there was an increase of 47.00 linear inches of weld repair work at bent 16 (Item 961.31) and 74.00 linear inches at bent 32 (Item 961.32). Payment based on these increased quantities were understood at the time of the work to provide full and fair compensation for the emergency work that the Department ordered done.

6. The Department admits that RDA was entitled to be compensated for the increased quantity of inches of welding work actually done.

7. The Department submitted no evidence to support or explain the adjustment made by the Finals Section.

8. The quantities submitted by the resident engineer correctly reflected the quantities the Department now admits should form the basis of payment for the weld repair work done under the Contract.

9. The finals section determined that the net overpayment to RDA before credit for retainage held of $175.84 was $7,990.04.

DISCUSSION

The Contract provides at Subsection 4.06

> When the accepted quantities of work vary from the quantities in the bid schedule, the Contractor shall accept as payment in full, so far as contract items are concerned, payment at the original contract unit prices for the accepted quantities of work done.

The Department engineer in the field measured the number of linear inches of weld repair, which included linear inches of welds required to repair the 3-inch cuts the Department had ordered. An increased quantity for weld repair was necessary on both bent 16 and bent 32 to arrest cracks in structural steel. The Department's resident engineer included the total linear inches of welding work for payment "at the original contract unit prices," which RDA accepted "as payment in full." Subsection 4.06.

The Department admits that "the increase in quantity was the result of a change in width" and that the resident's final quantities "reflect these changes." Ex. #3. The Department admitted that RDA is entitled to be paid for the increased number of linear inches of welding repair work. Ex. #4. Likewise, the quantities submitted by the resident engineer on the last estimate were admitted by the Department to be "accurate." Ex. #3.

RDA carried the burden of persuasion to show that the Finals Sections adjustments under Subsection 9.05 should be disturbed. See General Electric Co. v. Board of Assessors of Lynn, 393 Mass. 591, 598 (1984) (burden of persuasion is from the

outset on one party; presumption of validity of government's administrative action means challenging party has burden of proving the contrary). Here, RDA met its burden through admissions made by the Department itself.

The Department submitted no evidence concerning the adjustments made by the Finals Section, which thus remain wholly unexplained and unsupported on this record. Thus, substantial evidence supports RDA's appeal; there is nothing here to detract from the weight of that evidence, which was the Department's own.[1]

Accordingly, I conclude that the Department should restore the adjustments made by the Finals Section and pay RDA under Subsection 4.06 for increased quantities.

FINDINGS

I find that the Department agreed to the final quantities for welding repair submitted by the resident engineer on his last estimate. I find that 45 inches should be restored to payment item 961.31 (bent 16) and 74 inches restored to payment item 961.32 (bent 32). I find that the Contract value of the restored items to be $3, 295.80 for bent 16 and $5,316.16 for bent 32, a total of $8,611.96. The adjustment made by the Finals Section with respect to those payment items should be reversed. I find that the overpayment of $7,814.20 calculated by the Finals Section is incorrect. I find that the Department correctly paid RDA $8,611.96 in the first instance.

RECOMMENDATION

The Commissioner should adopt the findings of fact set forth above.

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[1] Substantial evidence "is such evidence as a reasonable mind might accept as adequate to support a conclusion." New Boston Garden v. Assessors of Boston, 383 Mass. 456, 466 (1981). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Id.

I recommend that RDA's appeal be allowed. For the reasons set forth I recommend that $8,611.96 be restored to the Contract.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: August 30, 2004

To: Secretary John Cogliano, EOT
Through: Commissioner Luisa Paiewonsky, MHD
From: Stephen H. Clark, Administrative Law Judge

Date: May 25, 2006

Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

The three pending appeals of the Todesca Equipment Co., Inc. (Todesca) arising from Department contracts #89123, #91078 and #92056 should be dismissed for the same reason: Todesca failed to timely state "valid written reasons" why the Department's final estimate was not correct within six months of receipt of the respective final estimates.

Subsection 9.05 of the Standard Provisions of the Department's contract provides that, unless a contractor file within six months after receipt of a final estimate "valid written reasons" why the final estimate is not correct, the final estimate is deemed "acceptable to the contractor…." Todesca did not file a "valid written reason" for not accepting the final estimate in any of the three above contracts.

Accordingly, Todesca's appeals to this office should be dismissed.

INTRODUCTION

The Todesca Equipment Co., Inc. (Todesca) filed appeals challenging the Department's final estimates in three separate contracts (MHD Nos. 89123, 91078 and 92056) on January 8, 2001. Each final estimate showed that Todesca owed the Department money. Two final estimates were sent to Todesca in 1995; one in 1997.

At the pre-hearing conference held on February 23, 2006 the Department moved to dismiss all the appeals on the ground that Todesca had not properly challenged the final estimates within the time permitted by Subsection 9.05 of the Standard Specifications. I asked that both the Department and Todesca file written argument on whether the appeals should be dismissed, which the parties did.

I conclude that all three appeals should be dismissed. Subsection 9.05 of the Standard Provisions sets forth the procedure that contractor's must follow in order to challenge a final estimate. That subsection required that Todesca "file a valid … written reason(s) for not accepting the final estimate" "within six months from the date the final estimate is forwarded to the Contractor." Todesca failed to make any such written statement setting forth any valid reason to disturb the final estimate within the time permitted for any of the three contracts listed above. Under Subsection 9.05 the Department's final estimate is "considered acceptable to the contractor" should it fail to file such timely written reasons. In addition, Todesca's failure to pursue the administrative remedy the contract gave it constituted a waiver of its rights to challenge the final estimates. Accordingly, Todesca's three instant appeals seeking adjudication of purported final estimate disputes should be dismissed.

BACKGROUND

Contract #89123

Todesca completed work on contract #89123 in 1989. On March 3, 1995 the Department sent Todesca a final estimate which showed that Todesca owed the Department $14,230. On March 22, 1995 Todesca wrote the Department that it "did not agree" with the final estimate. It stated no reason for its disagreement; however, it asked for a meeting "to discuss and review" the project. Two years then passed. On February 24, 1997 the Department forwarded a copy of the final estimate to Todesca; again Todesca wrote on February 26, 1997 that "[w]e are not in agreement with the amounts of these final estimates," but provided no statement to explain to the Department why it did not accept the final estimate. Two more years passed. On March 8, 1999 the Department's general counsel wrote Todesca that "failure to respond and reimburse" the Department the money it owed "may affect your firm's pre-qualification status." Todesca did not respond. On December 14, 1999 the Department sent another copy of the original final estimate. Todesca failed to respond.

On January 2, 2001 the Department sent a fifth notice again supplying a copy of the final estimate. On January 8, 2001 Todesca responded by filing an appeal in the office of the administrative law judge, stating "after reviewing this final estimate we are disputing the figures…." On February 28, 2001 Todesca filed a statement of claim stating "Final quantities agreed with Res. Engr." A hearing on the appeal was scheduled for June 8, 2004. On the day of the hearing Todesca's representative appeared and stated that he was not prepared to proceed. The hearing was suspended and Todesca was

ordered to file by July 15, 2004 a statement of claim that detailed the dispute. Todesca then filed an amended statement of claim five months later, on December 9, 2004.

Contract #91078

Todesca completed work on contract #91078 in 1992. On May 18, 1994 the Department sent Todesca a final estimate which showed that Todesca owed the Department $19,612.77. On July 12, 1994 Todesca wrote the Department that it "did not agree" with the final estimate. No reason for its disagreement was stated but Todesca asked for a meeting. On September 1, 1994 the Department issued a memorandum to the finals engineer and wrote a letter to Todesca asking it to meet with the Department's representative to resolve any disputed quantities. The record does not disclose whether a meeting was ever scheduled or held.

On March 3, 1995 the Department sent a duplicate of the original final estimate, to which Todesca responded by on March 22, 1995 "we do not agree with the final quantities." Two years then passed. On February 24, 1997 the Department again forwarded a copy of the original final estimate to Todesca. Todesca responded on February 26, 1997, stating "[w]e are not in agreement with the amounts of these final estimates." The letter stated no reason why Todesca did not accept the final estimate. Two more years passed. On March 8, 1999 the Department's general counsel wrote Todesca that "failure to respond and reimburse" the Department the money it owed "may affect your firm's pre-qualification status." Todesca did not respond. On December 14, 1999 the Department sent another copy of the final estimate. Todesca did nothing.

On January 2, 2001 the Department sent a fifth notice with a copy of the final estimate. On January 8, 2001 Todesca filed an appeal in the office of the administrative

law judge, stating "after reviewing this final estimate we are disputing the figures…." On February 28, 2001 Todesca filed a statement of claim stating "Final quantities agreed with Res. Engr." A hearing was duly scheduled for June 8, 2004. On the day of the hearing Todesca's representative appeared and stated that he was not prepared to proceed. The hearing was suspended and Todesca was ordered to file by July 15, 2004 a statement of claim that set forth in detail its reasons for challenging the final estimate. Five months later, on December 9, 2004, Todesca filed an amended statement of claim.

Contract #92056

Todesca completed its work on the contract in 1995. On February 24, 1997 the Department sent a final estimate to Todesca showing that it owed the Department $6,759.55. On February 26, 1997 Todesca wrote the Department that "[w]e are not in agreement with the amounts of these final estimates." Todesca provided no explanation or basis for its disagreement.

On March 8, 1999 the Department's general counsel wrote Todesca that "failure to respond and reimburse" the Department the money it owed "may affect your firm's pre-qualification status." On March 16, 1999 the Department forwarded a duplicate of the final estimate. Todesca did not respond to either the general counsel's letter or the notice of the final estimate.

On January 2, 2001 the Department sent a third copy of the original final estimate. On January 8, 2001 Todesca responded by filing an appeal in the office of the administrative law judge, stating "after reviewing this final estimate we are disputing the figures…." On February 28, 2001 Todesca filed a statement of claim stating "Final quantities agreed with Res. Engr." The matter was set down for a hearing on June 8,

2004. At the hearing Todesca's representative stated that he was not prepared to proceed. The hearing was suspended and Todesca was ordered to file by July 15, 2004 a statement of claim that detailed the dispute. An amended statement of claim was filed five months later, on December 9, 2004.

DISCUSSION

Subsection 9.05 of the Standard Specifications provides

> All prior partial estimates and payments shall be subject to correction in the final estimate and payment. If within six months from the date of the final estimate is forwarded to the contractor, the Contractor has not filed a valid (as determined by the Engineer) written reason(s) for not accepting the final estimate, the final estimate will be considered acceptable to the contractor and payment of the final estimate made.

Subsection 9.05 permitted Todesca to "file a valid … written reason(s) for not accepting the final estimate" "within six months from the date the final estimate is forwarded to the Contractor." The record shows that with respect to each of the above contracts Todesca never timely provided the Department with any "written reason for not accepting the final estimate" when it first received the final estimate.

With respect to #89123 and #91078 Todesca responded to the final estimate dated March 3, 1995 by a letter dated March 22, 1995 in which it stated "after review we do not agree with the final quantities." With respect to #92056 Todesca responded to the final estimate dated February 24, 1997 by a letter dated February 26, 1997 in which it stated "[w]e are not in agreement with the amounts of these final estimates." In none of the letters did Todesca offer any statement of the reasons it "was not in agreement" with the final estimates.

Even when Todesca filed its appeals in this office in 2001 it failed to explicate the nature of its final estimate disputes with the Department. To describe the nature of its

appeals on the statements of claim required by this office, Todesca replied in each case: "Final quantities agreed with Res. Engr." The first time Todesca explained the substance of its disagreement with the final estimates was on December 2, 2004, when it filed amended statements of claim for each of the three appeals.

The Contract provides a mechanism for a contractor to bring to the Department's attention the substance of its dispute with the Department's final estimate. To activate the mechanism set forth in Subsection 9.05 requires an affirmative act by the contractor, that is, a statement made within six months that specifies a "valid … written reason" for not accepting the final estimate. At a minimum a written reason would inform the Department of what it disputes within the Department's final estimate. Only a statement with some particularity would provide a meaningful opportunity for the Department to address the contractor's complaint and address it through administrative action.

Failure to supply a valid written reason within the time permitted has a specific consequence under Subsection 9.05: the acceptance of the Department's estimate. Here, Todesca affirmatively refused to avail itself of the administrative remedy the contracts provided. Such failures had the contractual consequence in each case that Todesca was deemed to have accepted the Department's final estimate. In addition, the failures to follow the contracts' administrative procedure that gave Todesca a remedy to correct an erroneous final estimate result in a clear waiver of all Todesca's rights to challenge the Department's final estimates. See Glynn v. Gloucester, 9 Mass. App. Ct. 454, 461 (1980) (contractor's failure to follow the remedies set forth in the contract precludes all relief).

Todesca's statement that "it did not agree" with the Department's final estimate was not a "written reason" to challenge the substance of a final estimate. Even if filing a

statement of disagreement were considered a "reason" in the most general sense, it was not a "valid … written reason" to challenge any adjustment the Department was by contract permitted to make on the final estimate. See J.F. White Contracting Co. v. Massachusetts Bay Transportation Authority, 40 Mass. App. Ct. 937, 938-39 (1996) (rescript) (contractor not permitted to merely assert that it relied on earlier estimates where government had authority under the contract to adjust final quantities). By the time the Department prepares the final estimate and sends it to the contractor, it is obvious that the last chance to notify the Department of matters in dispute has come. See G.L. c.30, s.39G (legislative time limits for final payments).

Todesca raises four arguments why the appeal to this office should be allowed to proceed, although none mentions the applicability of Subsection 9.05.

> (1) Anticipated Department Non-Cooperation: Todesca states that it "reasonably expected" that the Department engineers would refuse to meet to discuss the final estimate. That contention does not relieve Todesca of its contractual obligations to provide the Department with the underlying reasons for refusing to accept a final estimate in the first instance. There is no evidence that the Department refused to meet with Todesca.
>
> (2) Superseding Notices: Todesca contends that each of the multiple notices it received effectively "restarted" the six month time within which it could respond. Since the last notice was received on January 2, 2001, Todesca claims it provided a written "reason" "within six months" by filing a statement of claim in this office on February 28, 2001. The fact that the Department sent duplicate notices does not excuse Todesca's failure to file its reasons of disagreement. Todesca did not do so either after receipt of the initial notice or at any time until 2001. Then it stated its reasons for disagreement was "Final quantities agreed with Res. Engr." That statement is not a valid reason to dispute the final estimate. See J.F. White Contracting Co. v. Massachusetts Bay Transportation Authority, 40 Mass. App. Ct. at 937.
>
> (3) Statute of Limitations: Todesca states that the Department contends the appeals should be dismissed because Todesca "failed to prosecute its claim in a reasonable amount of time." It asserts that the Department, not Todesca, "had control of the time of the proceedings in this matter" and therefore can not "cite the passage of time as a reason for dismissal." Under Subsection 9.05 Todesca,

not the Department, was obligated to set forth valid reasons for not accepting the final estimate. The Department did nothing to prevent Todesca from making the required statement. It was Todesca's failures and not any action of the Department that rendered it impossible for the Department to learn the substance of Todesca's dispute until 2004.[1]

(4) Prejudice: Todesca claims that it is prejudiced by the unavailability of MHD personnel due to "the simple existence of delays in the adjudication of its appeal, attributable at least in part to MHD itself…." It is not the adjudication of Todesca's appeal that is the source of delay here—it is the failure of Todesca to set forth any "valid … written reasons" within the time permitted. Todesca's failure meant that witnesses that could have explained Department actions taken in 1995 or 1997 are unavailable due to retirement or death. It is the Department that is prejudiced, not Todesca.

CONCLUSION

I conclude that Todesca's failure to do what the contract required in Subsection 9.05 requires dismissal of each of the above captioned appeals. Under the Contract Todesca's failure to act requires it to accept the Department's final estimate. Because Todesca did not avail itself of the remedy the contract provided to dispute a final estimate, it is now precluded from pursuing an appeal to this office. See Glynn v. Gloucester, 9 Mass. App. Ct. 454 (1980).

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: May 25, 2006

[1] It is not necessary to decide whether the Department's argument that the three year statute of limitations had run is correct. See Campanella & Cardi Construction Co. v. Commonwealth, 351 Mass. 184, 187 (1966) (cause of action for contractor to bring a petition to dispute a final estimate accrues not later than the dates of the disputed semi-final or final estimate).

INTRODUCTION

The Angelo Todesca Corporation (Todesca), aggrieved by the determination of the Finals Section of the Massachusetts Highway Department (Department) reducing the final estimates of Contracts #93286 and #95405, appealed.

I conclude that Todesca failed to provide a "valid written" reason for challenging the adjustments made by the Finals Section as the contracts required. I also conclude that Todesca offered no substantial evidence that tended to show that the Finals Section's adjustments to the final estimates were incorrect. There was therefore no substantial evidence presented at the hearing that would support disturbing the adjustments made by the Finals Section. I recommend that the Secretary disapprove Todesca's appeals and that the final estimates for contracts #93286 and #95405, as adjusted by the Finals Section, be confirmed.

CONTRACT #93286

1. Background

Contract #93286 involved the reconstruction of part of Washington Street in Boston. The Contract was entered into on December 22, 1992. The completion date—as extended by the Department—was July 31, 1994.

The final estimate for the Contract was dated July 31, 1994. After making various quantity and item adjustments to the final estimate, on June 30, 1997 the Finals Section of the Department signed the final estimate. On January 8, 2001 Todesca informed the Department "after reviewing these finals [for contracts 93286, 95405 and three others] we are disputing the figures arrived at." Thereafter, on February 28, 2001, Todesca filed a Statement of Claim in which it stated the basis of its claim was "engineer & contractor

agreed with last estimate figures & quantities." In response to a question in the Statement of Claim seeking a breakdown of how the amount of its claim was computed, Todesca stated "Total value of work completed per final estimate." Todesca's claim failed to state a dollar amount.

A hearing was held on Todesca's claim on August 12, 2004. Present and participating in the hearing were

Stephen H. Clark	Chief Administrative Law Judge
Isaac Machado, Esq.	Deputy Chief Counsel
Harold M. Kane	Todesca

The following documents were admitted as exhibits in evidence:

Ex.#1	Statement of Claim
Ex.#2	Final Estimate, as approved 6/30/97

2. <u>Findings of Fact</u>

The Department objected to Todesca's Statement of Claim because it did not specify the payment items adjusted by the Finals Section in dispute.

The final estimate approved by the Contract resident engineer, showed the total value of work done to be $3,263,187.67; however, the total value approved by the Finals Section after reviewing the resident engineer's final estimate was $3,255,196.90. Ex. #2. I find that, as a result of the Finals Section review, the Department over paid Todesca (before credit for retainage of $5,000) by $7,990.77. I find that Ex. #2 shows that Todesca owes the Department $2,990.77 net of retainage.

At the August 12, 2004 hearing Todesca offered no documents in evidence. It relied solely on the oral testimony of Mr. Kane, an accountant. Mr. Kane stated the Todesca disputed three adjustments the Department made to Contract quantities and sought an explanation at the hearing why the Department made them, to wit: a reduction

in Item 120.1 (unclassified excavation) of 147 CY; a reduction in Item 141 (Class A trench excavation) of 30CY; and a reduction in Item 206.01 (drop inlet) of 4 items. Todesca "questioned" these adjustments, but introduced no evidence to show about whether the adjustments were warranted or what the correct quantities were. Instead, Todesca relied on the quantities as measured by the resident engineer as correct. Todesca offered no contract value of the reductions it questioned. However, based on Ex. #2, I find that the total of all quantity reductions have a contract value of $1,133.

Todesca also disputed and "questioned" the Finals Section's adjustments to pay items related to paid police details. Mr. Kane sought an explanation from the Department for the adjustment that reduced the sergeant rate downward to the patrolman's rate. Mr. Kane said that Todesca had been "compelled" to pay the higher sergeant rate. Mr. Kane questioned whether the Department incorrectly refused to pay the administrative fee charged by the Boston Police Department. Mr. Kane testified that payment of the administrative fee charged by the Boston Police Department was discontinued as of May 1, 1993 by a directive of the Department. Mr. Kane's testified that he knew of that fact from an internal Todesca document, not produced at the hearing, relating to another Department contract. Mr. Kane testified that the Department's directive "suggests" that "at some point in time" the resident engineer would have discontinued the fee. Although Mr. Kane did not specifically so testify, I find that the value of these challenged adjustments to be approximately $6,444, if accepted.

Cross-examination of Mr. Kane by the Department, established the following additional facts. Prior to the August 12, 2004 hearing Todesca gave the Department no notice in writing of the substance of Todesca's claim. Mr. Kane was not employed by

Todesca at the time of the Contract work. Mr. Kane had no personal knowledge of the administration of the Contract or the Contract quantity items adjusted by the Finals Section. Mr. Kane had had "general discussion" with Todesca personnel about the Contract. He had not seen the directive of the Department concerning Boston police detail administrative fees. Mr. Kane did not review the Contract or any records kept by Todesca before he testified. He testified that the basis for contesting the Department's adjustments was "the moral principle" that once the Department has approved and the contractor has paid for something (and can not recover the money it has paid) the Department "can't take it back."

The Department called no witnesses. It represented that the project records for Contract #93286 could not be located. It submitted the final estimate as approved by the Finals Section to prove the correct Contract quantities and payments. Ex. #2.

For the reasons stated *infra* at pages 10-12, I conclude that Todesca failed to meet its burden of persuasion because it introduced no substantial, credible evidence that the adjustments made by the Finals Section were incorrect.

CONTRACT #95405

1. Background

The work under Contract #95405 was for improvements to a 9.24-mile section of Route 58 in Carver. The Contract was entered into March 21, 1995. The completion date-as extended by the Department—was October 30, 1995.

The final estimate for the Contract was dated October 30, 1995. On September 9, 1996 the Finals Section signed the final estimates, after first making various quantity adjustments. Ex. #3. Todesca notified the Department on January 8, 2001 that "after

reviewing these finals [for contracts #93286 and 95405 and three others] we are disputing the figures arrived at." On February 28, 2001 Todesca filed a Statement of Claim, the basis of which was that the "resident engineer and the contractor agreed on final quantities" and that "total value of work performed per final estimate." Todesca's Statement of Claim did not specify a dollar amount.

A hearing was held on Todesca's claim on August 12, 2004. Present and participating in the hearing were

Stephen H. Clark	Chief Administrative Law Judge
Isaac Machado, Esq.	Deputy Chief Counsel, MHD
Richard Brodeur	District #5 Finals Engineer
Harold M. Kane	Todesca

The following documents were admitted into evidence as exhibits.

Ex. #1	Contract #95405
Ex. #2	Todesca Statement of Claim
Ex. #3	Final Estimate, as approved 9/9/96

2. Findings of Fact

The Department objected to Todesca's Statement of Claim because it did not specify the payment items adjusted by the Finals Section in dispute.

The final estimate approved by the Finals Section shows the total value of work done to be $765,839.71. Ex. #3. The total value of shown on the last estimate approved by Contract resident engineer's last estimate was $774,121.15. This results in an over payment of $8,281.44 before credit for retainage of $1,935.30. I find that, as a result of the Finals Section review, the Department over paid Todesca (before credit for retainage of $1,935.30) $8,281.44. I find that after the adjustments made by the Finals Section Todesca owes the Department $6,346.14. Ex. #3.

At the August 12, 2004 hearing Todesca offered no documents in evidence. It relied on the oral testimony of Mr. Kane. Mr. Kane testified that Todesca questioned the adjustments the Finals Section made relating to police details and bituminous cement. Mr. Kane questioned why the Finals Section made a downward adjustment of 230-240 man-hours of police detail work, which had the effect of reducing the Contract's compensation for police details by approximately $7,300 to $7,400. Mr. Kane offered no affirmative evidence pointing to how police details should have been paid under the Contract or why the adjustment of the detail hours by the Finals Department was incorrect.

Mr. Kane also "questioned" the adjustment of the Finals Section that netted out the application of a price adjustment factor for bituminous concrete in extra work of berm resurfacing that was paid for on a unit basis. Mr. Kane offered no documents or testimony to show how the price adjustment factor should be applied under the Contract.

Cross-examination established these facts. Mr. Kane was not personally familiar with the Contract work or the administration of the Contract. He had no knowledge of the police detail payment requirements or the extra work order for berm resurfacing. He had no knowledge of the time slips kept by Todesca as back up for the hours worked by police details and admitted he did not know if such slips were produced at the time of initial payment. Mr. Kane did not work for Todesca at the time the price adjustment factor was in use. He did not know that an extra work order for berm resurfacing existed until Department officials informed him at a conference on the day of the hearing. He had no personal knowledge about the extra work order or the work done under it. His basis for the testimony that the price adjustment factor applied to the unit price stated in

the extra work order was that once the extra work order became part of the Contract, the price adjustment applied to it. Mr. Kane offered no reference to the Contract or anything else as support for that conclusion. Mr. Kane admitted that he was not present when the extra work order for the berm resurfacing was executed and could not "assess" the price negotiation that took place at the time.

The Department called Mr. Richard Brodeur, District #5 Finals Engineer. He testified that the Department had originally paid for certain concrete used in the extra work of berm surfacing incorrectly, since it had applied the adjustment factor. He testified the Finals Section correctly adjusted the final payment to reflect the fact that the unit price in the extra work order was a negotiated unit price for all the work stated in the extra work order.

For the reasons stated *infra* at pages 10-12, I conclude that Todesca failed to meet its burden of persuasion because it introduced no substantial, credible evidence that the adjustments made by the Finals Section were incorrect.

DISCUSSION

THE TODESCA APPEALS

Because common procedural and substantive issues are raised in the appeals from the determinations of the Finals Section in both Contract #93286 and #95405 (Contract) I address the two appeals together.

The Contract provides in Subsection 9.05 ("Final Acceptance and Final Payment") that "All prior partial estimates and payments shall be subject to correction in the final estimate and payment." Pursuant to Subsection 9.05 the Finals Section in fact

made adjustments relating to the final estimates initially agreed upon by the resident engineer and Todesca in 1994 (#93286) and 1995 (#95405).

Subsection 9.05 also provides

> If within six months from the date the final estimate is forwarded to the Contractor, the Contractor has not filed a valid (as determined by the Engineer) written reasons(s) for not accepting the final estimate, the final estimate will be considered acceptable to the Contractor and payment of the final estimate made.

The evidence did not establish the date when the final estimates as adjusted by the Finals Section were sent to Todesca for either contract #93286 or #95405. It is thus not possible to know whether the final estimate was forwarded to Todesca "within six months." For both contracts, however, Todesca gave a Notice of Appeal under Subsection 7.16 on or about January 8, 2001. It filed its respective Statements of Claim with the Board of Contract Appeals on February 28, 2001.

In neither Notice of Appeal nor Statement of Claim did Todesca specify any basis for its appeal other than the fact that it had agreed with the resident engineer on the quantities submitted in the final estimate. Contract #93286, Ex# 2; Contract #95495, Ex. 3. At the August 12, 2004 hearings Todesca's witness reiterated that the basis for Todesca's appeals was the agreed upon "last estimate figures and quantities."

I assume here that Todesca both timely filed its appeals and supplied a "written" reason in its two statements of claim. However, that is not the end of the analysis required because the Contract requires that Todesca file "a valid … written reason for not

accepting the final estimate." [1] The question for decision thus becomes whether the written reasons filed were "valid."

At the hearings the Engineer, through Department counsel, contested the validity of the written reasons advanced by Todesca for both contracts. The Department objected to the overly general nature of Todesca's statements of claim. One result of that fact was that the Department only learned at the August 12, 2004 hearings that Todesca had any specific issues—namely, how police detail payments were accounted for and why the Department made certain quantity adjustments. The issues raised by Todesca at the hearing were never reduced to writing. The Department argued in substance that Todesca's statements of claim did not constitute "valid written" reasons for not accepting the final estimates.

I agree with the Department. The general statement that the "[Department resident] engineer and contractor agreed with last estimate figures and quantities" is not a valid written reason for contesting the adjustments made.

Subsection 9.05 of the Contract provides that the Department had the right to correct "all prior partial estimates and payments." In both contracts at issue the Department acted under the Contract to do just that. Todesca had no expectation under the Contract that the preliminary final estimate figures submitted in concert with the resident engineer would not be subsequently adjusted. Because Subsection 9.05 envisioned that the preliminary final estimate would be adjusted, Todesca could not rely on the preliminary final estimate figures as the sole basis to contest the determinations of the Finals Section. Cf. J. F. White Contracting Company v. Massachusetts Bay

[1] Subsection 7.16 states that an appeal of the Engineer's determination should "set forth … the amount of the claim (and breakdown of how [the] amount was computed) [and] a clear concise statement of the specific determination from which appeal is taken …."

Transportation Authority, 40 Mass. App. Ct. 937, 938-939 (1996) (rescript) (the terms of the contract precluded contractor from relying on Department furnished estimates). Merely reciting that it agreed with the unadjusted preliminary final estimate in these circumstances did not set forth a valid reason for an appeal.

Because Todesca did not state any "valid written" reason for its appeal, it did not comply with the requirements of Subsection 9.05 in appealing the final estimates as adjusted by the Finals Section. Todesca's failure to follow the remedies set forth in the Contract precludes relief. See Glynn v. Gloucester, 9 Mass. App. Ct. 454, 461 (1980) (failure to follow the remedies set forth in the contract preclude all relief).

TODESCA'S EVIDENCE

As the party seeking to appeal from the determinations of fact that the Contract permits the Department to make, Todesca carries the burden of persuasion. See General Electric Co. v. Board of Assessors of Lynn, 393 Mass. 591, 598 (1984) (burden of persuasion is from the outset on one party; presumption of validity of government's administrative action means challenging party has burden of proving the contrary). In these appeals Todesca had the burden to present evidence to persuade the trier that the Department's adjustments were for some reason incorrect. It failed to meet that burden.

Todesca's sole evidence concerning contract quantities was the oral testimony of its witness Mr. Kane.

With respect to #93286 Mr. Kane offered no affirmative evidence that the quantity adjustments made were incorrect. Todesca could not shift its burden of persuasion onto the Department by appearing at the hearing to ask the Department to explain why it made certain quantity adjustments.

Mr. Kane testified that according to an internal memorandum the Department would not pay the administrative fee of the Boston Police Department after May 1, 1993. He provided no facts concerning the pay of patrolman and sergeant rates for police details. He testified that once payment had been made by Todesca the Department had a "moral obligation" to reimburse, as Todesca could not recover money paid to Boston.

Detracting from the substance of his testimony were the facts that Mr. Kane had no personal knowledge of Todesca's work or the administration of the contract. He was not employed by Todesca during the times at issue. He had no personal knowledge of the contract quantities, preliminary or final, as agreed to by Todesca and the resident engineer or as adjusted by the Finals Section. On the police detail issues, Mr. Kane did offer any document to support his contention that there was a Department directive that altered the payment of administrative fees. He did not refer to any provision in the Contract provision that governed the payment of police details. He relied on an internal Todesca document not offered in evidence as the basis for his testimony.

I find Mr. Kane's testimony concerning the adjustments made in contract #93286 unsupported, speculative and unreliable. The factors detracting from the substance of Mr. Kane's testimony—the lack of personal knowledge, the lack of familiarity with Todesca's documents, the lack of knowledge of the contract work, lack of any documents relating to police detail payments—outweigh the probative value of his testimony. I find that Mr. Kane's testimony did not offer any facts upon which the trier could support a conclusion that the Finals Section made any error in adjustments made to contract #93286.

With respect to contract #95405, Mr. Kane offered no credible evidence. He offered no testimony at all concerning the adjustments made to police detail reimbursements. With regard to the adjustment that backed out the preliminary estimate's payment based on the price adjustment factor for bituminous concrete used in the extra work order, Mr. Kane offered no testimony based on personal knowledge or from knowledge of the Contract or records kept by Todesca with respect to it (including the terms of the extra work order). He had no knowledge of the extra work order or unit price negotiations. In sum, Mr. Kane's testimony on the issues raised on contract #95405 was not credible. He offered no substantial evidence that could support a finding that the Finals Section made a mistake.

I conclude that Todesca failed to support by substantial, credible evidence its contentions that the preliminary final estimates in #93286 or #95405 were correct. I conclude on this record that Todesca failed to meet its burden of persuasion in both appeals. There simply is no substantial evidence on this record to support the conclusion that the Finals Section made a mistake.[2] The adjustments made to the final estimates in both contracts by the Finals Section should stand as made.

FINDINGS

I find that Todesca failed to follow the remedy set forth in the Contract for not accepting the final estimate on Contract #93286 and Contract #95405. I find that

[2] Substantial evidence "is such evidence as a reasonable mind might accept as adequate to support a conclusion." New Boston Garden v. Assessors of Boston, 383 Mass. 456, 466 (1981). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Id. Here, the record as a whole shows that Mr. Kane's statements concerning police detail accounting were not supported and his statements doubting the adjusted quantities of materials used by the Department had no basis in fact.

Todesca offered no substantial evidence on which a decision to allow its appeal could be based.

RECOMMENDATION

The Commissioner should adopt the findings of fact set forth above.

I recommend that Todesca's appeal be disapproved and that the Department's final estimates, as respectively approved with adjustments on June 30, 1997 for contract #93286 and on September 9, 1996 for contract #95405, be made final.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: August 30, 2004

APPENDIX E-1

DECISIONS/RULINGS

Disputes re: Liquidated Damages

To: Acting Secretary John Ziemba, EOT

Through: Commissioner John Cogliano, MHD

From: Stephen H. Clark, Administrative Law Judge

Date: April 12, 2005

Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

North American Bridge Corporation (North American), a general contractor under MHD contract #97187 (Contract) to rehabilitate a bridge over the Ware River in Barre, appealed an assessment of liquidated damages of $4,675.00 voted by the former Board of Highway Commissioners (Board) on October 24, 2001. The Department recommended liquidated damages because North American had not completed the work by the original Contract completion date of July 25, 1998.

The appeal has merit. The Contract required the Department to grant time extensions "equivalent to the duration [a] delay" caused by the Department. On February 2, 1998 the Department for its own convenience suspended the work for 43 days by written order. On July 20, 1998 North American requested 43 additional days to complete the work. The Department did not respond to the contractor's request. The Department's refusal to extend the term by 43 days breached the Contract.

The Department's recommendation to the Board represented an incorrect "period" of Contract time "overrun" for liquidated damages. Because the Department erroneously refused to extend the contract term while sought liquidated damages, it unlawfully "whipsawed" the contractor. For both reasons, the liquidated damages assessed are invalid and should be rescinded.

INTRODUCTION

North American Bridge Corporation (North American), the general contractor in Department contract #97187 (Contract) for bridge work in Barre, appeals from the vote of the Board of Highway Commissioners (Board) to assess liquidated damages against it in the amount of $4,675.00. The Board assessed liquidated damages of $425/day for five days (July 26, 1998 to July 30, 1998) or $2,125; and also of $212.50/day for 12 days (between July 31, 1998 and October 13, 1998) or $2,550.00. The total of liquidated damages is $4,675.00 ($2,125 + $2,550).

The original Contract was dated November 13, 1997, the Notice To Proceed was issued on December 13, 1997. The time for performance expired on July 25, 1998. The Department suspended the work for 43 days in early 1998 by a written stop work order. The Contract provided that, where the work was suspended by the Department through no fault of the contractor, "the Contractor will be granted an extension of time" "equivalent to the duration of the delay." Standard Specifications (1988 ed) Subsection 8.10(B). On July 20, 1998 North American applied for 43 additional days in which to perform the work. The Department failed and refused to respond to North American's request at any time. Instead it required North American to finish the work on July 25, 1998. Since North American did not complete the work by that date, the Department recommended to the Board in 2001 that it assess liquidated damages. In 2002 the Department conceded that North American should have received an extension of time in 1998, a position it affirmed at the hearing held on this appeal on March 13, 2003.

North American's appeal has merit. The liquidated damages assessed in 2001 are invalid. By failing to grant the extension of time to which North American was entitled,

the Department breached the Contract. Because the Department failed to disclose to the Board that North American should have been granted an extension of time, its recommendation for liquidated damages was fatally flawed. Moreover, the Department may not on the one hand fail to grant the time extension the Contract requires and on the other impose liquidated damages for failure to perform by the original Contract date. Such behavior is arbitrary and unlawful "whipsawing" of the Contractor. See Farina Bros. Co. v. Commonwealth, 357 Mass. 131, 139 (1970) (failure to grant time extension where plainly required because of government suspension of work arbitrary and a breach of contract that provided for time extension equal to time of suspension).

BACKGROUND

On November 13, 1996 the Department awarded the Contract to North American for the rehabilitation of a highway bridge on Rte. 32 in Barre over the Ware River. Among other things, the work required the demolition of the existing bridge deck and superstructure, making modifications to existing piers and abutments, constructing a new superstructure and installing a temporary traffic signal for use during construction. The Contract, dated November 25, 1996, had an original date of completion of July 25, 1998 at a bid price of $555,892.00.

The Department for its own convenience suspended all work from January 26, 1998 through March 16, 1998 by written order dated February 2, 1998. North American recommenced the work on March 16, 1998. On July 20, 1998, in expectation that it could not meet the original completion date of July 25, 1998, North American applied for an extension of time of 43 days, the time lost because the Department's suspension order.

The Department did not act on North American's request for an extension of time and North American continued with the work. On August 4, 1998 North American made statutory presentment to the Department stating that the work was substantially complete. The Department conducted a site inspection with North American present on August 26, 1998 and forwarded a punch list of final items to the contractor on September 3, 1998. The Department certified the Contract work complete on October 13, 1998.

On April 24, 2000 the District Highway Director recommended that the Board accept the work as of April 18, 2000 and assess liquidated damages as follows:

From July 16, 1998	*to July 30, 1998*	*total of 5 days at $425.00/day*
From July 31, 1998	*to October 13, 1998*	*total of 12 days [sic] at $212.50/day*

The Chief Engineer endorsed the District's recommendation on October 21, 2001. The Board voted to assess liquidated damages as set forth above on October 24, 2001. Upon receipt of notice of the Board's action North American filed a notice of appeal in the Office of the Administrative Law Judge. In response to a written request of April 25, 2002 of then Administrative Law Judge Peter Milano, North American filed a Statement of Claim on July 30, 2002.

District 2 filed its Response to North American's Statement of Claim on September 6, 2002. In its response the District expressly conceded that the Department had never taken any action on North American's request for an extension of time and admitted "the contract should have been extended to September 6, 1998 (43 days)" in response to North American's request.

Judge Milano heard the appeal on March 11, 2003. Present at the hearing were

Brian McCabe	President, North American
Peter Milano	Administrative Law Judge
Isaac Machado	Deputy Chief Counsel, MHD

Steven Doyle	MHD
Eric Dorsey	MHD

At the hearing the following documents were entered as exhibits:

Exhibit #1	Contract #97187
Exhibit #2	Statement of Claim
Exhibit #3	Response of District 2, MHD
Exhibit #4	Submission of March 23, 2003[1]

At the conclusion of the hearing Judge Milano left the record open to receive specified evidence not available at the hearing, namely the documents contained in Exhibit #4. Among other things, Exhibit #4 contained the February2, 1998 letter from MHD district 2 to North American confirming the order of the District Highway Director of January 26, 1998 "in which I directed you to suspend all work on the subject project."

Mr. Milano took the appeal under advisement. On March 1, 2004 the undersigned was appointed Chief Administrative Law Judge. On July 21, 2004, through St. 2004, c. 196, s. 5 (Act), the Legislature abolished the Board and, so far as is pertinent here, conferred its prior functions on the Secretary of Transportation and the Commissioner of the Department (Commissioner). See G.L. c.16, s. 1(b), as appearing in the Act. This report and recommendation is made through the Commissioner to the Secretary.

Findings of Fact

In addition to the findings set forth above, the testimony and exhibits in the record provide substantial evidence to support the following findings, which I recommend the Secretary adopt.

[1] The post hearing submission dated March 23, 2003 consisted of (1) cover letter of North American dated March 25, 2003; (2) "Addition [sic] Time Schedule"; (3) February 2, 1998 letter of District Highway Director confirming suspension of work on January 26, 1998; March 6, 1998 letter of Chief Engineer confirming that resumption of work would commence March 16, 1008; (4) December 12, 1996 letter of Acting Secretary to the Massachusetts Highway Commission

1. The Department ordered a 43 day suspension of the work (from January 26, 1998 until March 16, 1998); the suspension was at the instigation and for the convenience of the Department; the suspension was by written order dated February 2, 1998.
2. On July 20, 1998 North American requested a 43-day extension of time to complete the work; its request expressly referenced the Department's 43 days suspension. North American requested September 6, 1998 as the new date of completion, which is 43 days after the original completion date of July 25, 1998.
3. At no time in 1998 did the Department make a response to North American's request for an extension. The Department took no action on North American's timely request for an extension of time for four years, which was long after the Board had assessed liquidated damages on October 24, 2001. The Department on September 6, 2002 conceded "the contract should have been extended to September 6, 1998 (43 days)." Ex. 3. The Department admitted at the hearing that the [C]ontract should have been extended to September 6, 1998 (43 days).
4. On August 4, 1998 North American presented the Department pursuant to G.L. c.30, s.39G a statement that the Contract work was substantially complete. The Department responded to North American's presentment on August 26, 1998 by meeting with North American on the work site and conducting an inspection. On August 28, 1998 District engineers wrote a memorandum to North American listing 16 items of work "that need to be

done or completed in order to finalize subject project," which was forwarded by letter dated September 3, 1998.

5. The District's September 3, 1998 written response to North American's August 4 1998 presentment was not prompt in the context of the District's position that time was of the essence, as it asserted the Contract term had expired on July 25 1998. The letter to North American inferred that the contract was in force and would be extended when it stated "please note that an extra work order to install fall protection along wing walls may be issued."

6. North American completed all Contract work on October 13, 1998.

7. On October 13, 1998 the District Highway Director certified in writing that the Contract work was completed. The District Highway Director signed a Certificate of Completion on April 24, 2000. The Certificate of Completion recommended that the Board accept the work as of April 18, 2000. It also recommended that the Board assess liquidated damages on North American in the amount of $4,675.00, as follows:

From July 16, 1998	to July 30, 1998	total of 5 days at $425.00/day
From July 31, 1998	to October 13, 1998	total of 12 days [sic] at $212.50/day

8. The Board voted to approve liquidated damages as recommended on October 24, 2001.

DISCUSSION

Liquidated Damage Clauses Are Enforceable

The Contract contained a liquidated damages clause. Specifications 8.11 ("Failure to Complete the Work on Time"). That clause provided that the work must be completed on or before the "date stated in the proposal" or "the date to which the time of

completion shall have been extended under the provisions of Subsection 8.10." Id. In the event the work "shall not have been physically completed by the time stipulated," the contractor shall pay the Department "a designated sum per day for the entire period of the overrun." (Emphasis added.) Id. A schedule of deductions in the Contract established that on a daily basis North American would pay the Department $425.00/day as liquidated damages for each day the after the completion date that the bridge was not open for traffic. After the roadway was open for traffic, the Contract provided that North American would pay the Department one half that sum, or $212.50/day, as liquidated damages for each day until the work was complete.

Liquidated damages clauses are valid in Massachusetts and are enforceable in accordance with their terms. Such damages are appropriate where the parties have agreed that the actual damages are difficult to ascertain and have estimated actual damages at the time the contract was executed. See Kelley v. Marx, 428 Mass. 877, 878 (1999) citing Guerin v. Stacy, 175 Mass. 595, 597 (1900) (Holmes, J) ("court will not undertake to be wiser than the parties, and therefore … when parties say that a sum is payable as liquidated damages they will be taken to mean what they say and will be held to their word.")

Assuming the Board voted to impose liquidated damages on North American upon a valid recommendation of the Department made in conformance with Subsection 8.10 ("Failure To Complete Work On Time"), the Contract's liquidated damages clause is valid and will be enforced according to its terms. North American, an experienced contractor in Massachusetts on notice that the Contract had a liquidated damages provision, bid on the project with knowledge of the Contract terms and is thus bound by

its terms. See Standard Specifications, Subsection 2.03 ("Examination of Plans, Specifications, Special provisions, and Site of Work").

The Positions Of The Parties

The Department seeks to uphold the Board vote assessing liquidated damages, as modified by evidence introduced at the hearing. The Department conceded at the March 11, 2003 hearing that North American's request for an extension of time "was never acted on by MassHighway"; it further admitted that the Contract completion date "should have been extended [from July 25] to September 6, 1998," or 43 days.[2] Based on this change of position, the Department contends that liquidated damages should still be imposed on North American under the aegis of the original Board vote. It seeks a ruling that includes a recalculation of liquidated damages by the undersigned after taking account of the 43 day time extension the Department now says it should have granted.[3]

North American argues that liquidated damages should not have been assessed, for two reasons. First, it contends that it finished the work within the time permitted because the Department should have granted it a minimum of 43 additional days for performance--to September 6, 1998—because of the suspension of the work the Department ordered for its own convenience, as well as 51 additional days for other reasons.[4] Second, it asserts that, because the Department failed to timely respond to its

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[2] The District first conceded on September 6, 2002 that it should have granted North American's request for a time extension. See Ex.4.

[3] Specifically, the Department asserts that 5 days of liquidated damages assessed from July 26, 1998 through July 30, 1998 (before the roadway was open from traffic) should be rescinded. Instead, it seeks a ruling that North American now owes liquidated damages of $7,862.50 for the 37 days from September 6, 1998 through October 13, 1998, the date of actual completion (37 X $212.50 = $7,862.50).

[4] North American argues that in addition to the 43 days conceded by the Department it is entitled to (a) 11 days because of the delay between contract award and the notice to proceed; (b) 14 days for the extra work of designing, installing and removal of steel sheeting; (c) 18 extra days to perform "overruns" in contract

August 4, 1998 presentment of its certification of substantial completion under G.L. c. 30, s.39G (Section 39G), the work was deemed completed as a matter of law on August 4, 1998, well before the September 6, 1998 extended date. Hence, no liquidated damages could have been lawfully assessed.

The Department responds to North American's Section 39G argument by claiming it timely responded to the presentment on August 26, 1998 when it met with the contractor at the work site to identify unfinished work. At that meeting it drew up a detailed list of 16 items of undone work, which it mailed to North American on September 3, 1998.

Analysis

I do not view the outcome of this appeal as depending on a determination of the particular number of days of extended time that North American should have been granted by the Department under the Contract. Nor does it depend on the correctness of North American's legal contention that the Department is estopped from asserting any time of completion date other than August 4, 1998 because of the Department's supposed failure to timely respond to North American's August 4, 1998 presentment of completion under G.L. c.30, s.39G.

Instead, I find that the Board's vote imposing liquidated damages on North American was invalid from inception for two reasons. First, at the time the Department applied to the Board for liquidated damages it was itself in breach of the Contract since it had failed to approve North American's timely and valid application for an extension of time of performance, which the Contract plainly required. Second, the Board voted

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work. Because of the disposition I recommend in this report it is unnecessary to determine whether any of these claims are valid.

liquidated damages on incorrect information that the Department now agrees was wrong. Both the District's and Chief Engineer's recommendations—dated April 24, 2001 and October 21, 2002, respectively—asked the Board to impose liquidated damages on North American on the representation that North American's Contract finally expired on July 25, 1998. But July 25, 1998 was not the true date of completion because North American had a Contractual right to extend the time of completion by (at least) 43 days. Because the Board's vote was based on an admittedly incorrect calculation of the time of the supposed "overrun," it was invalid.

The Department Breached The Contract

The Contract provides specific rights to a contractor where the Department for its own convenience suspends the work. The Contract does not permit North American damages where the work is so delayed. See Subsection 8.05 (contractor agrees it may not assert a "claim of damage of any kind on account of any delay"). Instead of damages the Contract provides North American with the right to an extension of the time of performance. See Subsection 8.05 (contractor's "sole allowance for any such [Department caused] delay or suspension … is an extension of time as provided in Subsection 8.10." Such contractual provisions are valid in Massachusetts. See Charles I. Hosmer, Inc. v. Commonwealth, 302 Mass. 495, 500-501 (1939) (upholding no delay damage clause where contractor's remedy was an extension of time to perform).

The Contract provides that "the Contractor will be granted an extension of time" "equivalent to the duration of the delay" in circumstances pertaining here. See Subsection 8.10 ("Determination and Extension of Contract Time for Completion")

paragraph B.[5] The Contract required the Department in plain words to extend the time available to North American for completion of performance where the Department itself suspended the work. When the Department failed to grant the time extension it breached the Contract. See Farina Bros. Co. v. Commonwealth, 357 Mass. 131, 139 (1970) (failure to grant time extension where plainly required because of government induced delays and suspensions of the work was arbitrary and breached contract that provided for time extension equal to time of suspension) (Farina).

The Department's refusal to approve North American's application for time extension persisted for four years during which time the Department was continually in breach of Subsection 8.10(B). See D. Federico Co., Inc. v. New Bedford Redevelopment Authority, 9 Mass. App. Ct. 141, 143 (1980). The Department's failure to act began on receipt of North American's application on July 20, 1998 and was continuing at the time it recommended to the Board that it assess liquidated damages—viz. from April 4, 2000 through October 21, 2001. At the time of the Board's vote to assess liquidated damages on October 24, 2001 the Department was still in breach for failure to act on North American's application. The Department's breach no doubt caused the Board to vote for liquidated damages based on the now admittedly incorrect written recommendation plainly showing North American's "overrun" began after it "failed" to meet its original July 25, 1998 completion date. See Ex. 2 (Board vote). The record here shows that the Department's failure to act continued until at least September 6, 2002, when the District conceded that it was in "agreement that the contract should have been extended to September 6, 1998 (43 days) as stated in North American's [] Statement of Claim." Ex. 4.

[5] Paragraph B provides in pertinent part: "In case … any part [of the work] is delayed or suspended by [the Department], the Contractor will be granted an extension of time in which to complete work … equivalent to the duration of the delay ….")

The Department's submission of factually incorrect recommendation to the Board for liquidated damages was also a violation of the Contract. Subsection 8.10 ("Failure to Complete Work On Time") obliges the Department to impose liquidated damages "for the entire period of [time of the Contract] overrun." Because the extended time due North American was not included in the Department's recommendation to the Board on October 21, 2002, its calculation of the "period" of overrun (if any) was manifestly wrong. The Department's error in its time calculation on the face of its recommendation caused to Board to assess liquidated damages for an incorrect "entire period of overrun" in contravention of Subsection 8.10. Because the "period" for which it assessed liquidated damages was incorrect, the Board vote is invalid.

The Department's Change Of Position Is Of No Avail

The Department may not on the one hand represent to the Board that North American was not entitled to a time extension and on the other hand claim at the hearing of North American's appeal that the Department should have granted that extension. Cf. D. Federico Co., Inc. v. New Bedford Redevelopment Authority, 9 Mass. App. Ct. 141, 144 (1980) (redevelopment authority may not simultaneously claim to court that it has not yet approved the work and also that plaintiff acted too late to obtain its approval). The Department's shift of position comes too late and does not in any way cure the prejudice its breach worked on North American in 1998 and beyond. Because North American did not receive a prompt extension of time in 1998 it did not have the opportunity in July 1998 to marshal its forces to complete the work by September 6, 1998. See Farina at page 139. Because the Department failed to promptly respond to North American's request for punch list items after the presentment of substantial

completion under Section 39G, the Department compounded the prejudice worked by its refusal to grant a time extension. Because the Department's breach continued when it went before the Board with erroneous information in 2001, North American was further prejudiced by the unjust assessment of liquidated damages.

The Department may not contend here that liquidated damages should be recalculated based on a Board vote that was invalid from inception. The fact that North American was entitled under the Contract to additional time because the Department suspended the work for its own convenience was not disclosed in the Department's recommendation for liquidated damages. To uphold the Board's vote here, or to recalculate liquidated damages as the District suggests, would ignore that the Department was in violation of the Contract when it asked the Board to approve its recommendations. It would also effectively permit the Department to take advantage of its own breach. This the Department may not do.

The Department's wholly inconsistent positions before the Board and the Administrative Law Judge require that the Board's assessment of liquidated damages be set aside. See D. Federico Co., Inc. v. New Bedford Redevelopment Authority, 9 Mass. App. Ct. 141, 144 (1980).

The Department May Not Whipsaw The Contractor

The fact that the Department should have granted North American a time extension but instead held it to the original contract completion date while it proceeded to affirmatively assess liquidated damages brings this matter within the ambit of the rule enunciated in Farina Bros. Co. v. Commonwealth, 357 Mass. 131 (1970) (Farina). In that case (as here) the contract precluded the contractor from seeking damages for delay, but

instead required the government to grant extensions of time for suspensions and delays for which it was responsible. In Farina (as here) the Commonwealth undeniably delayed and suspended the contractor's work and then, instead of granting the extensions of time the contract required, repeatedly denied the contractor's good faith requests for extensions while simultaneously demanding completion of the work by the original, unextended completion date.

The court held that the government's actions in combination constituted unlawful arbitrary behavior that breached the contract because it "whipsawed" the contractor. The damage arose not "from the Commonwealth's exercise of the privilege of delay or changing the time of performance but from the complete failure of its agents promptly to afford to the contractor the protection of extensions and the opportunity to reschedule its work during performance." 357 Mass. at 139. (Emphasis added.) In the words of the court

> In [such] circumstances [], the Commonwealth in effect has used the delay provisions to whipsaw the contractor. So employed, they cannot absolve the Commonwealth of liability. If, as may be the case, delay is to occur during performance of the contract the collateral provisions relating to appropriate extensions should come promptly into play. In the present instance their application was unconscionably delayed in a manner to deprive the contractor of such protections as the Blue Book afforded to it. 357 Mass. at 138-139. (Emphasis added.)

Here, the Department's unequivocal written directive suspended North American's work for the Department's own convenience. That suspension provided specific grounds in the Contract for an extension of the time for performance under Subsection 8.10 (B). Under Farina these facts made the provisions "relating to appropriate extensions" to come "promptly into play." In short, the Department was obliged to act "promptly" on North American's July 20, 1998 request. Instead, it waited

four years—until September 6, 2002—before it even recognized its obligation to approve North American's timely application for extended performance.

The Department's adamant refusal to act on North American's valid application for a 43 day time extension while simultaneously holding it to the original Contract completion date "whipsawed" the contractor. The Department's continued refusal to act on the time extension denied North American its contractual rights. As in Farina the damage to North American here arose from "the complete failure of [the Department's] agent promptly to afford to [North American] the protection of extension and the opportunity to reschedule its work during performance." 357 Mass at 139. The Department should have promptly granted North American 43 additional days in which to complete performance. It should also have promptly specified to North American the "punch list" of 16 undone items when it received the August 4, 1998 presentment.

CONCLUSION

North American's appeal has merit. The Department's failure to grant a time extension required by the Contract prejudiced the contractor and caused the Department to forward the Board an incorrect calculation of the "entire period of overrun."

RECOMMENDATION

The imposition of liquidated damages imposed by the Board should be set aside.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

APPENDIX F-1

DECISIONS/RULINGS

Disputes re: Price Adjustments

To: Secretary Daniel A. Grabauskas, EOT

Through: Commissioner John Cogliano, MHD

From: Stephen H. Clark, Administrative Law Judge

Date: January 20, 2005

Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

The appeal of Derbes Bros., Inc. (Derbes) to reverse the downward adjustment of the finals engineer made pursuant to the price adjustment special provision in Contract #98035 for compensation for the cost of bituminous cement used in resurfacing and related work on Rte. 3A in Quincy should be denied. The Contract compensated Derbes for use of bituminous concrete according to a formula that took into account both the bid price and the cost of the material at the time it was used. The Contract was delayed 9 months during which time the cost of bituminous concrete fell. Because Derbes failed to offer any evidence that its costs increased as a result of the falling price of bituminous cement, it did not prove any equitable adjustment in the Contract price was due. Derbes was properly compensated for the use of bituminous concrete under the Contract's special provision. Its appeal should be denied.

INTRODUCTION

Derbes Bros., Inc. (Derbes) appeals from the downward adjustment of $14,166.85 made by the finals engineer of the Massachusetts Highway Department (Department) in the final estimate for contract #98035 (Contract). The Contract was for resurfacing and related work on Rte. 3A in Quincy. The Contract contained a cost adjustment provision under which Derbes would be paid more or less for each ton of bituminous concrete used depending on a formula based on the difference between the market price at the time of use and the price Derbes originally bid. When the Department's finals engineer calculated the price adjustment, the final payment decreased by $14,166.85.

The work was delayed approximately 9 months, during which time the price of bituminous concrete fell. Derbes alleged in its claim that, because of the delay, its paving subcontractor and bituminous supplier "both asked for and renegotiated higher prices."

I conclude that Derbes stated a claim for an "increase in the cost of performance" under G.L. c.30, s.39*O* but failed to prove it. At the hearing Derbes failed to offer any evidence that is actual cost of performance had increased. The allegation that its subcontractor and supplier had increased their prices due to the suspension of the work was entirely unsupported. The evidence showed that the cost of bituminous concrete in fact decreased during the time of performance. Accordingly, the Department's $14,166.85 downward adjustment should not be disturbed.

BACKGROUND

The record discloses the following facts, which I recommend the Commissioner adopt.

Statement of the Appeal

Derbes and the Department entered into the Contract on June 8, 1998 at the bid price of $853,021.50 with an original completion date of June 27, 1998.[1] The Contract is governed by the Standards Specifications for Highways and Bridges (1998 ed.) (Standard Provisions) and the additional provisions set forth in Contract, including a supplement to the special provisions governing compensation for bituminous cement.
The project was delayed some 9 months, but the Department granted Derbes an extension of time to complete the work, which was completed by October 30, 1998.

On April 19, 2002 the Department sent Derbes the Contract final estimate, which incorporated the adjustment made for actual cost of bituminous concrete from June-October 1998. The Department determined that it had overpaid Derbes by $14,166.85 for bituminous concrete during six months in 1998 when the market price of bituminous concrete had fallen well below the bid price. On May 1, 2002 Derbes appealed to the Office of the Administrative Law Judge and, on May 16, 2002, filed its statement of claim.

A hearing was held on April 17, 2003 on the appeal before Chief Administrative Law Judge Peter Milano. Present and participating in the hearing were

Peter Milano	Chief Administrative Law Judge
Frank Derbes	Derbes Bros., Inc.
Jon Johanson	Resident Engineer, MHD
Mary Bearse	Fiscal, MHD
Isaac Machado	Deputy Chief Counsel, MHD

The following documents were admitted in evidence at the hearing.

Exhibit #1	Contract #98035

[1] Because of the adjustments to the Contract explained below Derbes was ultimately paid $756,673.88 (net of retainage).

Exhibit #2	Derbes Statement of Claim

At the hearing, Judge Milano left the record open to accept the following additional documents into evidence.

Exhibit #3	Derbes/MHD Correspondence[2]
Exhibit #4	Final Estimate Contract #98035
Exhibit #5	MHD Bit. Conc. Price Adjustment
Exhibit #6	Letter of Frank Derbes, 4/25/02
Exhibit #7	Memo of Jon Johanson, 1/24/02
Exhibit #8	Memo of P.J. Sullivan, P.E., 2/14/03

The matter was taken under advisement. In July 2003 Chief Administrative Law Judge Peter Milano resigned. At the time of Judge Milano's resignation no report had been made to the Board of Contract Appeals (Board). On March 1, 2004 the undersigned was appointed Chief Administrative Law Judge. On July 21, 2004, through St. 2004, c. 196, s. 5 (Act), the Legislature abolished the Board and, so far as is pertinent here, conferred the Board's prior functions on the Secretary of Transportation (Secretary) and the Commissioner of the Department (Commissioner). See G.L. c. 16, s. 1(b), as appearing in the Act. This report and recommendation is made through the Commissioner to the Secretary.

Findings of Fact

The Department issued a notice to proceed on August 29, 1997. Notwithstanding, at the preconstruction conference held September 5, 1997, the Department personnel orally informed Derbes that the Contract work should not start, as funds were no longer available. Derbes did not begin the work.

[2] The correspondence consisted of (1) notice to proceed (8/29/97); (2) notice preconstruction conference (9/5/97); (3) letter of Frank Derbes to Eric Botterman, District Highway Director (10/24/97); (4) letter of Eric Botterman to Frank Derbes (2/2/98); (5) Notice of Department to Derbes revising project limits (2/12/98); (6) letter of Eric Botterman to Frank Derbes (6/3/98); (7) Notice of Department to Derbes of Contract time extension until 10/27/98 (10/7/98).

On or about October 24, 1997 the Department orally informed Derbes that certain Contract work was to be deleted but that the project limits for resurfacing work were to be extended. In an apparent response to a Department request, on October 24, 1997 Derbes wrote the Department that it agreed to perform all items in the modified work "for the same contract prices that we bid. [ ] We will not seek to renegotiate any price increase for the deleted or reduced items or any increased quantities." The Department did not acknowledge Derbes's letter.

On February 12, 1998 the Board of Highway Commissioners approved in writing the oral representations made to Derbes on October 24, 1997. The deletions of work lowered the value of the overall Contract, while the expansion of the project limits added to resurfacing work, in which more bituminous concrete would be used. Neither Derbes nor the Department considered that the expansion of project limits to be extra work.

On January 8, 1998 the Department repeated its oral suspension of work order. On February 2, 1998 the District Highway Director confirmed in writing its oral order of January 8, 1998 suspending the work. The Department wrote, "you [Derbes] are directed to suspend all work on contract No. 98035, Quincy, Rte. 3A Resurfacing." The letter stated that "when engineers are available to oversee your work you will be notified." On June 3, 1998 the Department "directed [Derbes] to proceed on June 15, 1998 with the construction and related work under the Contract." Derbes accordingly began the work.

The delay resulting from the oral order to suspend work given September 5, 1997 was 123 calendar days. The delay resulting from the written order of the Department was 150 calendar days. The total time of delay was approximately 9 months. The Department and Derbes agreed to extend the time of Contract completion from June 29,

1998 to October 27, 1998, a total of 120 days. The Commission approved that extension of time on October 7, 1998. Derbes finished the work on or before October 27, 1998.

Derbes' Statement of Claim asserts, "the DBE and bituminous supplier both asked for and renegotiated higher prices [as a result of the delay]." At the hearing Derbes offered no evidence concerning its resurfacing subcontractor, the higher price allegedly renegotiated, or the actual cost to Derbes resulting from the renegotiated subcontract price. At the hearing Derbes offered no evidence concerning its supplier of bituminous concrete used in the work in the six months between June-October 1998 or any other time. Derbes offered no evidence concerning the prices it was obligated to pay any bituminous cement supplier under either an original or renegotiated contract. Derbes offered no evidence at the hearing to prove that its actual cost of performance of the Contract had increased as a result of the 9-month delay ordered by the Department.

The Contract included a "Supplement To The Special Provisions," revised as of January 1998, titled "Price Adjustment For Bituminous Concrete Mixtures."[3] The price adjustment clause for bituminous concrete "shall not include transportation or other charges." The base price of "bituminous concrete mixtures" set by the Department as a result of Derbes' bid, was $162.67 per ton. The total tonnage of bituminous concrete (all types) used in the work for the six-month period June/October 1998 was 9,670.7 tons. The final engineer's worksheet showing application of the Contract price adjustment

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[3] The supplement provided, in part, "The price adjustment clause is inserted into this contract because the shortage of oil products in relation to the national and work-wide energy situation has made future costs of asphalt unpredictable." "The price adjustment will be based on the variance in price for the asphalt cement component only from the base price to the period price. It shall not include transportation or other charges." "The contract price of the Bituminous Concrete Mixture will be paid under the respective item in the contract. The price adjustment, as herein provided, upward and downwards, will be made as work is performed, using the most recent previous price adjustment item until the applicable period price is established."

clause for the tonnage of bituminous concrete used in the six-month period June/October 1998 is the only evidence in the record showing the actual prices of Bituminous Concrete.[4]

On April 19, 2002 the Department's finals section notified Derbes in its Final Estimate that, due to the application of price adjustments factors resulting from a decrease in the price of bituminous concrete in the period June-October 1998, the Department had overpaid Derbes by $14,166.85. [5]

DISCUSSION

There is no question that the Derbes Contract was suspended after the notice to proceed had issued and that the work was suspended for more than 15 days. The delay was initiated only because the Department sought it and the Department unquestionably ordered Derbes in writing to suspend the work. These facts bring the Contract within the purview of G.L. c.30, s.39*O* (Section 39*O*).[6] Section 39*O* provides that an "awarding

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[4] The "period price" (FOB Terminal) is determined by the Department by "averaging the prices posted at the beginning, middle and end of each two month period by two or more suppliers." In this Contract there were three separate two month periods for which adjustments were made. The May-June and July-August 1998 time periods both showed a net price decrease of $24.84/ton; the September-October 1998 time period showed a decrease of $30.99/ton. Overall, after applying the price adjustment formula to the 9,670.7 tons used between May and October the contract formula yielded a total downward adjustment of $14, 166.85.

[5] Derbes' Statement of Claim states that its appeal is for $11,573.15. However, Derbes's stated number is plainly the result of a clerical error made by Derbes in reviewing the final estimate. Derbes intended to compute the amount subtracted from the final estimate by the finals engineer as a result of the price adjustment clause for bituminous concrete. The correct sum of all those reductions is $14,166.85, not $11,573.15. I treat the Derbes claim as one for $14,166.85.

[6] Section 39*O,* which must be included in every contract awarded under G.L. c.30, provides

> (a) The awarding authority may order the general contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the awarding authority; provided however, that if there is a suspension [ ] for fifteen days or more due to a failure of the awarding authority to act within the time specified in this contract, the awarding authority shall make an adjustment in the contract price for any increase in the cost of performance of this contract but shall not include any profit to the general

authority may order the general contractor in writing to suspend, delay or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the awarding authority…." Section 39*O*(a).

If there has been a written order for suspension of fifteen days or more, "the awarding authority shall make an adjustment in the contract price for any increase in the cost of performance of this contract, but shall not include any profit to the general contractor on such increase …." Section 39*O*(a). (Emphasis supplied.) The statute has been construed to mean that the awarding authority's obligation to consider a claim for an adjustment in the contract price only arises where the suspension is based upon a written order and the work is suspended for fifteen days or more. See Reynolds Bros. v. Commonwealth, 412 Mass. 1 (1992).

Section 39*O* does not require that the awarding authority make an automatic price adjustment to the contract. The statute provides that the general contractor "must submit the amount of a claim under provision (a)." Section 39*O*(b). The price adjustment contemplated by Section 39*O*(a) is only made after the general contractor both claims and proves an "increase in the cost of performance" net of "any profit to the general contractor on such increase." Section 39*O*(a) and (b).

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contractor for such increase; and provided further , that the awarding authority shall not make any adjustment in the contract price under this provision for any suspension, delay, interruption or failure to act to the extent that such is due to any cause for which this contract provides for an equitable adjustment of the contract price under any other contract provision.

(b) The general contractor must submit the amount of a claim under provision (a) to the awarding authority in writing as soon as practicable after the end of the suspension, delay interruption or failure to act and, in any event, not later than the date of final payment under this contract and except for costs due to a suspension order, the awarding authority shall not approve any costs in the claim incurred more than twenty days before the general contractor notified the awarding authority in writing of the act or failure to act involved in the claim.

Derbes in fact filed a statement of claim alleging that its actual cost of performance had increased because of the 9-month delay.[7] It specifically alleged that its "DBE [paving subcontractor] and bituminous supplier both asked for and renegotiated higher prices." Statement of Claim, PP 10.

Its claim also stated that it was appealing from the Department's "deduction for bit con [sic] lower fuel adjustments." Id., PP 9. The challenged adjustments were made by the Department's finals engineer pursuant to Subsection 9.05 ("Final Acceptance and Final Payment"), which provides, in part, "All prior partial estimates and payments shall be subject to correction in the final estimate and payment."

Because Derbes alleged higher costs of performance due to delay of more than fifteen days based on a written suspension order, I conclude Derbes has properly filed a Section 39*O* claim.

As the party appealing from the determinations of fact made by the Department's final engineer under Subsection 9.05, Derbes carries the burden of persuasion. See General Electric Co. v. Board of Assessors of Lynn, 393 Mass. 591, 598 (1984) (burden of persuasion is from the outset on one party; presumption of validity of government's administrative action means challenging party has burden of proving the contrary).

At the hearing Derbes offered no evidence to prove its allegations of increased cost of performance due to delay. It proffered no document or testimony that referred in any way to higher costs of performance it incurred as a result of actions of either its DBE

[7] Derbes filed its claim within the time allowed by the statute. Section 39*O* provides "The general contractor must submit the amount of a claim under provision (a) to the awarding authority in writing as soon as practicable after the end of the suspension, delay, interruption or failure to act and, in any event, not later than the date of final payment under this contract …." Section 39*O*(b). By immediately challenging the application of the bituminous cement price adjustment taken by the Department's final section, Derbes did "submit the amount of [its] claim" to the Department.

subcontract or its bituminous supplier. With respect to its DBE subcontractor, Derbes did not offer the subcontract itself into evidence and did not testify to its terms. Derbes failed as well to offer testimony concerning the alleged renegotiation of the subcontract terms.

With respect to its "bituminous supplier," Derbes offered no evidence whatsoever. The record is silent with respect to Derbes's allegation that its "bituminous supplier" "renegotiated higher prices." Likewise, Derbes offered no evidence to show the market price of bituminous concrete, either during the original or extended term of the Contract. Derbes did not show either what it originally was to pay its bituminous supplier or the amount of the alleged price increase due to the alleged renegotiation. The only evidence at the hearing on prices for bituminous concrete was the calculation sheet used by the Department's finals engineer in computing the price adjustment. Ex. 4.

I conclude that Derbes has failed to prove the allegations made in its statement of claim. Having the burden of persuasion Derbes was obligated as a matter of law to prove by substantial evidence the elements of its claim. General Electric Co. v. Board of Assessors of Lynn, supra. Substantial evidence "is such evidence as a reasonable mind might accept as adequate to support a conclusion." New Boston Garden v. Assessors of Boston, 383 Mass. 456, 466 (1981). Derbes produced no substantial evidence to prove that Derbes's DBE subcontractor in fact charged Derbes "higher prices" after a renegotiation or that Derbes's bituminous concrete supplier in fact charged higher prices as a result of renegotiation brought about by the suspension in the work. Derbes failed to show any "increase in the cost of performance."

Derbes also argues in substance that the Department's downward adjustment in compensation after applying the price adjustment clause ipso facto increased its cost of

performance. “We do not feel we should be responsible for the lower fuel [sic] adjustment,” Derbes says. Statement of Claim, PP 7. Derbes argues that had the work not been delayed it would not have been subject to the downward price adjustment. The application of the price adjustment clause after the price fell was done only because of the Department’s delay. In short, Derbes argues that, because it could not work when prices were higher, the delay caused “an increase in the cost of performance.” I disagree.

Derbes misapprehends the nature and operation of the bituminous cement price adjustment clause in the Contract. The price adjustment clause does not guarantee Derbes a price for bituminous cement. In contrast to compensation based on a bid item for which Derbes guarantees a fixed price for the term of the Contract, the price adjustment clause compensates Derbes on the basis of a formula. The Contract assumes that the price of bituminous concrete will fluctuate over the life of the Contract.

The stated purpose of the price adjustment clause is to protect both parties from the effects of anticipated price swings. The express intent of the clause is to insulate the parties from “unpredictable” higher or lower costs of asphalt. The price adjustment, which is based on a formula determined by the difference between Derbes bid price and the market price at the time the asphalt is used, is expressly written to provide a flexible, as opposed to fixed, means of compensation. The adjusted price does “not include transportation or other charges,” such as overhead or profit.

The market price of bituminous concrete fell during the three months the contract performance was extended. The result, based primarily on the cost of the asphalt, was a decrease in compensation payable to Derbes. Because Derbes had no contractual right to be paid at the “higher” price it originally bid, it has no basis to claim compensation at a

price other than that yielded by application of the price adjustment special provision. The adjustment made by the final engineer was required by the Contract. No such adjustment could be deemed an "increase in the cost [of Derbes] performance" when prices in fact decreased.

A final issue requires discussion. In its statement of claim Derbes says, "The Resident Engineer did not include the fuel adjustment because of the financial loss we would have been forced to absorb." PP 10. An internal Department memorandum dated January 24, 2002 by the former resident engineer corroborates that statement. The Department employee states

> I disagree with the [] deduction [of $14,166.85 made by the finals engineer]. The project had many delays, none of which were the fault of the contractor. The paving was the DBE portion of this contract. The contractor due to the delays had to renegotiate and pay a higher price both to the DBE and his bituminous concrete suppler to complete the project.… The deductions for Bit. Conc. Fuel Adjustments [sic] coupled with the higher price paid to the DBE, in my opinion, will do significant financial damage to a contractor that cooperated and worked diligently with the Department to overcome many unforeseen obstacles and complete his work. Ex. 7.

There is an inference in this record that the Department at the district level failed to abide by the Contract's price adjustment clause when it submitted certain periodic payment estimates. The Department's finals engineer properly corrected that oversight. The resident engineer was obligated to administer the Contract, including terms that seemed to him to adversely affect Derbes. Neither Department personnel nor the contractor may selectively enforce provisions of the Contract depending on their "opinions." If the contractor wishes to seek a price adjustment, it must follow the provisions of the Contract itself. Failure to follow the procedures set forth in the contract designed to provide it a remedy results in a forfeiture of any compensation it might have

been awarded. See Glynn v. Gloucester, 9 Mass. App. Ct. 454, 461 (1980) (failure to follow the remedies set forth in the contract preclude all relief). Whatever effect Derbes's letter of October 24, 1997 not to "seek to renegotiate any price increase" may be, it did not excuse Derbes from its failure to pursue its remedies under the Contract.

The Contract, as well as Section 39O, contained a provision that allowed Derbes to seek its "actual" increased costs attributable to delays not its own fault. Under Subsection 8.05 the Commissioner[8] has the discretion to adjust the compensation due Derbes. To seek a claim for such discretionary compensation under Subsection 8.05 "the contractor shall submit in writing not later than 30 days after the termination of such suspension, delay or interruption the amount of the claim and the breakdown of how the amount was computed [ ] except no allowance for overhead and profit shall be allowed."[9]

Here, assuming that Derbes gave the Department the required notice and assuming further that its statement of claim provided the required "breakdown" or "computation" of its "increase in the actual cost of performance," Derbes still cannot prevail. That is because a Subsection 8.05 claim, no less than a Section 39*O* claim, requires proof by substantial evidence. Derbes produced no evidence to show an "actual increase in the cost of its performance."

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[8] Subsection 8.05 provides that the "Commission" has the power to determine whether "the Department" should make an adjustment in the contract price "for any increase in the actual cost of performance …(excluding project and overhead)" caused by delays for which the contractor is not responsible. Through St. 2004, c. 196, s. 5 amended Chapter 16 of the General Laws abolishing the Commission and transferring its powers to the Commissioner.

[9] Subsection 8.05 provides that the contractor is precluded from seeking any damages for delay in the commencement or performance of the work, but shall granted an extension of time. Such a "no delay damages" clause is lawful. See Charles I. Hosmer, Inc. v. Commonwealth, 302 Mass. 495 (1939). Subsection 8.05 also provides an exception to the prohibition against damages for delay, however. Thus, where a contractor can show that it has suffered an "increase in the actual cost of performance" because of a delay for which it is not responsible, the Commissioner in his discretion may adjust the contract price.

CONCLUSION

I conclude that Derbes failed to prove any increase in its cost of performance due to the delays the Department ordered. I further conclude that the Department's application of the price adjustment clause reducing compensation payable for bituminous concrete was required by the Contract and was not an increase in the cost of performance.

RECOMMENDATION

The appeal of Derbes should not be allowed.

The Department should uphold the decision of the finals engineer.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

APPENDIX G-1

DECISIONS/RULINGS

Disputes re: Specifications

To: Secretary John Cogliano, EOT

Through: Commissioner Luisa Paiewonsky, MHD

From: Stephen H. Clark, Administrative Law Judge

Date: July 26, 2005

Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

A.F. Amorello & Sons, Inc. (Amorello), general contractor under MHD contract #32067 (Contract) for roadway reconstruction and related work on Grove Street in Paxton, appeals from the refusal of the Engineer to grant extra work of $14,018.40 for the removal of Class B Rock during earth excavation. Amorello claims removal of Class B Rock was extra work because the Contract purportedly contained no specific pay item for such work. The Department contends that excavation of Class B Rock is paid for under a special provision of the Contract.

Amorello's appeal is without merit. The special provision for "earth excavation" stated that it was for "work [that] include[s] the excavation of material of every description, regardless of the type encountered, from within the limits of the Contract…." The Contract provides that special provisions govern over conflicting standard specifications. Accordingly, the special provision prevails over Sections 120 and 140 that might otherwise be relevant.

The special provision of the Contract should be enforced in accordance with its plain meaning.

Amorello's appeal should be denied.

INTRODUCTION

A.F. Amorello & Sons, Inc. (Amorello), the general contractor on Department contract #32067 (Contract) for roadway reconstruction and related work on Grove Street in Paxton, appeals from the refusal of the Engineer to grant extra work worth $14,018.40 for the removal of Class B Rock during earth excavation. Amorello claims removal of Class B Rock to be an extra because the Contract purportedly contained no specific pay item for that work. The Department contends that the excavation and removal of Class B rock is to be paid under a special provision of the Contract, Item 120 ("Earth Excavation"). The Department argues that special provision controls the outcome here since it includes excavation of "materials of every description."

Amorello's appeal is without merit. The special provision, Item 120, is for "work [that] include[s] the excavation of material of every description, regardless of the type encountered, from within the limits of the Contract…." When Amorello bid a $14/CM unit price for Item 120, it knew or should have known that, with certain exceptions not applicable here, Item 120 excavation work included Class B Rock.

I recommend that the Secretary deny Amorello's appeal.

BACKGROUND

Amorello bid $1,953,009.90 for the road reconstruction work, a federal aid project. The Contract work was to correct and improve drainage, reconstruct travel surfaces, drainage structures, add paved shoulders and a concrete sidewalk on the east side of Grove Street in Paxton for a distance of 1.6 miles. On September 19, 2001 the Department awarded the Contract to Amorello. The Contract was executed on

September 28, 2001. The Contract is governed by the Standard Specifications for Highways and Bridges (1995 Metric Edition).

While removing and reinstalling drainage equipment within the Contract limits in June, 2002 Amorello encountered CL B Rock, which may be generally described as rock that must be blasted or jack-hammered to pieces before removal.[1] The resident engineer and the District 3 Highway Director agreed with Amorello that the removal and disposal of CL B Rock was extra work. District 3 asked Amorello to quote a price for its removal. On June 18, 2002 Amorello quoted a price of $99/CM to the Department and thereupon crushed and disposed of 141.6 CM of CL B Rock.

On August 30, 2002 the Deputy Chief Engineer for Construction, Mr. McGrath, reviewed and denied the District 3 Highway Director's request for extra work. Mr. McGrath found that special provision Item 120 ("Earth Excavation") included the removal of CL B Rock. He therefore refused to submit District 3's extra work request to the Board of Highway Commissioners (Board). Amorello thereafter perfected its rights to file a claim and this appeal. See infra p. 4.

At the time Amorello filed this appeal, Mr. Milano was the Department's Administrative Law Judge. On March 1, 2004 the undersigned was appointed Administrative Law Judge. On July 21, 2004, through St. 2004, c. 196, s. 5 (Act), the Legislature abolished the Board and, so far as is pertinent here, conferred its prior functions on the Secretary of Transportation and the Commissioner of the Department (Commissioner). See G.L. c.16, s. 1(b), as appearing in the Act. This report and recommendation is made to the Secretary through the Commissioner.

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[1] See infra p. 6, n. 5.

I held a pre-hearing conference in this appeal on February 15, 2005 and heard Amorello's appeal on March 31, 2005. Present at the hearing were

Robert Spence	Engineer, A.F. Amorello & Sons
Stephen H. Clark	Administrative Law Judge
Isaac Machado	Deputy Chief Counsel, MHD
Christian Gonsalves	Assistant Counsel, MHD
Andrew Nunes	Area Engineer, MHD, District 3

The following documents were entered as exhibits at the hearing:

Exhibit #1	Contract #32067
Exhibit #2	Statement of Claim
Exhibit #3	Special Provision Item 120
Exhibit #4	Submission of March 31, 2005[2]
Exhibit #5	Post Hearing Submission[3]

At the conclusion of the hearing I took the matter under advisement.

FINDINGS

The testimony and exhibits, and the record as a whole, contain substantial evidence to support the findings of fact set forth above and following.

At the time the CL B Rock was encountered, Amorello was performing trenching work for the installation of drainage and water pipe. The District 3 engineer ordered 141.6 CM of CL B Rock removed. The record does not state at which stations the CL B Rock was encountered but it is undisputed that the work was done within the limits of the Contract.

[2] Amorello's submission of March 31, 2005, which I had requested at the pre-hearing conference, consisted of a statement detailing the administrative procedure Amorello followed to perfect its claim, copies of special provision Item 120, Sections 120 and 140 of the Standard Specifications (1995 ed.) and a written statement of Amorello's contentions.

[3] After the hearing the parties stipulated that I could enter the following documents as Exhibit #5 on my own initiative: June 18, 2002 price quote of Amorello for CL B Rock; August 2, 2002 proposed extra work order of District 3; Extra Work Order (unexecuted) dated August 5, 2002; July 9, 2002 EWO cover sheet; August 30, 2002 memorandum of Michael A. McGrath; May 9, 2003 letter of Amorello to District Highway Director; May 29, 2003 letter of District Highway Director to Amorello; June 4, 2003 claim of Amorello for extra work.

On August 5, 2002 the District 3 Highway Director formally recommended that the Board approve extra work at the $99/CM price Amorello quoted because it was "necessary to establish a pay item for Class B Rock Excavation." Ex. #5.

On August 30, 2002, Michael A. McGrath, Deputy Chief Engineer, Construction, refused in writing to approve the District 3 Highway Director's recommendation to the Board. Mr. McGrath stated that the CL B Rock excavation should be paid under special provision Item 120 ("Earth Excavation"). Mr. McGrath's memorandum stated in relevant part:

> This request cannot be forwarded to the Board of Commissioners because of the second paragraph of the Earth Excavation Special Provision of the Contract. This provision incorporates "excavation of material of every description, regardless of the type encountered…" as part of the Earth Excavation Item. This extra work order is being returned [unapproved] to the District ….

Amorello was notified of Mr. McGrath's August 30, 2002 decision by letter dated May 27, 2003. As soon as Amorello learned that the Department denied its 2002 claim for extra work, it forthwith filed a formal claim under Subsection 7.16 ("Claims of Contractor for Compensation").[4] Upon the District's formal denial of that claim in June 2003, Amorello appealed to the Claims Committee. When the Claims Committee denied its claim, Amorello filed a notice appeal in this office. In these circumstances Amorello timely perfected its rights under the Contract to claim extra work.

DISCUSSION

The question for decision is whether the special provision, Item 120 ("Earth Excavation") ("Item 120" or "Special Provision"), includes within its ambit the work of

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[4] The record does not disclose when Amorello first learned of Mr. McGrath's August 30, 2002 rejection. However, on May 9, 2003 Amorello requested a response to its June 18, 2002 claim for approved extra work. It was in response to that inquiry that Amorello was first notified in writing that its 2002 claim for extra work had been denied. See Ex. #5.

excavating and removing 141.6 CM of Class B Rock, or whether such excavation should be paid as extra work.

Applicable Legal Principles

A contract is to be construed according to its plain and ordinary meaning. See Thomas v. Hartford Accident & Indemnity Co., 398 Mass. 782, 784 (1986). It must be interpreted as a transaction entered into by practical people to accomplish an honest and straightforward end in accordance with common sense and the likely intent of the parties. See Fleet Nat. Bank v. H&D Entertainment, 96 F.3d 532, 537-38 (1st Cir. 1996).

A contract must be "interpreted as a whole, and effect must be given to all of its provisions in order to effectuate its overall purpose." BayBank Middlesex v. 1200 Beacon Properties, Inc., 760 F. Supp. 957, 963 (D. Mass. 1991). Where the wording of a Contract is found to be unambiguous, the contract must be enforced according to its terms. Id.; Den Norske Bank AS v. First National Bank of Boston, 75 F.3d 49, 52 (1st Cir. 1996).

Here, neither party contends that the words of the Contract are ambiguous. Rather, each party contends that the words of the Contract have a different meaning. In such circumstances it is appropriate that a judge construe the meaning of the Contract by applying established legal principles. See Freelander v. G&K Realty Corp., 357 Mass. 512, 516 (1970).

Positions Of The Parties

(a) Amorello

Amorello claims payment for excavation and disposal of 141.6 CM of Class B Rock at its proposed price of $99/CM because the Contract contained no express pay

item for the removal of CL B Rock.[5] It contends that CL B Rock excavation must be paid for under the Section 140 of Standard Specifications, specifically under Subsection 140.25 ("Class B Rock Excavation").

Amorello argues that Section 140 work, including removal of CL B Rock, "has no relationship with Section 120 [work]" and thus no relationship to Special Provision Item 120. Amorello recognizes that the language of the Special Provision ("Earth Excavation") is broadly worded, but argues that all work to be done under Item 120 must nonetheless fall within work generally defined under Section 120 of the Standard Specifications. The excavation of CL B Rock is not Section 120 work but is work described in Section 140 of the Standard Specifications, specifically Subsection 140.25, pay Item 144 ("Class B Rock Excavation"). Thus, according to Amorello, CL B Rock excavation work cannot be included within Item 120. Moreover, the absence of any pay item under Section 140 for removal of CL B Rock in the Contract means that such work was beyond the work specified there and is thus an extra.[6] Ex. 4. p. 2.

Amorello supports it contentions by pointing to the Contract's "Preliminary Estimate Of Quantities"[7] with respect to Item 120, none of which included CL B Rock. The "Preliminary Estimate" gave quantities for four components, A through D, namely: "for full depth pavement construction areas" [A], "for bituminous and cement concrete driveways" [B], "for bituminous concrete sidewalk areas" [C], and "for cement concrete

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[5] CL B Rock is defined, in part, in Subsection 140.25 of the Standard Specifications (1995 ed.) as ""[b]oulders measuring 1 cubic yard or more and all solid rock that requires blasting or breaking by hand power tools [ ] prior to removal."

[6] Amorello asserts that Item 144 ("Class B Rock Excavation") was simply "inadvertently omitted" from the Contract.

[7] See Contract at p. A00803-3.

wheelchair ramps" [D]. Because CL B rock is nowhere referenced, Amorello argues it must be outside the scope of Item 120 work.

Amorello lastly contends that the quantity estimates for Item 141 ("Class A Trench Excavation"), which reference "the removal of existing drainage lines and associated headwalls, etc." at named stations, do not include CL B Rock excavation, which means that such work was omitted from Section 140. Amorello thus concludes that the work of CL B Rock excavation must be deemed extra work. See Section 1.20 ("Extra Work").[8]

(b) <u>Department</u>

The Department contends that the work of excavating CL B Rock is contained within the express language of the Special Provision.

Accordingly to the Department, the language of the Special Provision means what it says when it states that Item 120 covers excavation of "material of every description, regardless of the type encountered." Thus, it says, the Deputy Chief Engineer McGrath correctly interpreted the language of the Special Provision to "incorporate" the work of CL B Rock excavation.

Analysis

The Contract expressly provides at Subsection 5.04 ("Coordination of Special Provisions, Plans, Supplemental Specifications and Standard Specifications") that

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[8] Subsection 1.10 of the Contract defines "extra work" as work that

1. was not originally anticipated and/or contained in the contract: and therefore
2. is determined by the Engineer to be necessary for the proper completion of the project: and
3. bears a reasonable subsidiary relation to the full execution of the work originally described in the contract.

“Special Provisions shall govern over Supplemental Specifications, plans and Standard Specifications.” The Special Provision at issue here is Item 120.

Item 120 (“Earth Excavation”) provides

> The work under this item shall conform to the relevant provisions of section 120 of the Standard Specifications and the following:
>
> The work shall include the excavation of material of every description, regardless of the type encountered, from within the limits of the Contract in accordance with the plans and specifications or established by the Engineer, except those materials for which payment is made under some other item of this contract and except those materials for which excavation is included with the work specified to be performed under other items of this Contract.
>
> [Paragraphs three and four omitted.]

The first phrase in the sentence comprising the first paragraph of Item 120 makes plain that the work “shall conform” with the “relevant” work specified in Subsection 120 of the Standard Specifications. The second phrase of that sentence adds additional work to be included in Item 120 through the words “<u>and</u> the following:…” (Emphasis added).

As a whole the sentence intends that both “relevant” Subsection 120 work <u>and</u> work described in the “following” paragraphs are included within Item 120. The common sense meaning of paragraph one is that certain specified work, not conforming to Section 120 work, is described in the “following” three paragraphs of Item 120 and expressly included within its scope.

The second paragraph of Item 120 specifies particular work beyond the scope of Section 120 work that is nonetheless included in Item 120. Specifically, the “following” emphasized language in the second paragraph states that earth excavation shall encompass “the excavation of <u>material of every description, regardless of the type</u>

encountered, from within the limits of the Contract in accordance with the plans and specifications," with two exceptions.[9]

I think the Contract language imparts the meaning that "earth excavation" under Item 120 is intended to cover any "material" that might be encountered within the Contract "limits." The plain text of the Special Provision certainly leads to that conclusion. As well, the broadly worded text in the third and fourth paragraphs provides support. The third paragraph makes plain that Item 120 applies to the removal of "any" temporary pavements placed for protection of traffic; while the fourth paragraph specifies that "disposal of existing materials" deemed "not suitable for reuse" in the work, and "all" associated costs, are included in Item 120. The comprehensively broad language throughout Item 120 demonstrates it is a "catch-all" provision, intended to supplant all Contract provisions to the contrary. See Subsection 5.04. Language of such broad character is enforceable in accordance with its terms.

The principal flaw in Amorello's argument is that Item 120 does not only include work within its terms that would otherwise be described in Section 120 of the Standard Specifications. The Department was free to specify whatever excavation work it pleased in Item 120. The Contract provided no prohibition against expanding the scope of work to include "materials" not usually found in Section 120 excavation work.

It is the text of Item 120, not the fact that it was labeled "120," that controls. Amorello points to no authority to substantiate its theory a special provision can only

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[9] No party claims that the named exceptions control the result here. The work excepted from the operation of the text of the second paragraph of the Special Provision is (a) excavation of "materials for which payment is made under some other item of this Contract" and (b) excavation of "those materials for which excavation is included with the work specified to be performed under other items of this Contract." (Emphasis added.) CL B Rock excavation is not included under any other pay item in the Contract. Nor is that work included "with" work under "other items." To the contrary, CL B Rock Excavation is expressly excluded from Item 142 ("Class B Trench Excavation"), for which Amorello bid $4.00/CM. See subsection 140.23 ("Class B Trench Excavation") (CL B Rock excavation expressly excluded).

"cover" work otherwise called out in a cognate section of the Standard Specifications. It points to nothing that requires that special provisions be so circumscribed. The Contract on its face specifies without qualification that special provisions control standard specifications. See Subsection 5.04 ("Coordination of Special Provisions, Plans, Supplemental Specifications and Standard Specifications").

Amorello was put on notice by the broad language of the Item 120 that the unit price it bid was to excavate, remove and dispose of any "material" needing excavation "within the limits of the Contract." Amorello was bound to "examine carefully the site of the proposed work … [and] special provisions … before submitting a Proposal." Contract at Section 2.03 at p. 00200-2; See Standard Specifications, Subsection 2.03 ("Examination of Plans, Specifications, Special Provisions, and Site of Work"). Amorello knew when it bid that the Contract "omitted" a pay item for CL B Rock; and it knew that the text of Special Provision, Item 120, must be understood with that "omission" in mind.

Amorello is not correct that Item 120 work is limited to only the four types of materials identified in quantity estimates (A through D). The plain text of the special Provision makes clear that "materials of every description" are included.

CONCLUSION

Amorello's appeal is without merit. The Special Provision plainly required it to excavate, remove and dispose of "material of every description" "within the limits of the Contract."

RECOMMENDATION

The decision of the Claims Committee should be upheld.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: July 26, 2005

To: Secretary John Cogliano, EOT
Through: Commissioner Luisa Paiewonsky, MHD
From: Stephen H. Clark, Administrative Law Judge
Date: May 25, 2006

Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

A.R. Belli, Inc. (Belli), general contractor under MHD contract #32088 (Contract) for roadway reconstruction and the installation of granite pavers for a new plaza fronting on the Boston Public Library, appeals from the refusal of the Engineer to grant extra work of $75,089.35 for its purported additional cost to supply Radiant Red instead of a cheaper "as equal" granite paver. Belli claims that the Department arbitrarily refused to accept any granite paver other than Radiant Red, which was named in the specifications. The Department contends that Belli did not submit a substitute paver with the same color or "appearance" as Radiant Red and that it approved two additional, acceptable granite pavers, Vermillion and Morning Rose.

Belli's appeal is without merit. The Department was entitled to specify the color granite it desired and it did so by naming Radiant Red in the specification. Belli never proposed a substitute granite with a color that matched. The Department acted in good faith to consider every sample Belli submitted. Its decision to reject proposed pavers on the basis of color alone was not arbitrary. Because its rejection was based on "appearance," a factor expressly allowable under G.L. c.30, s.39M(b), the decisions to reject pavers on the basis of color alone was final.

Belli failed to produce any evidence that it had proposed an "as equal" paver or that the cost of an "as equal" paver was more than the cost of Radiant Red. Belli also failed to show that any act of the Department damaged it since the cost to supply Radiant Red was far less than the unit price it bid for that item.

Belli's appeal should be denied.

INTRODUCTION

A.R. Belli, Inc. (Belli) appeals from the denial by the chief engineer's claims committee of purported damages of $75,089.35[1] said to have resulted from a proprietary specification the Massachusetts Highway Department (Department) issued in contract # 32088 (Contract) for granite pavers for the new plaza built at the main entrance of the Boston Public Library (Library).

Belli claims that it was required to supply "Radiant Red" granite pavers from a named supplier because the Department refused to approve "as equal" less expensive granite pavers. The Department responds that it was always prepared to accept "as equal" any other granite paver, provided the "appearance"—specifically, the reddish color—was "equal" to the color in the named "Radiant Red."

Belli's appeal has no merit. The Department had the right to select the color it wanted for the pavers for the Library plaza. The Contract gave the Department, not Belli, the authority to approve the "appearance" of all samples, including samples of proposed substitutes. When the Department named "Radiant Red" in the specification it did not

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[1] Belli requested from District 4 extra work in the amount of $75,089.35 for the cost to furnish "red granite pavers" for Items 708.1 and 708.2. On February 2, 2004 the District Highway Director denied the request. Statement of Claim, Belli Ex. 1. On February 11, 2004 Belli submitted "a claim with the Department in the amount of $75,089.35 for the red granite pavers." Belli Ex. 42. The Claims Committee denied the February 11, 2004 claim. Belli Ex. 44. Belli thereupon filed a notice of appeal in this office "for the granite pavers we purchased for the above referenced project." Belli Ex. 45. Belli then filed a Statement of Claim for $118,779.45 (not $75, 089.35). Belli's appeal, as set forth in its Statement of Claim, asked this office to hear new claims never filed at the district or brought before the claims committee. The attempt to add such claims is improper and not authorized by the Contract. See Subsection 7.16 of the Standard Specifications. This report addresses only Belli's claim for $75,089.35, which is the original (and only) claim Belli timely filed. Under the Contract Belli waived its rights to all other claims. See D. Frederico v. Commonwealth, 11 Mass. App. Ct. 248 (1981) (untimely filing of claim bars right to extra compensation).

issue a proprietary specification; rather, it informed bidders of the characteristics of the granite it required—including the color or "appearance."

Belli's allegation that the Department refused all substitutes is belied by the record; in fact, the Department told Belli it would approve two granite pavers it considered equal to "Radiant Red," namely, "Vermillion" and "Morning Rose." Belli did not prove it offered an "equal" paver. Belli did not offer evidence that any of the substitute pavers it proposed was "equal" in color to Radiant Red and thus failed to prove its main contention—that the Department arbitrarily rejected every proposed substitute thus rendering the specification proprietary.

Belli failed to prove that it was damaged. It offered no evidence of the cost of any granite paver that it contends the Department should have approved as equal. Belli's contention that the Department's actions rendered the specification "proprietary" or "sole source" has no basis in fact. Even assuming that the Department's refusal of alternatives was arbitrary with the sole purpose of compelling Belli to install Radiant Red, Belli was not damaged since the unit cost of Radiant Red Belli did supply was far less than the unit price Belli bid for Item 708.1 or Item 7.08.2.

BACKGROUND

New Library Plaza

The Library is an architecturally significant historic structure and a Boston landmark. The Contract required the reconstruction of Dartmouth Street in the Back Bay. Among other things, two lanes of the existing street were closed, the street relocated, and a spacious, raised plaza was built at the main Library entrance fronting on Copley Square.

The Department drew up the Contract specifications for the street reconstruction. The City of Boston (City), through its consultant Walker-Kluesing Design Group (WK), drew up the specifications for the Library plaza, including the specifications for the pavers. The City and Department specifications were consolidated into a single bid package. The Department alone solicited competitive bids and awarded the Contract.

In developing the specifications for the plaza WK met repeatedly with interested municipal bodies and neighborhood groups. The governmental bodies with jurisdiction over various aspects of the Library plaza design included the Back Bay Historic District Commission, the Boston Landmarks Commission and the Boston Parks Department. WK also met with and obtained the views of the principal local civic association, the Back Bay Neighborhood Association. Testimony of Victor J. Walker.

One purpose of WK's meetings with both official bodies and private groups was to select by consensus an appropriate color of the pavers, a process that took a year. The participants in the public/private review process reached the consensus that the color should be that of "Radiant Red." Id. WK then incorporated the stated color preference into the specifications by naming "Radiant Red" manufactured by the Cold Spring Granite Company, Cold Spring, MN (Cold Spring) as pavers for Items 708.1 and 708.2, the only items at issue here. See Contract, page A00801-138.

Bidders responded to the Department's invitation to bid on September 25, 2001. Belli bid $499/SM for Item 708.1 on an estimated quantity of 900 SM and $529/SM for Item 708.2 for an estimated quantity of 55 SM. Belli was the successful low bidder and the Department awarded it the Contract on October 17, 2001 for $1,968,032.90. The

Contract was executed on October 24, 2001, with an original completion date of September 28, 2002. The Department issued a notice to proceed on November 26, 2001.

The Specifications For Granite

Special Provisions governing Items 708.1 and 708.2 for granite pavers did not state that it was a proprietary specification or sole source specification issued in the "public interest" in conformance with G.L. c.30, s.39M(b). Special Provisions set forth the complete requirements for the furnishing and installation of all granite to be used for the Library plaza. See Contract, pp. A00801-132 through 148.

The Special Provisions are divided into four sections: GENERAL,[2] PRODUCTS,[3] EXECUTION[4] and COMPENSATION. The specification at issue here is found in the "Materials" subsection under PRODUCTS. Contract, p. 138. The text provides:

a. Field Pavers: Radiant Red as supplied by Cold Spring Granite Company, Cold Spring, MN.
b. Band Pavers: Milford Pink as supplied by Fletcher Granite Company, Chelmsford, MA.
c. Bollards: Milford Pink as supplied by Fletcher Granite Company, Chelmsford, MA

The specifications governing samples are found within "Submittals" under GENERAL. Contract, p. 133. The text provides:

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[2] GENERAL includes subsections on "Description of Work," "Reference Standards," "Submittals [including 'Samples']," "Quality Assurance," "Delivery, Storage and Handling" and "Project Conditions."

[3] PRODUCTS includes subsections on "Materials" "Stone Accessories," "Mortar Materials," "Concrete Reinforcement," "Granite Fabrication," "Cleaning Equipment for Existing Granite" and "Mortar Mixtures."

[4] EXECUTION includes subsections on ""Salvage," "Gravel Base and Concrete Subslab," "Installation—General," "Installation—Pavers and Edging, "Cleaning and Protection of Existing Granite" and "Cleaning and Protection of New Work."

(1) Granite: 305mm x. 305mm minimum of each grade and finish of stone required, three of each stone minimum. Include full range of exposed color and texture to be expected in the completed work.

(2) Additional samples and/or mockups may be required by the Engineer….

The special provision governing "Quality Assurance," Contract, p. 134, states:

(1) All granite shall be strictly in accordance with mock-ups and samples approved by the Engineer;

(2) The Engineer has the right to require the layout and blending of individual stones … to prove a blended appearance;

(3) Take particular care to obtain quarry blocks from the same areas of quarry that supplied the material for the approved samples and mockups….

Under "Sources" the Contract, at page 134 provides:

> All granite shall be obtained from the respective sources specified and be available to meet project requirements. The sources shall have adequate capacity and facilities to meet the project requirements.
>
> Any source used is subject to approval of the engineer. [ ]
>
> Obtain exposed stone units of uniform texture and color, or a uniform blend with the ranges accepted for these characteristics. [ ]
>
> Do not quarry or fabricate stone until samples have been approved.

The Special Provisions do not disclose that the color "Radiant Red" had been selected after discussion with public agencies and private civic groups. The specifications do not describe (or attempt to describe) the color "Radiant Red." "Radiant Red" is a well known granite and associated in the trade with Cold Spring; it is akin to a brand name.

Expert testimony at the hearing showed that the color of granite can be difficult to match. Testimony of Swenson. The color of granite taken from a particular quarry may differ substantially from the color of stone taken from another part of the same quarry.

Fabricators of cut granite attempt to achieve color consistency by quarrying uniform blocks of granite from the same location and then cutting the blocks into slabs. Id.

The color of granite is determined by the relative quantity of black "grains" (which vary in size) compared with the distribution of other variously hued minerals within the stone. The granite industry does not have a color scale for use in describing or matching colors (or shades of colors) of granite. Obtaining a match is done by eye to eye comparison. Matching the color of existing granite to newly quarried granite can be "a struggle." Testimony of Swenson. The color of a particular sample of granite from a particular quarry may not be the same color that can eventually be supplied.[5]

Submittals Of Samples For Approval

Before it bid Belli construed the paver specification to mean that an "as equal" material would be accepted. Belli submitted for approval "as equal" a sample of "Missouri Red" on February 1, 2002, which was disapproved by WK on February 20, 2002.[6] On April 5, 2002 Belli submitted a sample of "Autumn Red." The Department wrote Belli on May 6, 2002 that "pavers may be as equal—provided they are an exact color match," informing Belli that Victor Walker of WK was to make that determination. Belli Ex. #9.[7] WK "disapproved" Belli's proposed "Autumn Red" substitute on June 5,

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[5] MHD Ex #6, a sample of "Radiant Red" from Cold Spring, contains this written disclaimer: "This granite sample indicates basic color only. One granite sample will not accurately represent the color variation and natural markings which will be evidence in a finished project."

[6] A sample of "Missouri Red" is in evidence. MHD Ex. 5. Victor Walker of WK explained why the color of "Missouri Red" did not match that of "Radiant Red." To the disinterested observer it is frankly obvious that the colors of the two granites are not alike.

[7] Belli complains that the color determinations were made by Victor Walker of WK, the City's consultant, and not by the Department itself. Victor Walker without doubt was the person the Department expressly authorized to make final determinations for the Department about color of granite samples. Belli Ex. #9.

2002, noting on the face of the disapproval "Please provide specified granite." Id. Between June 5, 2002 and December 11, 2002 Belli submitted additional proposed equal samples. All were rejected because the color did not match "Radiant Red."

Belli submitted no evidence of the price of any of the substitute granites it proposed "as equal." Belli submitted no evidence that any particular named granite substitute should have been found "as equal" by WK; and Belli did not offer any witness to explain the reasons why any particular granite should not rationally have been rejected.

On June 27, 2002 Belli wrote the Department setting forth purported "price differentials" between a paver Belli proposed and "Radiant Red." Belli Ex. 1.[8] Belli's letter did not identify the name or manufacturer of the rejected granite paver it used for comparison purposes. The total claimed cost difference (including an unexplained escalation of 10%) between "Radiant Red" and the unnamed, rejected paver was $75,089.35.

For pay Item 708.1 (granite paver) Belli's bid price was $499/SM, the price of "Radiant Red" was $277.95/SM, and the price of the unnamed substitute $206.02/SM. For Item 708.2 (granite paver over structure) Belli's bid price was $529.00/SM, the price of "Radiant Red" $247.86/SM, and the price of the unnamed substitute $183.71/SM.

On October 31, 2002 WK informed the Department that it had determined that two additional granite pavers were acceptable in addition to "Radiant Red," namely, "Vermillion" and "Morning Rose." On December 11, 2002 the Department informed

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[8] The letter describes purported price differentials for other granite used in the project. No claim was filed with respect to any of those granites. See supra page 1, n.1.

Belli that it had approved both those pavers.[9] The record contains no price for either "Vermillion" or "Morning Rose." The record does not contain samples of "Vermillion" or "Morning Rose."

On June 27, 2003 Belli ordered "Radiant Red" pavers from Cold Spring. Belli Ex. 33. The project had been substantially delayed because Cold Spring had notified Belli and the Department that WK's design for "granite covering structure," Item 708.2, was probably not strong enough to support anticipated load over the trench drains. The redesign of the trench drains took months to resolve.[10] It was only on August 19, 2003 that the Department "finalized" the order for the trench drain granite pavers.

The Belli Claim

On February 2, 2004 the Department denied Belli's request for extra work for supplying granite pavers. Belli Ex. #42. Belli thereupon submitted a claim in the amount of "$75,089.35 for the red granite ['Radiant Red'] pavers" Id. On February 2, 2004 the District Highway Director rejected Belli's claim for a change order for "$75,089.35 for granite pavers," stating that Belli was "incorrect" in its assertion that the Contract contained "a proprietary specification." The District's letter then stated

> The City's architect, Walter Kluesing Design Group, always maintained that other suppliers would be acceptable, provided the contract specified color was met. Previous granite paver sample submitted to the city's Architect were rejected solely because of color. (Emphasis added.)

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[9] December 11, 2002 Ken Lim, the Department's resident engineer for the project, forwarded to Belli the WK letter to the Department dated October 31, 2002, which stated "Vermillion" and "Morning Rose" "are acceptable alternatives to "Radiant Red."

[10] The cost of the "Radiant Red" pavers to cover the trench drains was paid for by extra work order and reimbursed to the Department by the City. That cost is not part of this claim.

Belli's claim was then referred to the claims committee. On June 21, 2004 the claims committee, under the signature of the Department's chief engineer, rejected Belli's claim, stating in part,

> The specifications clearly indicate the color of any samples had to match the existing paver on file. Belli Ex. 1.

The Belli Appeal

Following the June 21, 2004 rejection by the claims committee, Belli filed a notice of appeal in this office on June 29, 2004. After making certain amendments, Belli filed a final statement of claim on December 22, 2004.[11]

A pre-hearing conference was held on April 14, 2005. On June 1, 2005 Mr. Charles E. Schaub, Jr., Esq. notified this office that he would appear for Belli. The City was invited to appear at the hearing but declined to do so.

The hearing was held on July 19, 2005. Present were

Linda Wigren, President	A. R. Belli
William Keaveney, Supervisor	A.R. Belli
Malcolm Swenson	Swenson Stone Consultants, LTC.
Charles E. Schaub, Jr., Esq.	A.R. Belli
Richard DeSantis, Area Engineer, Dist. 4	MHD
Victor J. Walker	Walker, Kluesing Design Group
Isaac Machado, Esq.	MHD
Christian Gonsalves, Esq.	MHD

In all, 55 exhibits were admitted into evidence, including the relevant Contract specifications and plans, correspondence memorializing events during contract

[11] A more detailed statement of the chronology of Belli's claim and appeal is set forth supra at page 1, n.1.

performance, photographs and two granite samples. A list of exhibits, together with a short identifying description, appears in Appendix A.[12]

At the hearing Victor Walker explained why "Radiant Red" and "Missouri Red" did not have the same color or finish. He explained that the colors and size of the grains of the various mineral components, together with the size and distribution of the black specks, determined stone color. Compare MHD Ex. 5 with MHD Ex. 6.

After the hearing Belli and MHD each submitted post-hearing memoranda, the last of which was received on October 4, 2005. I then took the matter under advisement. This report is made under the authority of St. 2004, c.196, s.5.

DISCUSSION

Section 39M(b) generally provides that all "specifications [in Department contracts] … shall be written to provide for full competition for each item of material to be furnished under the contract."[13] The statute expressly authorizes the public awarding authority to issue either "competitive" or "proprietary" [sole source] specifications.

To issue a "competitive" specification the awarding authority may either physically describe the item of material it requires or specify at least three brand names for the item. Section 39M(b) permits the contractor to supply an "equal" to the item described or specified and sets forth criteria under which the determination of "equal" is

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[12] Belli introduced 45 exhibits and the Department introduced 6. I introduced 4. See list in Appendix A.

[13] Section 39M(b) is designed to foster full competition in public contracts and is consistent with "[t]he legislative goals … [ ] to create an open and honest competition with all bidders on an equal footing … [and] to obtain the lowest eligible bidder," Petricca Constr. Co. v. Commonwealth, 37 Mass. App. Ct. 392, 396 (1994). The purpose of full competition is to "reduc[e] opportunities for corruption, favoritism, and political influence in the award and administration of public contracts." Modern Continental Constr. Co. v. Lowell, 391 Mass. 829, 831 n.5 (1984).

made. Specifically, a proposed substitute "shall be considered equal to the item named or described if (1) it is at least equal in quality, durability, appearance, strength and design, (2) it will perform at least equally … and (3) it conforms substantially … to the detailed requirements…."[14] (Emphasis added.)

A "proprietary" specification may also be issued under Section 39M(b) in exceptional circumstances when there exist stated "sound reasons in the public interest" for a non-competitive procurement. Specifically, a "proprietary" specification may be written

> for sound reasons in the public interest stated in writing in the public records of the awarding authority or promptly given in writing by the awarding authority to anyone making a written request therefore, in either instance such writing to be prepare after reasonable investigation. Section 39M(b).

Here, the Special Provision described the granite paver to be supplied by naming "Radiant Red" manufactured by Cold Spring. The characteristics of granite needed may be specified by name, manufacturer and type of granite when "as equal" products are also allowed. Cf. The George Hyman Construction Co. v. United States, 366 F. 2d 1015, 1016 (1966) ("Granite indicated on the drawings as type "A" shall be "Milford Pink" as

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[14] The text of Section 39M(b) states: "Specifications for [Chapter 30 contracts] … shall be written to provide for full competition for each item of material to be furnished under the contract; except, however, that said specifications may be otherwise written for sound reasons in the public interest stated in writing in the public records of the awarding authority or promptly given in writing by the awarding authority to anyone making a written request therefor, in either instance such writing to be prepared after reasonable investigation. Every such contract shall provide that an item equal to that named or described in the said specifications may be furnished; and an item shall be considered equal to the item so named or described if (1) it is at least equal in quality, durability, appearance, strength and design, (2) it will perform at least equally the function imposed by the general design for the public work being contract for or the material being contracted for or the material being purchased, and (3) it conforms substantially, even with deviations, to the detailed requirements for the item in the said specifications. For each item of material the specifications shall provide for either a minimum of three named brands of material or a description of material which can be met by a minimum of three manufacturers or producers, and for the equal of any one of said named or described materials."

quarried by the H.E. Fletcher Company, West Chelmsford, Mass," but equal products permitted). The specification here thus precisely described the paver required and its salient characteristics—including the required "appearance" or color.

The Department intended to issue a "competitive" specification and believed it had done so.[15] The actions the Department took during performance were consistent with its understanding that it must consider proposed "as equal" granite pavers. Belli too considered the paver specification to be "competitive" when it bid and consistently acted on that understanding during performance by repeatedly submitting proposed substitutes. Only after WK had rejected several proposed substitutes did Belli even raise a contention that the paver specification was "proprietary."

In making a decision to approve an acceptable or "as equal" item the Department is permitted to exercise its judgment through a person authorized to make a final decision. In Acmat v. Daniel O'Connell's Sons Inc., et als, 17 Mass. App. Ct. 44, 46 (1983) (Acmat) the Appeals Court held, where the contract allows the determination of substituted products to be made "in the opinion of the architect," a final decision must be upheld, provided the architect based his decisions on the factors set forth in Section 39M(b). Among the permitted statutory factors is "appearance" (e.g. color). See Acmat at 49.

Here, the Contract confers upon the Engineer the same broad discretionary power to make final decisions concerning materials as the architect was authorized to exercise in

[15] On cross examination Mr. Walker testified that he gave no consideration to issuing a proprietary specification and admitted that he could have avoided much difficulty had he drafted and issued "proprietary" specification instead of one that permitted "as equal" substitutes.

Acmat. The Standard Specifications provide that the Engineer shall decide "all questions which may arise as to the quality, quantity, value and acceptability of materials … to be furnished." Subsection 5.01. The Engineer exercised that authority here. He delegated the task of determining "equal" color to WK. Belli Ex. 9.

The Special Provisions governing the pavers, read together, demonstrate that a specific shade of color was specified. "Radiant Red" was named. The Engineer was permitted to exercise his judgment to make a decision on color by approving (or rejecting) samples, which were expressly required to "[i]nclude full range of exposed color and texture in the completed work." Contract, page A00801-133. "[A]ll granite shall be strictly in accordance with …samples approved by the Engineer." Id. at 134.[16] Because the Engineer's decisions here were plainly based upon the criteria of "appearance" expressly stated in Section 39M(b) the decisions he made were final. See Acmat, 17 Mass. App. Ct. at 46. The Engineer's decisions to accept (or reject) on the basis of color alone the sample pavers Belli offered must be upheld as he acted within his contractual and statutory authority.

Belli argues that the Engineer acted "subjectively" and "arbitrarily" in making his decisions about the acceptable color of the pavers. Belli did not prove that contention. The record demonstrates that the Department, through its agent WK, in fact endeavored in good faith to determine whether each sample granite paver Belli offered was equal in "appearance" to "Radiant Red." Between February and December Belli proposed several

[16] The importance of the color is highlighted by the requirement that the contractor is required to "obtain quarry blocks from the same areas of quarry that supplied the material for the [Engineer]-approved samples" and the Engineer's right to supervise the details of the work so that the granite used would have "a blended appearance." Contract, page A00801-133.

substitutes, each of which was rejected by WK.[17] During the approval process (on May 6, 2002) the Department affirmed to Belli that the rejection of its proposed "equal" pavers had been based on color alone and that an "as equal" substitute would be acceptable if the color matched the named "Radiant Red." Victor Walker credibly testified at the hearing that it was the color alone that led him to reject the alternative granite pavers. When asked at the hearing to explain specifically why a sample of "Missouri Red" differed from "Radiant Red" Mr. Walker readily and convincingly pointed to visible differences in grain (size and density) and hue (color of various mineral components) to show with particularity why the sample did not match the specified color.

The fact that the Department could (and did) name two acceptable paver alternatives by name and manufacturer six months before Belli ordered "Radiant Red" demonstrated both that acceptable alternatives existed and that the Department would approve "as equal" substitutes. It also showed that WK acted rationally and in good faith. See Department Ex. 3. I conclude that the decisions made on the basis of "appearance" were not arbitrary and were made by comparing samples on the eye to eye method used within the granite industry itself. The final decisions on sample color were made on an articulable basis and are final.

A decision on whether a particular item is "as equal" frequently depends on specific findings on the details of a proposed item. See, e.g., John F. Miller v. George Fichera Construction Corp., 7 Mass. App. Ct. 494, 496 (1979) (findings on the details of

[17] The notations on the rejection slips do not show arbitrary rejection. For example, when it rejected "Autumn Red" and stated "please provide specified granite," I think WK intended to communicate that the color of the sample was far from that of the "specified granite."

a proposed substituted item showed it to be "different animal"); E. Amanti & Sons, Inc. v. R.C. Green, Inc. et als, 53 Mass. App. Ct. 245, 253 (2001) (detailed findings established only one item existed that could satisfy specification); Acmat v. Daniel O'Connell's Sons Inc., et als, 17 Mass. App. Ct. 44, 46 (1983) (detailed subsidiary finding on characteristics of proposed item showed architect exercised judgment upon permissible factors).

Here, Belli failed to offer any substantial evidence to support any finding that any rejected paver should have been found "as equal" to "Radiant Red." Although the record shows without doubt that the Engineer rejected all substitute granite pavers, it also shows that Belli failed to introduce any evidence that cast doubt on any particular rejection. The mere fact that WK repeatedly rejected proposed samples does not determine the outcome of this appeal. Rather, the fact that Belli did not introduce any rejected sample and adduced no evidence to show why the "appearance" of any rejected sample should have accepted by the Department "as equal" to "Radiant Red" in color is the essential reason why Belli can not prevail. Belli's failure to support its contention that the Department acted arbitrarily and its failure to show that any of the rejected samples should have been accepted demonstrate that Belli did not meet its burden of proof.

Belli argues that, because the Engineer acted arbitrarily to reject all substitutes, the paver specification was in effect an impermissible "proprietary" specification for 'Radiant Red" only. This argument is not convincing. The specification is clearly not "otherwise written" and does not purport on its face to be a "sole source" procurement. Neither party acted during performance as if the paver specification was "proprietary,"

either when Belli bid or during the first full year of performance. How the parties acted is significant to show how the specification was to be understood. Martino v. First National Bank, 361 Mass. 325, 332 (1992) ("There is no surer way to find out what the parties meant when they entered into a contract than to see what they have done.") (Internal citation omitted).

Belli only argued that the specification was "proprietary" when its proposed substitutes were found to be non-matching in "appearance." The fact that the Department in fact named two granite pavers that it had found acceptable demonstrates that the specification could in fact be met by granite pavers other than "Radiant Red." Belli does not contend that the mere fact that the specification identified a particular granite rendered the specification proprietary. Compare The George Hyman Construction Co. v. United States, 366 F. 2d 1015 (1966) (named granite did not make specification proprietary) with E. Amanti & Sons, Inc. v. R.C. Green, Inc. et als, 53 Mass. App. Ct. 245, 253 (2001) (complex and overly detailed specifications that could only be met by a single supplier may be proprietary).

Finally, there is the important point that Belli failed to prove it was damaged by any act or omission of the Department. Belli both failed to show that a particular proposed granite paver should have been accepted "as equal" or that the cost to Belli of an "equal" paver was less than it had to pay for "Radiant Red." There is no evidence on the record of the cost to provide the alternatives the Department did approve, "Vermillion" or "Morning Rose." Belli's evidence that "Radiant Red" cost it

$277.95/SM actually supports a finding that Belli was not damaged since Belli bid more, not less, than that for Item 708.1 ($499/SM).

CONCLUSION

I conclude that the Department issued competitive specifications under G.L. c. 30. s. 39M(b) but that Belli failed to provide an "as equal" granite paver even though at least three available products were available that the Department would approve. Belli failed to prove that the Department acted arbitrarily or that it was damaged. Belli's appeal should be rejected.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: May 25, 2006

To: Secretary John Cogliano, EOT

Through: Commissioner Luisa Paiewonsky, MHD

From: Stephen H. Clark, Administrative Law Judge

Date: July 26, 2005

Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

Baltazar Contractors Inc. (Baltazar), a general contractor under MHD contract #31055 (Contract) to reconstruct Rte. 32 in Monson, appealed from two adverse decisions of the Claims Committee. The first appeal is for extra work of $21,394.14 to build 54.64 cubic meters of field stone cement mortared masonry wall on a stepped footing redesigned by the Department during the work and paid for as extra work. The second appeal is for work costing $14,756.80 to clean up flood damage following two thunderstorms.

The first appeal has merit. The specifications for the original footing and wall on which Baltazar bid differed significantly from the redesigned footing and wall which the Department ordered Baltazar to build. The additional volume of wall built was attributable to the redesigned footing the Department required and was work outside the original contract specifications.

The second appeal is without merit. The Contract obligated Baltazar to "take every necessary precaution against … damage to the work" from the weather, except "hurricane" and other defined Acts of God. The Contract plainly allocated "all losses" "on account of the weather elements" to Baltazar. Baltazar took no action to secure the work but instead sought "direction" and a contract modification from the Department. Baltazar failed to abide by the Contract and bears all risk of loss.

INTRODUCTION

Baltazar Contractors, Inc. (Baltazar) appeals from two adverse decisions of the Department's Claims Committee. First, Baltazar claims extra work worth $21,394.14 for building 59.64 cubic meters (CM) of a field stone masonry retaining wall (New Wall) after the Department changed the original design from a "monolithic [slab] footing" (Slab Footing) to a "stepped footing" (Stepped Footing) after the Department determined that the Slab Footing would not support the wall originally designed by the Department (Old Wall). Second, Baltazar claims $14,756.80 in extra work for costs to clean up gravel and repair utility trenches damaged by floodwater run off (Flood Damage) after thunderstorms on June 17 and June 20, 2002.

There is merit to Baltazar's first claim. The contract paid for the Old Wall by measuring its volume in place. Baltazar bid on an original design which necessitated building a mere 40 CM of Old Wall on a monolithic slab. The Department abandoned the original design and specified an entirely different footing, which per force exponentially increased the volume of New Wall to be built from 40 CM to 99.62 CM.

In furnishing bidders plans for the original Slab Footing and Old Wall the Department impliedly warranted that the design it specified was sufficient for the purpose of bidding on the volume of wall to be built. See Alpert v. Commonwealth, 357 Mass. 306 (1970). When the Department substituted the Stepped Footing for the original design, the height, width and depth of the New Wall all materially changed. The wall upon which Baltazar bid was abandoned and an entirely new wall substituted, with new dimensions and volume. Because the New Wall was work outside the scope of the

original specifications impliedly warranted to be accurate, Baltazar's claim for extra work to build 59.64 additional CM has merit.

There is no merit to Baltazar's second claim. Baltazar was responsible by the express terms to secure newly dug utility trenches against the risk of possible Flood Damage and bear "all losses" resulting "on account of the weather elements." See Subsection 7.18. Baltazar did not take necessary protective measures—such as installing temporary patching, building up gravel damming or placing adequate numbers of hay bales at the site. Instead, it sought "direction" from the District on whether the Department would increase the allowable quantity of temporary patching. Flooding occurred during two heavy downpours, on June 17 and 20, 2001. The resulting Flood Damage was a direct result of Baltazar's failure to discharge its unequivocal contractual obligation to secure the work.

Baltazar's request for "direction" and an increase in quantity of a pay item did not alter its obligations to secure the work. The Contract specified that the contractor was to bear the loss due to adverse weather. Contrary to Baltazar's contentions thunderstorms did not create a "changed condition" at the site. Baltazar's second claim is without merit.

I recommend that Baltazar's appeal for $21,394.14 in costs of building additional 59.42 CM of Wall be allowed, but that its claim for Flood Damage clean up be denied.

BACKGROUND

The Contract

Baltazar was the low bidder on Department contract #31055 (Contract) for the reconstruction of Rte. 32 in Monson at the bid price of $881,870. It bid $4,535.03 lower than the office estimate. On September 18, 2000, after bids were received but before the

Contract was awarded, the Chief Engineer, Mr. Broderick, advised Baltazar in writing that 17 of its bid items offered "unrealistically low unit prices" with the consequence that no adjustment of unit prices "will be permitted [to Baltazar] for these items." The Engineer based his notice on Subsection 4.06 ("Increased or Decreased Contract Quantities") as appearing in the Supplemental Specifications of December 23, 1998 (Subsection 4.06). Subsection 4.06 provided that, in the event of an "abnormally low" bid Baltazar "waived" any right to an "equitable adjustment" of unit prices otherwise pertaining where quantities estimates increased or decreased by 25% or more. Among the "penny bids" submitted by Baltazar was a bid of $1.00/CM bid for Item 685 ("Field Stone Masonry In Cement Mortar") to construct the Old Wall.[1]

The Contract was awarded on October 16, 2000; a notice to proceed was issued on or about October 31, 2000. The original completion date was July 7, 2001. The Contract is governed by the Standard Specifications for Highways and Bridges (1995 Metric Ed) and included the Supplemental Specifications dated December 23, 1998.

Statement of the Appeal

Baltazar timely filed its two claims at District 2, which denied both. Baltazar then appealed to the Department's Claims Committee, which upheld the District. Thereafter, Baltazar filed a notice of appeal in this office. On February 26, 2002 Baltazar filed a separate Statement of Claim for its extra cost to construct the New Wall and its claimed cost to clean up the Flood Damage.

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[1] The office estimate for Item 685 was $260/CM for the Wall and the average of the next 4 lowest bidders $326.75/CM. Similarly, Baltazar bid $1.00 per hay bale for an estimated 100 hay bales under Item 767.8 ("Bales of Hay For Erosion Control"). The office estimate was $6.00 each and the average of next 4 lowest bidders $5.50 each.

The Department's Administrative Law Judge when Baltazar filed its Statements of Claim was Peter Milano. Judge Milano held a hearing on Baltazar's two claims on July 18, 2002.

Present at the hearing were

Peter Milano	Administrative Law Judge
Robert Hirtle, Esq.	General Counsel, Baltazar
Lisa Anderson, Esq.	Counsel to Baltazar
Frank Baltazar	Baltazar
Robert Simard	Baltazar
Isaac Machado, Esq.	Deputy General Counsel, MHD
Steven Doylp	MHD
Mark S. Waler	MHD

At the hearing the following documents were entered into evidence.

Ex. #1	Contract #31055
Ex. #2	Statement of Claim (Flooding)
Ex. #3	Statement of Claim (Wall Construction)
Ex. #4	Hourly Surface Observations-Chicopee Falls
Ex. #5	Estimated Cost of Patching—Thompson St.
Ex. #6	Profile of Redesigned Masonry Wall
Ex. #7	MHD Const. Standards Drawing 302.2.0
Ex. #8	MHD "Lowball" Letter To Baltazar 9/18/00

On September 19, 2002, Baltazar submitted a post-hearing memorandum. In July 2003 Judge Milano resigned and was succeeded by Acting Administrative Law Judge John J. McDonnell, who scheduled a conference on December 18, 2003. The scheduled conference was not held, but was continued by agreement of the parties to February 25, 2004.

On March 1, 2004 the undersigned was appointed Administrative Law Judge. I held a status conference on Baltazar's appeals with both parties present on April 29, 2004. At the conference the parties agreed that Baltazar's appeal could be decided by the undersigned based on the existing record.

FINDINGS

Based on the testimony at the hearing and the exhibits in evidence, I find the facts recited above and the following, all of which I recommend the Secretary adopt.

(1) Claim For Extra Work For The New Wall

In the midst of construction the Department notified Baltazar on March 26, 2001 that the original Old Wall and Slab Footing design had been abandoned. The Department determined that the original design was flawed and that the Old Wall would be unsafe if built. Baltazar had pointed out to the Department that the original design required a portion of the Old Wall to be constructed above the frost line, which created a risk of sliding or cracking.

The Contract paid for both Old and New Wall by volume (CM) under Item 695. A schematic drawing of the wall was published in the Department's Construction Standards as drawing 302.2.0 dated 9/22/95 titled "Cemented Stone Masonry Wall" (Drawing). Ex. 7. The Drawing shows a generic masonry wall. A table included in the Drawing shows by wall section the height, depth and width of wall to be built on footings of associated volume per unit length of wall and footing. The volume of both footing and wall (excluding coping) is given at 0.2M intervals of wall height. The footing and wall were paid under separate pay items by volume (CM). The Department paid for the increased volume of the Stepped Footing by an extra work order.[2]

The Department's design substitution of the Stepped Footing for the original Slab Footing necessarily increased the height, depth and width—and thus the volume—of the New Wall. Each part of the New Wall built on a lower "step" of the Stepped Footing

[2] Baltazar's additional cost of building the Stepped Footing was $11, 816.35 and is not in dispute on this appeal.

required a higher wall segment to be built to achieve a level top. As a consequence of the new design, the volume of the New Wall more than doubled, from 40CM to 99.64 CM.

On April 2, 2001 Baltazar requested a change in Contract unit price for Item 685 from $1.00/CM to $480/CM based on the fact that the redesigned footing "substantially increased the quantity of the [New Wall] to be constructed," to 92 CM.[3] On April 2, 2001 the District, treating Baltazar's request as a claim for increased quantity, refused to change the unit price. The District's denial relied on Chief Engineer's Broderick's September 18, 2000 letter finding Baltazar had submitted an "unbalanced bid" of $1/CM for Item 685.

Baltazar asked the District to reconsider its denial on April 16, 2001. The District denied that request on April 18, 2001, citing Subsection 4.06.[4] On April 26, 2001 Baltazar renewed its claim at the District level. It stated that the increased quantity of the New Wall "represents a 'cardinal' change, allowing us the right to request a change in our contract price to reflect the level of effort required to construct this [redesigned] wall."

On May 23, 2001 Baltazar on May 23, 2001 wrote the Deputy Chief Engineer, Mr. Anderson, that the redesigned Wall was an "increase[] in size and scope" and that "the [W]all we bid on was removed from our contract and replaced with an alternate design." Mr. Anderson responded on June 7, 2001 that the District correctly denied the price adjustment. He stated:

> The plans indicate a typical cross section depicting how the wall is to be constructed. On the Alignment and Grading Plan (Sheet 17 of 44) it clearly states that the wall height varies. In addition, the plan shows the

[3] The actual quantity of New Wall installed was 99.64CM.

[4] The text of Subsection 4.06 appears infra page 11.

> proposed station and elevation along the length of the wall so that at the time of bidding the project a contractor would know how to deal with this situation.

Mr. Anderson invited Baltazar to file a formal claim, which it did on September 20, 2001. Its claim stated that the total volume of the New Wall was 99.64CM and the total construction cost was $35,742.99, as derived from "our daily reports." Baltazar derived a unit price for the New Wall of $358.72/CM ($35,742/99.64CM). It then subtracted the first 40CM for which it had bid $1.00/CM. For the remaining 59.64 CM Baltazar calculated the cost of extra work to be $21,394.14 ($358.72/CM X 59.64).

(2) Claim For Costs To Clean Up And Repair Flood Damage

By April 18, 2001 Baltazar had removed certain utility lines on Thompson Street and constructed trenches to receive the removed lines. On May 7, 2001 Baltazar wrote District 2 about "a situation" that needs "immediate attention by the Department." Baltazar told the Department that unpaved streets and open trenches at the site could impact public safety "should rain wash away material from the trench or road." It sought an increase in quantity of pay Item 472.1 ("Temporary Patching") for temporary paving. It asserted that the "quantity [in the contract] does not appear adequate to patch the utility trenches (water and storm)." Baltazar made no temporary patches before May 7, 2001.

The District referred Baltazar's May 7, 2001 letter to the town engineer of Monson for comment. The town engineer's letter of May 10, 2001 stated, "the design calls for maintenance of the trenches by the contractor" and it is "his responsibility to do so." As the contract had "no specific item for trench patching it is [Baltazar's] responsibility to maintain those excavated trenches with gravel." Ex. 2, Tab B. The District Highway Director forwarded the town engineer's response to Baltazar on May

15, 2001 stating in his cover letter, “it is the contractor’s responsibility to maintain the trenches.” The Department did not grant Baltazar’s request for an increased quantity of Item 472.1 (“Temporary Patching”).

On June 17 and June 20, 2001 thunderstorms in the Monson area produced heavy downpours. Water runoff from both storms caused washouts in open trenches and the unpaved roads at the site. The Department ordered Baltazar to clean and stabilize the site, which Baltazar did. Because June 17, 2001 was a Sunday, Baltazar paid premium time for clean up work done on that date. Baltazar did no patching work after May 7, 2001 prior to the storm flooding on June 17th and 20th.

On June 20, 2001 Baltazar made a claim for extra work for $14,756.80, its claimed cost to “re-establish the drain and water main trenches” in Thompson Street. Among other things, the claimed extra work consisted of the clean up of the washout and replacement of gravel in the trenches. In response to the District’s assertion that Baltazar must pay for the clean up Baltazar stated “we cannot find the section of the specification” that placed responsibility for maintaining the trenches on the contractor.

Baltazar’s claim reasserted its “position that the trenches should have been paved temporarily” under Item 472.1, as originally set forth in its May 7, 2001 letter. The District denied Baltazar’s claim on July 10, 2001, citing Subsection 7.18 of the Standard Specifications as grounds. Baltazar responded to the District’s denial by arguing that Subsection 7.09 (“Public Safety and Convenience”) and Item 472.1 (“Class I Bituminous Concrete Mixture”) supported its claim. The Claims Committee agreed with the District and this appeal followed.

DISCUSSION

In determining the meaning of a Contract the function of the judge "is to construe the contract as a whole, in a reasonable and practical way, consistent with [the Contract's] language, background and purpose." USM Corp. v. Arthur D. Little Systems, Inc., 28 Mass. App. Ct. 178, 116 (1989) and cases cited. A judge must construe a contract in a manner that gives effect to a rational agreement in order to carry out the intent of the parties. See Starr v. Fordham, 420 Mass. 178, 192 (1990). The principal guide to contract interpretation is the language of the contract itself. "Words that are plain and free from ambiguity must be construed in the usual and ordinary sense." Citation Ins. Co. v. Gomez, 426 Mass. 379, 381 (1998); see also Forte v. Caruso, 336 Mass. 476, 480 (1957) (plain meaning of words to control where no inconsistency results).

Claim For Wall

Baltazar

The heart of Baltazar's claim is that the "as built" three-meter New Wall built on the Stepped Footing was "substantially different from a two-meter [old] wall [that was to be] installed on the [original] monolithic footing." Baltazar claims the increase in volume of 59.64 CM for the New Wall is solely due to the redesigned wall and footing. It argues that the New Wall, built after the Department initiated a redesign, was different in "scope" from the Old Wall and that it was a "cardinal" change from the Old Wall on which Baltazar had bid. Baltazar asserts, in essence, that the redesigned New Wall deviated from the Old Wall in height, size and volume to such an extent that it was

outside the contemplation of the original Contract specifications. Hence, the Department should pay for cost of the New Wall (in excess of 40CM) as extra work.[5]

When the Department did not agree that construction of the additional 59.64 CM was extra work, Baltazar kept time and material records of construction costs in daily reports. See Subsection 9.03. From its records Baltazar derived a cost/CM of $358.72 by dividing the entire 99.64 CM of Wall constructed by the total cost of construction. Baltazar asserts that the Department should pay it $21,394.14 for the extra work of building 59.64 CM of the New Wall ($358.72 X 59.64).[6]

The Department

The Department views the New Wall as a mere increase in volume of the Old Wall. It argues that, irrespective of the fact that the original design of the Slab Footing was changed to a Stepped Footing, the New Wall itself was not a redesign. The Department views the matter as a simple increase in quantity.[7] Because the volume

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[5] Baltazar originally styled its claim as one for an increased unit price under Subsection 4.06 ("Increased or Decreased Contract Quantities") or Subsection 4.04 ('Changed Conditions"). It recognized that the Chief Engineer "has the authority to deny an increase in unit price under Section 4.04 Changed Conditions." See Statement of Claim. But it said "We find nowhere in the contract documents [the authority] to capriciously deny an increase should the Department change the quantity of an Item beyond twenty-five percent without an equitable adjustment [under Subsection 4.06]." Id. at Tab G. Baltazar based its changed condition claim on the assertion that (1) had the Department acted immediately when apprised by Baltazar on March 15, 2001 that the wall footing had to be redesigned, the Department could have designed "the footing and the wall in such a manner that would not have impacted the quantity of the wall"; and (2) the "three-meter stepped footing wall is substantially different from a two-meter wall installed on a monolithic footing and that the methods of construction … differ." Id. In sum, Baltazar contended that the Engineer did not have the authority "to preclude us from requesting this [equitable] adjustment" for installing an increased volume of Masonry [New] Wall under either Subsection. Because building the redesigned wall constituted extra work, it is not necessary to address Baltazar's initial theories of recovery.

[6] Baltazar has waived any claim for the cost to build the first 40 CM of the New Wall.

[7] Subsection 2.02 provides in pertinent part "An increase or decrease in the quantity for any item shall not be regarded as cause for an increase or decrease in the contract unit prices, nor in the time allowed for the completion of the work, except as provided in the Contract. (Also see Subsections 4.06 and 9.03.)"

increase was greater than 25%, the Department contends that the outcome here is governed entirely by Subsection 4.06.

Subsection 4.06 provides

> The Department reserves the right to increase or decrease the quantity of any particular item of work.
>
> Where the actual quantity of a unit price pay item varies more than 25 percent above or below the bid quantity stated in this contract, an equitable adjustment in the contract price for that pay item shall be negotiated upon demand of either party. The equitable adjustment shall be strictly based upon any increase or decrease due solely to the variation above 125 percent or below 75 percent of the estimated quantity. In this regard, no allowances will be made for loss of anticipated profits suffered or claimed by the Contractor resulting directly or indirectly from such increased or decreased quantities or from unbalanced allocation among the contract items from any other cause.
>
> The Contractor shall be estopped to rely on and deemed to waive under this subsection his right to have an equitable adjustment of a unit price bid by him which, in the opinion of the Engineer, is an unrealistic unit price, abnormally low for the unit item priced and which does not reflect the actual cost of performing such unit item of work. It shall be the obligation of the Engineer to notify the Contractor prior to award of the contract of any unit price that has been determined to be abnormally low for the unit item priced and that the unrealistic low unit price not reflecting the actual cost of performing such unit item of work would bar the Contractor from an equitable adjustment under this subsection. (Emphasis added.)

The Department contends that, even though the volume of New Wall built increased by more than 25% when constructed on the redesigned Stepped Footing, Subsection 4.06 does not apply because of Baltazar's "penny" bid for Item 685. Instead, under Subsection 4.06 Baltazar is "estopped to rely on and deemed to waive" its right to an equitable adjustment.

The Department supports its argument by pointing to the fact that both the Old and New Walls were constructed according to the specifications appearing in the Drawing. Because the schedule on the Drawing plainly shows that the volume of any

wall will increase as its height increases, the Department concludes that Baltazar was "bound to know" when it bid that the number of CM of wall might change. Viewed as a matter of increased quantity under Subsection 4.06, the Department contends that no "allowance" for increased cost above the original $1.00/CM is permitted. The Department offered no evidence on the cost of the New Wall; nor does it argue that the unit cost of the New Wall as built is unreasonable. It concludes that it must only pay Baltazar $59.64 for the New Wall ($1.00 X 59.64CM).

Analysis

Baltazar's claim has merit. The New Wall was extra work within the meaning of the Contract. Baltazar timely filed an appeal for such extra work, which was outside the scope of the original contract documents on which it bid. The fact that Baltazar submitted a "low ball" bid of $1.00/CM to build the Old Wall did not preclude it from proving a claim for the cost of extra work never contemplated when it originally bid.

The Contract defines extra work in Section 1.20 ("Extra Work") as work that

1. was not originally anticipated and/or contained in the contract: and therefore
2. is determined by the Engineer to be necessary for the proper completion of the project: and
3. bears a reasonable subsidiary relation to the full execution of the work originally described in the contract.

The facts here show that the work the Department ordered for the construction of the New Wall fit within the definition set forth in Section 1.20. First, the New Wall, no less than the redesigned Stepped Footing, was "not originally anticipated and/or contained in the contract" at the time of bid. Second, the Engineer required the New Wall to be designed and built expressly for the reason that it was "necessary for the proper completion of the project." Third, the New Wall bore "a reasonable subsidiary

relation to the full execution of the work originally described in the contract" as a new kind of retaining wall was needed after the original design was abandoned. For these reasons alone Baltazar's appeal has merit.

The outcome of the appeal here is also guided by the familiar principle enunciated by the Supreme Judicial Court in Alpert v. Commonwealth, 357 Mass. 306 (1970). There, the court said: "It is well established that where one party furnishes plans specifications for a contractor to follow in a construction job, and the contractor in good faith relies thereon, the party furnishing such plans impliedly warrants their sufficiency for the purpose intended." 357 Mass. at 320. Where the plans are insufficient for the purpose intended, the government bears the risk if extra work is required.

Here, the Department made a positive representation about the type of wall foundation and the height of the wall required. That representation included a design requiring that the Old Wall be built on a simple Slab Footing. The design of the Old Wall called for a wall of essentially uniform height, depth and width. In the original design a substantial increase in volume would occur only where the length of the Slab Footing substantially increased. Thus, the design specified by the Department impliedly warranted a wall in which the volume would be essentially determined by the length of the slab. The original design never contemplated a wall with segments of varying height.

The redesigned Stepped Footing altered the original design of both footing and wall. The new design was not similar to the design on which Baltazar bid. When a Stepped Footing replaced the Slab Footing a newly designed wall was substituted for the original Old Wall. The redesign necessarily meant that the New Wall would have a far greater volume than the Old Wall since the height of the New Wall would vary according

to the height of each "step" of the new footing. As a matter of fact the New Wall was different in shape, size and volume; the New Wall was not a mere extension in quantity of the original design.

The Department correctly recognized that the job of installing the redesigned Stepped Footing was--and should be paid for as--extra work. It appropriately executed an extra work order for $11,816.35 for the new Stepped Footing.[8] It should have recognized that the New Wall was also extra work. Just as the Stepped Footing was different in kind from the Slab Footing, so the New Wall was different in kind from the Old Wall. Each "step" of the Stepped Footing required a progressively higher segment of New Wall be built in order to maintain a level top. That is, the lower the step the higher the associated segment. The redesign of both footing and wall thus necessitated an increase in the New Wall's volume far beyond the contemplation of the original specifications.

It is undeniable that wall and footing together make up the whole design. That the Contract pays for wall and footing under separate Items does nothing to alter the fact that the design of wall and footing comprise a unified structure so that a substantial change in the original design require extra work. The Department initiated the redesign of both footing and wall for its own convenience after determining the original design was insufficient.

The grounds for rejection of Baltazar's claim by Mr. Anderson on June 7, 2001 miss the mark. The fact that the wall height might vary somewhat in the original design scheme hardly notified a contractor "at the time of bidding" of the increases in volume necessitated by the New Wall redesign. Even if it is true that Baltazar should anticipate

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[8] This is not a case where the length of the slab as originally designed increased in length and Baltazar was asked to build a Wall with the original height and width, but of increased length. The Chief Engineer's "low ball" letter of September 18, 2000 might well have a different impact in such circumstances.

some slight variation in volume of any wall, the New Wall as actually built was simply outside the original design.

The New Wall was no mere increase in quantity of Old Wall, as the Department argues. It is true, as the Department points out, that the same schematic Drawing governed the dimensions of the both the "original" and "redesigned" wall. But the size, shape and design of the New Wall make obvious that it is no mere extension of the Old Wall. The New Wall underscores the extent to which the Department altered the scope of the wall work with its redesign. See Ex. 7.

Baltazar was warranted in originally computing a unit price bid for the Old Wall on the assumption that that wall would be built on the Slab Footing shown on the Department's plans. When the Department changed the design, it required extra work. See Alpert v. Commonwealth, 357 Mass. 306 (1970). Baltazar was correct when it asserted to District 2 "We believe that this increased quantity is a result of the design by your Engineer which constitutes a change in work."

I conclude that the work performed as the redesign was not merely increased quantities of originally bid work, but extra work, which should be paid for as such under Subsection 9.03.

Flood Damage

The Department argues that the Contract specifies in subsection 7.18 that Baltazar is responsible for securing the work.

Baltazar contends "had the trenches been properly patched as provided under Item 472.1 and per the provision of Subsection 7.09 the washout would never have occurred. Our May 7, 2001 letter to the District reflected our concerns and the potential for

washout. We maintain our position in requesting compensation [for clean up work]." Statement of Claim, Tab E. At the hearing Baltazar advanced the further argument that the flooding caused a changed condition in the work for which the Department must make an equitable adjustment in the Contract price.

The Department's view of the Contract is correct; Baltazar's arguments are without merit.

Subsection 7.18 of the Contract provides

> Until written acceptance of the physical work by the Chief Engineer, the Contractor shall assume full charge and care thereof and the <u>Contractor shall take every necessary precaution against injury or damage to the work by action of the elements, or from any cause whatever</u> ….
>
> <u>The Contractor shall bear all losses resulting</u> to him/her on account of the amount or the character of the work or because the nature of the land in or on which the work is done is different from what was estimated or expected, or <u>on account of the weather elements</u> or other causes (except as stated in Subsection 4.04, Changed Conditions).
>
> <u>The Contractor shall rebuild, repair, restore and make good all injuries or damages to any portion of the work occasioned by any of the above causes</u> … and shall bear the expense thereof, except damage to the work due to war, … to "Acts of God" (limited to hurricane, tornado, cyclone and earthquake as classified by the United States Weather Bureau for the particular locality … and damages resulting directly from flooding from any of the aforementioned "Acts of God"). The repair of such damages shall be done by the Contractor and paid for at the respective contract unit prices for the quantity and items of work involved. …. (Emphasis supplied.)

The import of Subsection 7.18 is plainly that Baltazar was responsible to "take every necessary precaution" against possible damage "by action of the elements." The Contract expressly assigns the risk of loss in the event of damage to the work to Baltazar, who "shall bear all losses resulting to him …on account of the weather elements." Baltazar is required to "rebuild, repair … and make good all injuries or damages to any portion of the work occasioned" by weather. Baltazar does not fall within the exceptions

that the Contract provides, which are specified weather events classified as "Acts of God," namely, "hurricane, tornado, cyclone and earthquake." For "such" events the Department will pay for damage at the Contract "unit prices." See 116 Commonwealth Condominium Trust v. Aetna Cas. & Surety Co., 433 Mass. 373, 376 (2001) (ordinary and usual sense of language in contract controls meaning).

Baltazar's arguments are without merit. It first contends that, because it brought to the District's attention on May 7, 2001 the purported danger of flooding and the purported fact that the Contract did not specify the proper quantity of temporary patching material under Item 472.1, the Department must bear risk of loss. But the fact that Baltazar wrote the District specifying "a situation" needing the Department's "immediate attention" and sought "direction" from the Department, while it admittedly delayed securing the work "until we receive direction from you on this issue," did not alter the Contract. Baltazar was at all times required to secure the work from "weather elements," no matter the quantity of asphalt specified in Item 472.1 and no matter whether such material was suitable for temporary patching.[9]

Baltazar next argues that certain language in Subsection 7.09 ("Public Safety and Convenience") relieves it of responsibility. The pertinent text is

> The work at each trench shall be practically continuous, with the placing of conduit and piping, backfilling and patching of the surface closely following each preceding operation.

This language in Subsection 7.09 merely specifies certain actions that must be taken by the contractor. It only emphasizes Baltazar's primary responsibility to assure public safety during the work. Nothing in the quoted language negates the language in

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[9] Baltazar and the Department do not agree whether Item 472.1 is the appropriate pay Item for temporary patching. Even if Baltazar is correct that Item 472.1 was to be used for temporary patching, Baltazar should have taken action to protect the work and then made a claim for increased quantity.

Subsection 7.18 that expressly assigns the risk of loss from weather events to the contractor.

Baltazar finally contends that the flooding created a "changed condition" which excepts it from bearing the risk of loss here. Subsection 4.04 ("Changed Conditions") governs compensation where, during the work, either party "discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans…." Subsection 4.04 speaks to subsurface conditions that differ from those shown on the plans or "ordinarily encountered" in the work. No changed condition exception applies here. Flood damage is not a "subsurface" or "latent" condition.[10] There was no deviation from the plans; the plans did not warrant fine weather. Baltazar does not come within any exception specified in Subsection 7.18.

The damage to the work was caused by two thunderstorms, not Acts of God as defined by the Contract. Accordingly, the Department correctly determined that the Contract required that Baltazar "bear" all loss including the cost to "restore and make good all … damage to the work." Moreover, Baltazar's failure to make any effort to secure the site was the proximate cause of the damage it sustained. The Contract allocates the risk of such weather damage loss to the Contractor.

CONCLUSION

I conclude that Baltazar's claim for (1) constructing a volume of Wall never contemplated in the original specification was extra work but that its claim for (2) costs to clean up Flood Damage was not extra work, because the Contract required Baltazar to repair any damage caused by weather.

[10] The exception for "changed conditions" due to "latent physical conditions" referenced in Subsection 7.18 addresses a contractor's loss otherwise pertaining "because of the nature of the land in or on which the work is done is different from what was estimated or expected." That is not the case here.

RECOMMENDATION

I recommend that Baltazar's claim for extra work to build the redesigned Wall be allowed in the amount of $21,394.14. I recommend that its claim for extra work to repair Flood Damage be denied.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Bardon Trimount, Inc. (Bardon) appeals to the Board of Contract Appeals (Board) from the denial of the Claims Committee of the Massachusetts Highway Department (Department or MHD) for claimed extra work of $39,068.37 incurred by its subcontractor Renz Painting, Inc. (Renz) for cleaning and painting two bridges (Subject Bridges) in MHD contract # 97071(Contract). Bardon/Renz[1] claims that the additional work was the blast cleaning of bridge bearings on the Subject Bridges to a near white specification and painting the same. Statement of Claim, Attachments D & E.

I find the Bardon/Renz appeal without merit. The claim for extra work rests on an erroneous reading of the Contract specifications. Twenty-one pages of specifications detail the cleaning and painting work to be done on the Subject Bridges. There is a specification titled "Cleaning In The Bearings Areas," which expressly requires the contractor to clean by blasting to "near white." With respect to painting, the contractor is directed to paint the "metal surfaces in the areas of the bearings that were cleaned."

Bardon/Renz contends that all the above-specified work is outside the work required under the Contract. It contends that it is only required to clean and paint "the steel bridge rails and stringers."

I find that the special provisions of the Contract, when construed to give effect to all its provisions, does not support the interpretation that Bardon/Renz proposes.

I recommend that the appeal be denied.

STATEMENT OF THE CASE

On November 28, 1997 Bardon notified Mr. McCourt, MHD's District Highway Director in District 5, of a "request" for an extra work order of $39,068.37, enclosing an

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[1] The report uses the term Bardon/Renz to identify the appellant as both general contractor Bardon and subcontractor Renz argued at the district level. Bardon is technically the appellant.

October 25, 1997 letter from Renz to it for "additional costs generated by the near white blasting of bearing areas" on two bridges on Rte. 27, S-9-7 and S-9-8.[2] On December 17, 1997 Mr. McCourt denied the claim. On February 6, 1998 Bardon appealed to the Claims Committee, which heard the matter on May 20, 1998. On May 22, 1998 the Claims Committee denied the claim, noting "the cleaning requirements for bearing areas" were described in the Contract special provisions.

On or about June 9, 1998 Bardon/Renz appealed to the Board and on July 10, 1998 filed its Statement of Claim. Administrative Law Judge Peter Milano heard the appeal on September 10, 1998 and December 5, 2002.

Present at the hearings were

Peter Milano	Chief Administrative Law Judge
Isaac Machado	Deputy Chief Counsel, MHD
David Mullen	Counsel, MHD
Richard Bibby	MHD, District 5 (retired)
Stephen Marsden	MHD, District Area Engineer
John Gendall	MHD Bridge Maintenance Engineer
Ronald Ouellette	MHD, District 5
Gerald Bernard	MHD, District 5
Mark Welch	Bardon
Greg MacKenzie	Bardon
Bill Renz	Renz Painting, Inc.

The following exhibits were admitted into evidence.

Ex. 1	Contract #97071
Ex. 2	Statement of Claim
Ex. 3	Letter of Richard Bibby 11/17/02

In July 2003 Administrative Law Judge Milano resigned before making a report or recommendation to the Board. On November 28, 2003 Anthony E. Battelle, Esq.

[2] Section 7.16 of the Standard Specifications provides that "all claims of the contractor for compensation … must be made in writing to the Engineer within one week after the beginning of any work or the sustaining of any damage on account of such act….." The record does not reveal when the cleaning and painting work was done on bridges S-9-7/8. Thus, it is impossible to determine whether Renz's claim letter was given to Bardon within "one week" after the work began.

appeared for Renz through a letter to Acting Chief Administrative Law Judge John McDonnell.

On March 1, 2004 the undersigned was appointed Chief Administrative Law Judge. On April 8, 2004 I held a conference on the record. Present were Mr. Renz, Mr. Battelle, Mr. MacKenzie, Mr. Machado and myself. I asked the parties whether, in light of the fact that Mr. Milano had resigned before a report was made to the Board, they desired to have the appeal reheard or a report and recommendation made on the existing administrative record. The parties stated they were content to have the undersigned make a report and recommendation to the Board.

FINDINGS OF FACT

Substantial evidence in the record, consisting of tape recorded testimony and the three exhibits admitted by Judge Milano, supports the following findings of fact, which I recommend the Board adopt.

1. Bardon is the contractor on MHD Contract #97071 for resurfacing and bridge repair and painting work on I-95 in Norwood, Sharon and Walpole. Renz was a subcontractor to Bardon for bridge cleaning and painting work.
2. The Bardon/Renz appeal to the Board originates from a dispute about which of two separate statements of "scope of work" in the special provisions of the Contract governs the cleaning and painting work on two bridges over I-95 in Sharon, known as S-9-7 & S-9-8 (Subject Bridges).
3. With respect to the Subject Bridges the special provisions provide

> [Payment] Item 106.317 CLEAN AND PAINT ST. BR. S-9-7/8 LUMP SUM

4. On June 20, 1996, 20 days prior to the submission of bids, the Department inserted Addendum No. 4 into the Contract, which revised and restated the special provisions governing cleaning and painting on the Subject Bridges.

5. The special provisions in Addendum No. 4 consisted of two parts. The first part consisted of special provisions that applied to seven bridges, identified as [Payment] Items 106.313 – 106.319 and included the Subject Bridges (First Part). The second part consisted of different special provisions that applied to five different bridges, identified as [Payment] Items 106.311 – 106.316, and did not include the Subject Bridges (Second Part).

6. The First Part applying to the Subject Bridges are divided into the following sections: (1) Scope of Work [1 page]; (2) Requirements For Protection of Workers and the Environment [12 pages]; (3) Cleaning [6 pages] ; and (4) Painting [6 pages].

7. The "Scope of Work" in the First Part is set forth directly below pay Item 106.317 and states:

> "Work under these [Payment] items [106.313 – 106.319] includes cleaning and painting all structural steel, steel railings, drainages systems, utility supports and steel lamp posts on the above listed bridges with a three coat, non lead [] paint;.... The existing structure and appurtenances are believed to be coated with lead paint. []. (Emphasis supplied.)

8. The special provisions in the First Part titled "Requirements For Protection of Workers and the Environment" contain paragraphs detailing the requirements of environmental regulations, the type of containment system to be employed, the operational requirements for worker health

and safety, the handing of hazardous waste, and the five written plans for aspects of the work (paint removal, protection of air/soil, worker health, disposal of waste and hygienist).

9. The "Cleaning" special provisions in the First Part contains the following paragraphs (1) general, (2) cleaning abutments and pier caps, (3) surface preparation, (4) methods of cleaning, (5) steam cleaning SSPC-SP 1, (6) Commercial Blast Cleaning SSPC-SP6 and (7) Cleaning in the Bearing Areas.

10. The paragraph referring to "steam cleaning" states that SP 1 is "required for all areas that are to be painted unless otherwise directed by the engineer" and that the use of SSPC SP6 "wet abrasive blasting" is strictly regulated by the engineer.

11. The paragraph referring to "Cleaning in the Bearing Areas" states, in part

> <u>All steel within the width of the pier caps and abutments</u> and a length from the end of the stringer to five (5) feet beyond the centerline of the bearing from the top of the pier caps and abutments to the bottom of the bridge deck, with the exception of the intermediate pier supporting the continuous members[,] <u>shall receive</u> an SSPC SP 11 Power Tool Cleaning to Bare Metal or SSPC SP10 Near White Blast Cleaning using wet abrasive blasting or closed abrasive blasting with recyclables. [Emphasis added.]

12. The "Painting" section of the First Part contain the following paragraphs (1) general, (2) Paint System, (3) Requirements for Structural Paints, (4) Progress Photographs and (5) Compensation.

13. The paragraph titled "Paint System" provides in part

> The metal surfaces in the areas of the bearings that were cleaned to an SSPC SP 120 or SPP 11 level shall first receive a full coast of Inorganic Zinc Rich primer [].

14. The Compensation special provision at the end of the First Part of Addendum No. 4 provides

> Compensation for this work will be at the Contract Lump Sum price under the [Payment] Items for "Clean and Paint Steel Bridge," which price shall included full compensation for all labor, equipment, [] containment and disposal ….

15. The Second Part of Addendum No. 4 contains special provisions governing the cleaning and painting of five other bridges (namely S-9-16; S-9-14; S-9-14; S-9-11; S-9-9/10).

16. Pages 2 to 6 of the Contract consist of introductory paragraphs to the 112 pages of special provisions that follow. Each of the 12 bridges in the Contract is identified in a separate introductory paragraph titled "scope of work." The introductory scope of work for each of the 12 bridges consists of numbered "bullet" phrases or sentences generally summarizing the work.

17. There are six numbered "bullet" sentences generally describing the work on the Subject Bridges. Number 6 states: "Clean and paint steel bridge rail and stringers."

18. The introductory "scope of work" summaries in the special provisions contains the following "bullet" sentences with respect to bridges other than the Subject Bridges: "Clean and paint steel bridge [S-9-9 & S-9-10]"; "Clean and paint steel bridge[s] [S-9-11 & N-25-28 & S-9-15]"; "Clean

and paint steel bridges [S-9-12 & S-9-13]"; "Clean and paint steel bridge and bridge rail [S-9-14 & S-9-16 & W-3-33]."

19. Bardon was the successful bidder on the Contract with a bid price of $10,115,354.00. The Contract was entered into on July 23, 1996 with a completion date of November 20, 1998.

20. Bardon bid a lump sum $112,000 for Item 106.317: "Clean and Paint Steel Bridge S-9-7/8," the Subject Bridges.

DISCUSSION

The question to be decided is whether claimed extra work of $39,068.37 for cleaning and painting the bridge bearings on the Subject Bridges was within the scope of work specified in the contract documents or beyond the written scope of work.[3] Bardon/Renz argues that the scope of work was "clean and paint steel bridge rail and stringers" and so did not include bearings. The Department contends that the applicable scope of work was "cleaning and painting all structural steel" which included bridge bearings. Therefore, the Department says, the special provision titled "Cleaning In the Bearing Areas" applied to Baron/Renz. That provision expressly required the bridge bearings on the Subject Bridges to be cleaned to "bare metal" or "near white" before painting because "all structural steel" was included in the applicable scope of work.

The sections of the Contract should be construed to give reasonable effect to each. S.D. Shaw & Sons, Inc. v. Joseph Rugo, Inc., 343 Mass. 635, 640 (1962). Where the plans and specifications show the precise material to be furnished and installed, and there is no error or omission in the awarding authority's specifications, the bidder is required to

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[3] Subcontractor Renz details costs of $35,516.70 to which general contractor Bardon adds mark ups to yield the claimed amount of $39,068.37.

complete the work as detailed. John F. Miller Co., Incl. v. George Fichera Construction Corp., 7 Mass. App. Ct. 494, 498 (1979). The sub bidder is bound to perform "the exact work described in the plans and specifications." J. F. White Contracting v. Department of Public works, 24 Mass. App. C. 932, 933 (1987).

I find the written specifications relating to cleaning and painting the Subject Bridges are plain and unambiguous. They appear in detailed specifications set forth in Addendum No. 4 and consist of twenty-one (21) pages of special provisions setting forth a detailed scope of work, the requirements for de-leading and the protection of workers and the environment, and detailed specifications for cleaning and painting.

The special provisions contain all specifications for seven bridges, each identified by a "lump sum" payment item number. With respect to the two Subject Bridges,[4] the relevant payment item states: "ITEM 106.317 CLEAN AND PAINT ST. BR. S-9-7/8 LUMP SUM."

The "Scope of Work" specifically relating to the Subject Bridges appears next below Payment Item 106.317 and provides in relevant part

> "Work under these [above payment] items[5] includes cleaning and painting all structural steel, steel railings, drainages systems, utility supports and steel lamp posts on the above listed bridges with a three coat, non lead [] paint;…. The existing structure and appurtenances are believed to be coated with lead paint. []. (Emphasis supplied.)

Bridge bearings fall within this scope of work as structural steel. The cleaning specifications are detailed in six pages. Steam cleaning is first "required for all areas that

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[4] Payment Item 106.117 refers to the bridges "S-9-7/8," which are the Subject Bridges referred to in Bardon/Renz's Statement of Claim.

[5] The payment items referenced are 106.313 (1 bridge); 106.314 (2 bridges); 106.317 (the 2 Subject Bridges); 106.318 (1 bridge); and 106.319 (1 bridge). In all, seven bridges are subject to the scope of work set forth under "these [payment] items." The other 5 bridges within the Contract are under separate payment items and subject to different cleaning and painting special provisions.

are to be painted" and" shall <u>precede</u> all other phases of cleaning." (Emphasis in original.) Cleaning methods are particularly specified with reference to engineering standards, namely SSPC –SP 1 SSPC – SP 6, SSPC SP 10, and SSPC PS 11. Particular cleaning methods and standards are required for particular areas.

A detailed specification governing "Cleaning In the Bearing Areas" provides:

> <u>All steel</u> within the width of the pier caps and abutments and a length from the end of the stringer to five (5) feet beyond the centerline of the bearing from the top of the pier caps and abutments to the bottom of the bridge deck, with the exception of the intermediate piers supporting continuous members <u>shall receive an SSPC-SP 11</u> Power Tool Cleaning To Bare Metal <u>or SSPC SP 10 Near White Blast</u> Cleaning using wet abrasive blasting or closed abrasive blasting with recyclables.

I find that the Contract specifications plainly and unambiguously require cleaning and painting of the bridge bearings of the Subject Bridges. Bridge bearings are within the meaning of "all steel" in the specification. My conclusion is supported by a fair reading of all twenty-one pages of special provisions relating to Payment Item 106.317, giving a reasonable effect to each.

The detailed scope of work set forth next below payment item 106.317 includes within its meaning bridge bearings. Thus, with respect to the Subject Bridges the lump sum bid for "clean and paint St. Br." includes (1) "all structural steel, steel railings, drainage system, utility supports and steel lamp posts" (2) the removal of lead paint; and (3) the application of non lead paint. Construing the Contract to include bridge bearings within the scope of work is consistent with the special provision requiring the cleaning of "all steel within the pier caps and abutments," as set forth in the specification titled "Cleaning In The Bearing Areas."

The finding that work under Payment Item 106.317 unambiguously includes cleaning and painting bridge bearings is mutually consistent with a finding that the introductory scope of work and the more detailed scope of work are not inconsistent when read together. The introductory scope of work is not inconsistent with the subsequent, more detailed scope of work because cleaning and painting "steel bridge rails and stringers" falls within the more detailed work later described. The fact that the more detailed scope of work includes other work and by its own terms applies directly to "all structural steel" does not make it inconsistent with the more general provision. Specific language generally governs more general language, which is the case here. See Lembo v. Waters, 1 Mass. App. Ct. 227 (1973).

Bardon/Renz argues, however, that the introductory scope of work of the special provisions relating to the Subject Bridges "specifically calls for only the bridge rail and stringers of [the Subject Bridges] to be painted with no mention of bearings." Statement of Claim, Attachment D. According to the contractor, where bridge bearings are to be painted, the introductory scope of work states, "[c]lean and paint steel bridges," a "description that incorporates the entire bridge." Id.

There is no merit in the Bardon/Renz contention. The introductory scope of work, on which Bardon/Renz relies, need not specifically mention bridge bearings in that particular place in order for that item to fall within the Contract. The critical requirement is that the Contract provisions be read together in a consistent manner so that reasonable effect is given to each. See Corbin On Contracts, Revised Edition Vol. 5, Sec. 24.21. As explained above, the words "clean and paint steel bridge rail and stringers" falls within the meaning of the more detailed scope of work that plainly includes cleaning

"all structural steel, steel railings, drainages systems, utility supports and steel lamp posts on the above listed bridges" and painting with a "three coat, non lead [] paint…."

The principal flaw in the Bardon/Renz argument is that it construes the Contract in a way that renders meaningless entire sections of specifications contained in the special provisions. For example, Bardon/Renz offers no legal justification for a proposed interpretation that reads out of the Contract the unambiguous provision titled "Cleaning In The Bearing Areas."[6] That provision must be given some meaning—it cannot simply be put aside. That provision is entirely consistent with the special provision "Paint System," which provides, in part "The metal surfaces in the areas of the bearings that were cleaned to an SSPC 10 or SP 11 level shall first receive a full coat of [zinc primer] [etc.]…." In short, in contradiction to the Bardon/Renz theory, the Contract construed as a whole supports the conclusion that bridge bearings were intended to be within the scope of work.

As a matter of law, the Bardon/Renz interpretation fails. The Contract is to be interpreted giving effect is to be given to all its provisions. Corbin On Contracts, supra. Judicial construction is made upon the entire contract and not on "merely disjointed parts of it." Id. A particular clause is not entitled to "special emphasis." Lembo v. Waters, supra.

The scope of a party's obligations cannot "be delineated by isolating words and interpreting them as though they stood alone." Commissioner of Corporations & Taxation v. Chilton Club, 318 Mass. 285, 288 (1945). "Words matter; but the words are

[6] That special provision states, in pertinent part: "All steel within the width of the pier caps and abutments and a length from the end of the stringer to five (5) feet beyond the centerline of the bearing from the top of pier caps and abutment to the bottom of the bridge deck [with certain exceptions], shall receive an SSP SP 11 Power Tool Cleaning To Bare Metal or SSPC SP 10 Near White Blast Cleaning…."

to be read as elements in a practical working document and not as a crossword puzzle." Fleet Nat'l Bank v. H&D Entertainment, Inc., 96 F.3d 532, 538 (1st Cir. 1996). Bardon/Renz isolates the words "clean and paint steel bridge rails and stringers" and interprets them to create a discrepancy where none exists.[7] Its interpretation cannot be correct since its effect is to read out of the Contract specific special provisions plainly intended to be included.

FINDINGS

I find that a one sentence general summary of the cleaning and painting work to be done on the two bridges does not control the interpretation of the Contract's special provisions. I find that cleaning and painting bridge bearings in accordance with the special provisions is within the scope of work for the Subject Bridges.

RECOMMENDATION

The Board should adopt the findings of fact set forth.

The Board should deny the appeal of Bardon/Renz.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

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[7] The Bardon/Renz proposed interpretation creates such a glaring inconsistency within the special provisions that, if correct, it would qualify as the kind of obvious error that legally obligates a bidder to seek clarification before it submits a bid. See and compare John F. Miller Co., Inc. v. George Fichera Construction Corp., 7 Mass. App. Ct. 494, 499 (1979) with Richardson Electrical Co. v. Peter Francese & Son, Inc.: Lenox, 21 Mass. App. Ct. 47, 52 (1985). Indeed, the Contract itself obligated Bardon to bring supposed discrepancies to the Department's attention. See Standard Specifications for Highways and Bridges, 1988 ed., Subsection 5.04 (Contractor shall take no advantage of any apparent error or omission in the plans or specifications and upon discovery shall immediately notify the engineer). Bardon's failure to do so binds Renz in the circumstances of this case. See Richardson Electrical Co. v. Peter Francese & Son, Inc.: Lenox, 21 Mass. App. Ct. at page 52.

To:	Secretary Bernard Cohen, EOT
Through:	Jeffery Mullan, Esq., Undersecretary and General Counsel, EOT Luisa Paiewonsky, Commissioner, MassHighway
From:	Stephen H. Clark, Administrative Law Judge
Date:	August 8, 2008
Re:	Report and Recommendation

Gardner Engineering, Inc. (Gardner), general contractor on MassHighway contract #32160 for bridge demolition and a replacement bridge over the Swift River between Belchertown and Ware, appeals from the refusal of the Engineer to grant it extra work of $39,093.51. The extras were for clean up, repair and dewatering of two damaged coffer dam containment structures on each bank of the river. The damage was caused by the release of 77 million gallons of water by the Massachusetts Water Resources Authority (MWRA) into the Swift River from the Quabbin Reservoir on September 3, 2003.

Gardner asserts that the need for extra work was caused by misleading MassHighway plans, which incorrectly stated the water elevation of the Swift River at 110.00 meters when the actual elevation was 110.66 meters. Gardner also asserts that it was misled because MassHighway omitted any reference to the MWRA, which artificially controlled the water elevation of the river by releases water from the Quabbin Reservoir.

Gardner's appeal has merit. Gardner was entitled to rely on the water elevation measurement stated in the plans because MassHighway impliedly warranted that its specifications are accurate. The measurement of 110.00 meters was materially incorrect and caused Gardner to design inadequate containment structures and dewatering.

Gardner did not prove all its claimed extra costs. MassHighway should pay Gardner $25,252.95, the total of extra costs that it proved at the hearing.

INTRODUCTION

Gardner Engineering, Inc. (Gardner) appeals from the refusal of the Engineer to pay $39,093.51 for claimed extra work to clean up and dewater two sheet steel containment structures in the Swift River. Gardner erected the containment structures on the east and west banks to demolish an old bridge and drive piles and do foundation work for a new bridge between Belchertown and Ware under MassHighway contract #32160.

The Swift River flows from the Quabbin Reservoir to the Connecticut River. Using the Swift River as a conduit the Massachusetts Water Resources Authority (MWRA) discharges millions of gallons of water daily into the Connecticut River to maintain government mandated levels. On a day to day basis the MWRA artificially controls the water elevation and rate of flow of the Swift River at the work site.

On September 3, 2003 the MWRA released 70 million gallons/day (MGD) into the Swift River, more than three times its average release of 22 MGD. As a result the east containment structure collapsed and Gardner incurred costs of claimed extra work to clean up and strengthen the containment structures and to extend dewatering.[1]

Gardner makes two contentions on appeal. It contends that MassHighway issued materially incorrect specifications since its plans erroneously stated that the water elevation of the Swift River was 110.00 meters. It also contends that MassHighway failed to inform it of the MWRA's active role in controlling the water elevation of the Swift River. So, Gardner relied on MassHighway's inadequate plans to unwittingly design ineffective containment structures and to adopt an inadequate dewatering plan.

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[1] Gardner's original appeal included a claim for its costs due to a one year delay MassHighway ordered in writing to stop work because the town had failed to take by eminent domain certain land the contract specified for compensatory wetland storage. On September 13, 2006 MassHighway and Gardner settled the delay claim for $96,000.00.

Gardner's claim has merit in part. Gardner was required by law to perform the project strictly in accordance with the specifications issued by MassHighway. See G.L. c.30, s. 39I. When MassHighway issues contract specifications it impliedly warrants their accuracy and usefulness for the purpose intended. See Alpert v. Commonwealth, 357 Mass, 306, 320 (1970) (Alpert).[2] Here, MassHighway plans incorrectly showed the water elevation of the Swift River (Elevation) to be 110.00 meters, when it was in fact 110.66 meters, a material difference of more than 2 feet. Because the contract documents made no specific disclaimer about the water Elevation measurement and the specifications did not require Gardner to verify the accuracy of any measurements, Gardner was entitled to rely on the unambiguous specification. Accordingly, MassHighway breached the implied warranty that its plans were free from error and fit for the purpose of planning and executing the work.

Gardner's contention, however, that MassHighway is liable solely because the specifications failed to disclose that the MWRA controlled the water Elevation has no merit. Gardner cites no authority to support its argument. Established law is to the contrary. To recover on a non-disclosure theory Gardner must prove not only that MassHighway failed to disclose MWRA's actions. It must also prove that MassHighway knew of the MWRA's discharges into the Swift River at the time of award but it withheld that information knowing it to be vital to performance. See Helene Curtis Indust. Inc. v. United States, 312 F.2d 774, 777 (Ct. Cl. 1963) (Helene Curtis) This Gardner did not do.

[2] Alpert follows the so-called "Spearin Doctrine" articulated by the Supreme Court in United States v. Spearin, 248 U.S. 132, 137 (1918) (Spearin) ("Whenever the government uses specifications in a contract there is an implied warranty that these specifications are free from errors. The test for recovery based on inaccurate specifications is whether the contractor was misled by these errors.")

Nor did Gardner prove all of its claimed extra costs of $39,093.51. As explained below I find it only proved extra work costs of $25,252.95.

BACKGROUND AND FINDINGS

Based on the testimony of the witnesses and the exhibits in evidence I make the following findings.

MassHighway on April 24, 2002 awarded Gardner contract #32160 for $883,774.00. The work required the demolition of an existing bridge over the Swift River and replacement with a new, pre-cast reinforced concrete bridge.

MassHighway Plans

MassHighway's plans consistently showed the water elevation of the Swift River (Elevation) to be 110.00 meters. See ALJ Ex. #1 (Plans, sheets 1 & 4). The water Elevation of 110.00 meters was specified unambiguously. Id. Gardner relied on MassHighway's representation that the water Elevation at the site was 110.00 meters when it planned the work, formulated its bid, designed the containment structures, estimated dewatering costs and began the work. Id. (Plans, sheets 1,4, 5 & 6). The contract documents did not warn bidders that the water Elevation measurement specification might be inaccurate; there was no requirement to verify water Elevation.

Commencement of the Work

Gardner mobilized for the project in June, 2002. MassHighway issued a written stop work order shortly thereafter. See supra p.1, n. 1. One year later, in June, 2003, Gardner remobilized. Neither Gardner nor MassHighway measured the water Elevation before Gardner began the work.

The specifications required that the demolition of the old bridge and construction of the new foundations be done within two dewatered containment areas, on the east and west banks. MassHighway approved Gardner's design for the containment structures (steel sheeting) and its dewatering plan (sump pumps, interlocking steel sheeting).

The containment structures were semi-circular coffer dams built by driving overlapping steel sheeting from upstream to down stream bank and paid under Item 952 (Steel Sheeting) at the bid unit price. The soil on both easterly and westerly riverbanks was sandy. After dewatering the containment structures Gardner demolished the existing abutments and piers and began to drive piles for the new footings for the abutments of the new bridge. Dewatering continued day to day during this work, paid under the lump sum Item 991.1 (Control of Water).

MWRA Releases From the Quabbin

The MWRA is required to discharge a minimum of 20 MGD from the Quabbin Reservoir into the Swift to maintain mandated water levels in the Connecticut River.[3] If conditions of flow in the Connecticut River so require, releases up to 77 MGD may be required. The Releases from the Quabbin Reservoir into the Swift River are measured by the United States Coast and Geodetic Survey (USGS) at its West Ware gauge (Gauge) upstream of the work. The accuracy of measurements taken at the USGS gauge (Gauge) in 2003 is uncontested and unrebutted.

Gardner introduced a chart (Chart) summarizing hydraulic data collected by day and hour at the Gauge. Gardner Ex. # 9. The Chart correlates the daily average flow of the Swift River in cubic feet/second (CFS), the water discharged by the MWRA from the

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[3] The MWRA now releases water from the Quabbin in cooperation with the Department of Conservation and Recreation, which was established by St. 2003, c.26, s.290. See MassHighway Ex. #9 & 10. Releases in the Swift River were first authorized as part of the state reservoir system by St. 1927, s. 321.

Quabbin in millions of gallons per day (MGD), the water elevation of the Swift River (Elevation) and the deviation in Elevation in inches each day from the 110.00 meters specified on MassHighway's contract plans. Id. The following excerpts from the Chart show data before, during and after peak Elevations reached on September 3 and 4, 2003:

Date	Gauge	CFS	MGD	Elevation	Deviation
8/18/03	1.98	840.48	22.6	110.66	2' 2"
8/27/03	2.64	2502.23	67.4	110.81	2' 8"
9/01/03	1.98	854.46	22.9	110.66	2" 2"
9/02/03	2.00	866.60	23.3	100.663	2' 2"
9/03/03	2.66	2619.76	70.6	110.8205	2' 8"
9/04/03	2.66	2813.00	75.8	110.8385	2' 9"
9/05/03	2.01	1107.74	39.8	110.684	2' 3"
9/06/03	2.01	901.20	24.3	110.666	2' 2"

Gardner did not know when it bid or began the work that the MWRA artificially controlled both the water Elevation and flow rate of the Swift River. The contract documents make no reference to the MWRA or its obligation to maintain the water level of the Connecticut River. The record does not reveal whether MassHighway knew of the MWRA's releases when it published the contract plans or when it awarded the contract.

Damage To the Containment Structure

On August 12, 2003 Gardner notified District 2 that it had measured the water Elevation at the work site at 110.66 meters and asked it to confirm the water Elevation for itself. MassHighway declined. Gardner Ex. #4. MassHighway conceded at the hearing that the water Elevation at the site was never less than 110.66 meters at any time during the summer and fall of 2003. I find that the actual average water Elevation was at least 00.66 meters, or 2 feet 2 inches higher, than the specified 110.00 meters shown on the plans. During the summer of 2003 the average MWRA release was 22 MGD, which resulted in the "normal" water Elevation of 110.66 meters. See Gardner Ex. #9.

Gardner noticed as work continued that the water Elevation and flow rate of the Swift River varied from day to day. Gardner's foreman saw that the Swift's water level typically rose during dry spells. "I couldn't figure it out," he said. In "mid August" 2003 Gardner first learned that the MWRA controlled the water Elevation and rate of flow of the river. Gardner then began to communicate directly with MWRA engineers. On August 27, 2003 an MWRA engineer told Gardner it would discharge that day 67.5 MGD, which was three times the 22 MGD average release.

The August 27, 2003 release increased seepage into both containment structures due to increased hydrostatic pressure on the steel sheeting and on the river bed. As a result Gardner had to pump more water than usual from the containment structures. MassHighway determined that the existing sedimentation basins did not have the capacity to filter the increased volume pumped on August 27, 2003 and so ordered Gardner to cease pumping when the capacity of the desedimentation basins was attained.

On September 3, 2003, following a dry spell of five days, MWRA released 70.4 MGD from the Quabbin into the Swift River, an increase of 48.4 MGD over the 22 MGD average release. As a result the water Elevation of the Swift River rose to 110.8205 meters, 2 feet 9 inches above the Elevation specified on the plans. Gardner Ex. #9. The flow rate increased to 2,619.76 CF/sec that day from an average of approximately 850 CF/sec. Id.

The MWRA release of September 3, 2003 resulted in the flooding of the east containment structure: the sandy soil on east bank collapsed at the junction of the sheeting and river bank on the downstream side; the river then filled the containment structure from "behind" the steel sheeting. See Gardner Ex. #1 (sketch on page 077).

The flood was the result of the increased flow and elevated water level of the Swift River. On September 3, 2003 Gardner's subcontractors were welding rods on the pile caps when the east containment structure flooded. As the water rose the six workmen "ran for their lives." The west containment structure did not flood. On September 4, 2003 Gardner notified MassHighway of a "changed condition" and filed a notice of claim.[4]

THE APPEAL

Gardner timely filed a claim at District 2 on September 4, 2003, which was denied on September 16, 2003 because MassHighway deemed that control of water was the sole responsibility of Gardner. On October 2, 2003 MassHighway denied Gardner's request to investigate "the difference in water elevation of the Swift River, which differs substantially from the design elevations as shown on the Plans."[5] Gardner Ex. #4, #5.

Gardner appealed District 2's denial to the Engineer's Claims Committee. The Claims Committee had before it the record of Gardner's costs for post flood clean up and on-going dewatering. On March 8, 2004 Chief Engineer Thomas Broderick (Engineer) denied all Gardner's claims on the ground that the water control plan was the sole responsibility of Gardner. See MassHighway Ex. # 7.

On April 4, 2004 Gardner appealed the Engineer's decision to this office. It then timely submitted a Statement of Claim seeking $39,093.51 for "additional water control costs including manpower and equipment." ALJ Ex. #2.

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[4] Gardner cited no authority to support its theory that the discovery of an incorrect measurement of water Elevation is an "actual subsurface or latent physical condition" within the meaning of G.L. c.30, s.39N. In light of the result reached, it is not necessary to address Gardner's theory since the amount of any equitable adjustment that might be due under G.L. c.30, s.39N is identical to the cost of extra work performed.

[5] A claim for an equitable adjustment under Subsection 4.04 of the Standard Specifications incorporating G.L. c.30, s.39N requires that the awarding authority conduct an investigation. In refusing to investigate the District wrote, "the Contract states the contractor is to determine the size and kind of stream diversion needed at the site ….The Contractor therefore should have reviewed the existing site conditions prior to submitting a water control plans for review…."

I held an initial conference in 2004. Because the project was not complete and Gardner stated it intended to make a claim for costs due to the one year delay, I stayed the appeal. In due course Gardner appealed the Engineer's denial of the delay claim here. The parties advised that they would attempt to resolve all their differences by negotiation.

On September 13, 2006 the parties reported that they had settled the delay claim but requested a hearing on the extra work/changed conditions claim. On May 2, 2006, I held a final pre-hearing conference.

The appeal was heard on December 19, 2006. Present at the hearing were

Stephen H. Clark	Administrative Law Judge
William Fountain	President, Gardner Engineering, Inc.
Steve Potorski	Gardner Engineering
Steve Doyle	MHD Area Engineer, District 2
Christian Gonsalves, Esq.	Special Counsel, MassHighway
Daniel P. Collins, Esq.	Assistant Counsel, MassHighway

At the hearing Mr. Potorski testified for Gardner and Mr. Doyle testified for MassHighway. The following exhibits were taken into evidence.

<u>Bench Exhibits</u>

ALJ Ex. #1	MassHighway Contract #32160
ALJ Ex. #2	Statement of Claim, and attachments (04/04/04)

<u>Exhibits of Gardner</u>

Ex. #1	MassHighway Resident Engineer Daily Logs (7/18/03 – 12/04/03)
Ex. #2	S. Potorski daily logs (6/16/03 – 6/28/03)
Ex. #3	Gardner letter to District 2 alleging "changed condition" (09/04/03)
Ex. #4	Gardner letter to District 2 requesting survey (09/22/03)
Ex. #5	MassHighway letter to Gardner denying survey request (10/02/03)
Ex. #6	MWRA logs of water releases into Swift River (01/99 – 11/03)
Ex. #7	Conversion tables for MWRA water release logs
Ex. #8	Drawing of DMC Engineer showing pier cap and water elevations
Ex. #9	Comparison of Gauge readings with CFS and Elevation (Chart)
Ex. #10	Conversion table of MGD to Elevation

Exhibits of MassHighway

Ex. #1	Letter of Gardner (Potorski) to District 2 (Stegemann) (11/06/03) stating claim of $39,093.51, with calculation sheets and invoices.
Ex. #2	Contract #32160: Special Provision Item 991.1 (Control of Water)
Ex. #3	Contract #32160: Bid Sheet
Ex. #4	Contract #32160: Plan ("Sheet Piling Plan") by Loomis and Loomis Inc.
Ex. #5	MassHighway Standard Specifications, Subsection 2.03 ("Examination of Plans ")
Ex. #6	Contract #32160: Plan ("Proposed Bridge Belchertown-Ware") by Loomis and Loomis
Ex. #7	Gardner Statement of Claim (04/05/04)
Ex. #8	Gardner letter to District 2 alleging "changed condition" (09/04/03)
Ex. #9	Letter of Massachusetts Department of Conservation and Recreation (Pula) to Daniel P. Collins, Esq. (12/04/06)
Ex. #10	Letter of Massachusetts Water Resources Authority (Coppes) to Daniel P. Collins, Esq.
Ex. #11	Subsection 4.04 of Standard Specifications, including G.L. c. 30, s.39N.

At the conclusion of the hearing the record was left open to receive detailed back up of Gardner's dewatering labor costs. On January 25, 2007 MassHighway submitted a post-hearing memorandum; on February 5, 2007 Gardner submitted a post-hearing memorandum. Gardner submitted a reply memorandum on February 19, 2007.

DISCUSSION

The first question is whether the inaccurate water Elevation of 110.00 meters appearing ubiquitously on the plans misled Gardner when it planned, bid and performed the work and whether the extra work it did was attributable to reliance on the erroneous specification for water Elevation.

"It is well established that where one party furnishes plans and specifications for a contractor to follow in a construction job, and the contractor in good faith relies thereon, the party furnishing such plans impliedly warrants their sufficiency for the purposes intended." Alpert, 357 Mass. at 320. This rule of law is often termed the Spearin doctrine after United States v. Spearin, 248 U.S. 132 (1918). See supra, at 2, n.2. A

contractor is required to strictly follow the plans and specifications issued by the awarding authority. See G.L. c.30, s.39I. It follows that a contractor is entitled to rely on the plans the government issues as accurate and sufficient. Alpert, 357 Mass. at 320.

Here, two plans unambiguously specified that the water Elevation at the site was 110.00 meters. ALJ Ex. # 1 (sheet 1 of 17 [profile]; sheet 4 of 17 [elevation, showing water level below tops of pile caps]). On two other plans the water Elevation is plainly assumed. ALJ Ex. #1 (sheets 5 & 6 of 17 [elevation, showing abutment weep holes "just above pile cap"]).[6] A water Elevation of 111.00 meters is uniformly represented as a "fact" on every plan of the bridge where water Elevation is given.

The contract did not instruct bidders to verify the water Elevation at the site; it did not characterize any measurement on the plans as "approximate." The specifications and plans contained no exculpatory language that purported to shift the risk of an inaccurate water Elevation measurement to Gardner. Contrary to MassHighway's argument, the contract's site investigation requirements, which are broadly worded, do not require the bidder to re-measure the water Elevation stated on the plans.[7] MassHighway thus took no effective, affirmative step that might have limited the scope of the implied warranty

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[6] Both plans show the top of the footings on the east and west abutments to be 110.25 meters, plainly above the water Elevation of 110.00 meters. Because the actual water elevation was 110.66 meters, dewatering had to continue after the September 3, 2003 flood since work on tops of the footings could not otherwise be done "in the dry." I credit Gardner's testimony that "The actual water level required … [dewatering] during the construction of the abutments [that] was not anticipated in our bid."

[7] MassHighway points to general language in Subsection 2.03 and argues that this language imposed on Gardner the obligation of verifying the accuracy of measurements. But Subsection 2.03 does not contain a specific requirement to verify measurements and does not warn the bidders that they must not rely on any measurements given. General exculpatory clauses, such as Subsection 2.03, are not effective in these circumstances. See Alpert, 357 Mass. at 321 (contractor entitled to rely on qualities provided "without further investigation irrespective of the general language of several exculpatory clauses in the contract").

when it published the contract plans to bidders. Gardner was thus entitled to rely on the water Elevation shown on the plans.

The inaccurate water Elevation on the plans was material. The difference between the correct and the incorrect water Elevation during construction in 2003 at all times was at least 2 feet 2 inches. A sustained water Elevation above 110.00 meters meant greater water volumes, swifter flows and greater hydrostatic pressures than implied by the published plans. For example, the inaccurate elevation of 110.00 meters meant that all work on the tops of the pile caps and weep holes would take place below the actual water elevation of river, not above, as would have been the case had the water elevation been accurately stated. See ALJ Ex. #1 (Plans, sheets 5 & 6). I conclude that, since the water elevation at the site was never less than 110.66 meters during the work in 2003, the plans were erroneous and affirmatively misled Gardner. [8]

The extra work was directly attributable to MassHighway's erroneous plans. The flooding on September 3, 2003 created the need to repair and rebuild the containment structures and extend dewatering operations. Neither cost would likely have been incurred had the given water Elevation of 110.00 meters been accurate. MassHighway is responsible for the extra work made necessary because of its inaccurate plans. See Alpert v. Commonwealth, 357 Mass. at 320; Spearin, 248 U.S. at 137 (theory of implied warranty allocates risk to the government when the specifications furnished are not suitable for their intended purpose; contractor entitled to recover costs of increased expenditures caused by the defect, even if minor). Id.

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[8] The plans show that MassHighway measured the water elevation of the Swift River at 110.00 meters on January 30, 1996. ALJ Ex. #1 (Plans, sheets 1 & 4).

MassHighway argues that the plans were accurate because it disclosed on the plans a 10 year flood level of 111.08 meters.[9] MassHighway's argument misses the mark. The risk of accepting an engineer's calculation that conditions occurring once every ten years in the watershed as a whole may yield flood conditions is not commensurate with the risk that plainly erroneous specifications may lead to substantial extra work due to inadequate design of structures or the need to hire extra men and equipment. The contractor does not bear the risk that plans are materially inaccurate; the government does.

The second question is whether MassHighway is liable for damages on the theory that it failed to inform bidders that the MWRA artificially controlled the Swift River.

Generally, an awarding authority may be liable for breach of an implied duty to disclose information in its possession that is vital for the proper planning and execution of the work when such information is plainly required by a contractor to prepare bids or perform the work. The public awarding authority is not free to stand aside and, without warning of facts known to it, allow a contractor to bid or start work when it knows specifications to be incomplete.

For Gardner to prevail here it must show (a) that the government knew of circumstances that would adversely affect the performance of the contract at the time the contract was awarded; (b) that the contractor neither knew nor should have known those facts; and (c) that the government was or should have been aware of the contractor's ignorance but nonetheless failed to disclose the pertinent information. See Helene Curtis, 312 F.2d at 777 (failure to disclose knowledge of method needed to mass-produce

[9] MassHighway argues, "This figure [111.08 meters] gave Gardner enough guidance to design a water control system to absorb the 110.66M [water] elevation that it claims it encountered at the site."

disinfectant and allowing contractor to use another method it knew might not work); See also J.A. Jones Construction Company v. Unites States, 390 F.2d 886 (1968) (government's failure to disclose known labor shortages in area that would require mandatory overtime contract provisions).

MassHighway is not liable to Gardner merely because it failed to mention the MWRA in the contract documents. See S.T.G. Construction Co. v. United States, 157 Ct. Cl. 409, 416-17 (1962) (attribution of knowledge to one government agency of files contained in another "absurd" in absence of meaningful connection). While Gardner is entitled to rely on the affirmative representations MassHighway made, it does not follow that MassHighway is per se liable for omissions. Only where the government consciously omits to share superior knowledge in its possession and knowingly allows the contractor to proceed without information it knows would lead the contractor astray is liability possible. Even then the contractor must further show that the withheld knowledge is "vital" to perform the contract and that the contractor could not reasonably expect to obtain the knowledge from another source. Cf. Appeal of Wilner Construction, 83-2 BCA P 16886 (1983). Gardner failed to prove the required elements.

Damage Due To The MWRA Releases

The MWRA releases increased both Elevation and rate of flow at the work site. The data demonstrate unambiguously that the greater the MGD of water discharged, the higher the Elevation and the greater the rate of flow in CFS. Gardner Ex. #9.

The parties agree that a higher water Elevation "increase[s] … hydrostatic pressure on whatever dewatering system" is used in the containment structures and that such pressure would cause a "proportional" increase of water seepage from the river

bottom into the containment dams. Increased rates of flow and water Elevation also increase seepage from the sides of the containment structures and scour of the sandy river bank. Together, these factors destabilized the banks to the point of collapse.

The MWRA release of 75.7 MGD on September 3, 2003 subjected the weakened east river bank to exceptional downstream scour at the junction of the bank and the steel sheeting of the east containment structure. That release caused the collapse of the east bank and flooded the east containment structure, bringing in earth, debris and water. See Gardner Ex. #1 (sketch on page 077). The west containment structure was not materially damaged.

Cost of Extra Work: Clean Up and Additional Dewatering

Gardner seeks costs of extra work performed after September 3, 2003 to clean up the flood damage, extend the steel sheeting 12 feet into firmer soil on both banks, and dewater for approximately two additional months with more powerful pumps, all needed so work on pile caps, wingwalls and abutments could be completed. MassHighway argues that all costs for extra work, except the $5,897.75 paid to Rain-for-Rent, must be disallowed since such work was included within lump sum items for steel pipe (Item 943.13) or water control (Item 991.1).

MassHighway's contention is without merit. To the contrary, the extra costs Gardner incurred were due to damage attributable to the September 3, 2003 incident and its aftermath, including on-going dewatering. The clean up and need for continued dewatering are tasks that are outside the scope of work in Items 943.1 and 991.1 because the original work was planned, bid and attempted in reliance that the correct water Elevation was 110.00 meters. I find the following extra costs.

Labor: Gardner substantiated direct labor costs of $5,200.00 to re-excavate and clean up debris from 9/3 washout (east abutment), repair containment structures, reconstruct a silt basin (west abutment), and extend dewatering (9/3/03-10/23/03).[10]

Materials: For tremie pour mix Gardner paid (including 10% overhead) $1,340.90 for extra work on September 30, 2003.

Subcontractors: Crane service $4,590, September, 2003.[11]

Equipment: Allowed equipment costs: Rain for Rent= $5,897.75; Advanced Corp. = $1,170; Harold's Garage = $1,000; Ind. Concrete Pumping = $1,050), for a subtotal of $9,117.75.[12] Adding 10% for overhead, total equipment is $ 10,029.53.

TOTAL ALLOWED EXTRA WORK [13]

Total Labor	$5,200.00
Total Materials	$1,340.90
Total Subcontractor Costs	$4,590.00
Total Equipment	$10,029.53
Total Benefits	$1,796.80
Total Costs	$22,957.23
10% of Total Costs	$2,295.72
GRAND TOTAL	$25,252.95

[10] At the hearing Gardner expressly limited its claimed costs for extra work done after September 3, 2003. Potorski testimony ("costs incurred for work…repairing … damage done after the [9/3/03] breach"). I disallow 22 hours of labor incurred between 8/18/03 and 9/2/08 because that labor was included within Item 991.1 (Control of Water).

[11] I disallow $2,400 requested for four hours of "downtime" incurred by the crane subcontractor on August 29, 2003 and disallow $3,276.80 for steel sheeting installed after September 3, 2003 since Gardner conceded at the hearing that it had already been paid for that steel sheeting under Item 952 (Steel Sheeting).

[12] I disallow $2,400 (Advanced Corp.) and $2,918.40 (Matlasz Construction) as the record plainly shows these costs were incurred in August, 2003 or not supported by invoices, or both. I disallow $150 (Advanced Mobil) because there was no invoice and because Gardner's witness did not know what that firm did or what work was done.

[13] See Appendix A for a detailed breakdown and calculation of allowed extra work.

CONCLUSION

MassHighway should pay Gardner $25,252.95 for the costs of extra work it had to perform due to the inaccurate specification of water Elevation.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: July ___, 2008

APPENDIX A

EXTRA WORK CALCULATIONS

Labor

	Total Hours	Rate	Amount
Laborer	168.5	$27.10	$4,566.35
Operator	5	$32.23	$161.15
Subtotal Direct Labor Costs			$4,727.50
10% of Direct Labor for Overhead			$472.50
			$5,200.00

Materials

	Quantity	Units	Unit Price	Amount
Concrete	26.5	CM	$46.00	$1,219.00
Subtotal Material Costs				$1,219.00
10% if Material costs for Overhead				$121.90
Total Material Costs				**$1,340.90**

Total Subcontractor Costs

	Quantity	Units	Unit Price	Amount
Northeast Downtime	5	hr	$600.00	$3,000.00
Northeast Remob. & Demob.	1	LS	$1,590.00	$1,590.00
Total Subcontractor Cost				**$4,590.00**

Equipment

	Amount
Rain for Rent	
Invoice No. 863280	$2,214.60
Invoice No. 987651	$3,204.35
Invoice No. 870738	$478.80
Advanced Corp.	$1,170.00
Harold's Crane	$1,000.00
Ind. Concrete Pumping	$1,050.00
Subtotal Equipment Costs	$9,117.75
10% of Equiment Costs	$911.78
Total Equiment Costs	**$10,029.53**

Health, Welfare, SS, Workers Comp. Ins., Liability Insurance

	Total Hours	Rate	Amount
38% of hourly wage			
Laborer (38% x $27.10)	168.5	$10.30	$1,735.55
Operator (38% x $32.23)	5	$12.25	$61.25
Total H,W, INS. BENEFITS			**$1,796.80**

TOTALS

Total Labor	$5,200.00
Total Materials	$1,340.90
Total Subcontractor Costs	$4,590.00
Total Equipment	$10,029.53

Total Benefits	$1,796.80
Total Costs	$22,957.23
10% of Total Costs	$2,295.72
GRAND TOTAL	**$25,252.95**

INTRODUCTION

Gardner Engineering, Inc. (Gardner) appeals from the refusal of the Engineer to pay $39,093.51 for claimed extra work to clean up and dewater two sheet steel containment structures in the Swift River. Gardner erected the containment structures on the east and west banks to demolish an old bridge and drive piles and do foundation work for a new bridge between Belchertown and Ware under MassHighway contract #32160.

The Swift River flows from the Quabbin Reservoir to the Connecticut River. Using the Swift River as a conduit the Massachusetts Water Resources Authority (MWRA) discharges millions of gallons of water daily into the Connecticut River to maintain government mandated levels. On a day to day basis the MWRA artificially controls the water elevation and rate of flow of the Swift River at the work site.

On September 3, 2003 the MWRA released 70 million gallons/day (MGD) into the Swift River, more than three times its average release of 22 MGD. As a result the east containment structure collapsed and Gardner incurred costs of claimed extra work to clean up and strengthen the containment structures and to extend dewatering.[14]

Gardner makes two contentions on appeal. It contends that MassHighway issued materially incorrect specifications since its plans erroneously stated that the water

[14] Gardner's original appeal included a claim for its costs due to a one year delay MassHighway ordered in writing to stop work because the town had failed to take by eminent domain certain land the contract specified for compensatory wetland storage. On September 13, 2006 MassHighway and Gardner settled the delay claim for $96,000.00.

elevation of the Swift River was 110.00 meters. It also contends that MassHighway failed to inform it of the MWRA's active role in controlling the water elevation of the Swift River. So, Gardner relied on MassHighway's inadequate plans to unwittingly design ineffective containment structures and to adopt an inadequate dewatering plan.

Gardner's claim has merit in part. Gardner was required by law to perform the project strictly in accordance with the specifications issued by MassHighway. See G.L. c.30, s. 39I. When MassHighway issues contract specifications it impliedly warrants their accuracy and usefulness for the purpose intended. See Alpert v. Commonwealth, 357 Mass, 306, 320 (1970) (Alpert).[15] Here, MassHighway plans incorrectly showed the water elevation of the Swift River (Elevation) to be 110.00 meters, when it was in fact 110.66 meters, a material difference of more than 2 feet. Because the contract documents made no specific disclaimer about the water Elevation measurement and the specifications did not require Gardner to verify the accuracy of any measurements, Gardner was entitled to rely on the unambiguous specification. Accordingly, MassHighway breached the implied warranty that its plans were free from error and fit for the purpose of planning and executing the work.

Gardner's contention, however, that MassHighway is liable solely because the specifications failed to disclose that the MWRA controlled the water Elevation has no merit. Gardner cites no authority to support its argument. Established law is to the contrary. To recover on a non-disclosure theory Gardner must prove not only that MassHighway failed to disclose MWRA's actions. It must also prove that MassHighway

[15] Alpert follows the so-called "Spearin Doctrine" articulated by the Supreme Court in United States v. Spearin, 248 U.S. 132, 137 (1918) (Spearin) ("Whenever the government uses specifications in a contract there is an implied warranty that these specifications are free from errors. The test for recovery based on inaccurate specifications is whether the contractor was misled by these errors.")

knew of the MWRA's discharges into the Swift River at the time of award but it withheld that information knowing it to be vital to performance. See Helene Curtis Indust. Inc. v. United States, 312 F.2d 774, 777 (Ct. Cl. 1963) (Helene Curtis) This Gardner did not do.

Nor did Gardner prove all of its claimed extra costs of $39,093.51. As explained below I find it only proved extra work costs of $25,252.95.

BACKGROUND AND FINDINGS

Based on the testimony of the witnesses and the exhibits in evidence I make the following findings.

MassHighway on April 24, 2002 awarded Gardner contract #32160 for $883,774.00. The work required the demolition of an existing bridge over the Swift River and replacement with a new, pre-cast reinforced concrete bridge.

MassHighway Plans

MassHighway's plans consistently showed the water elevation of the Swift River (Elevation) to be 110.00 meters. See ALJ Ex. #1 (Plans, sheets 1 & 4). The water Elevation of 110.00 meters was specified unambiguously. Id. Gardner relied on MassHighway's representation that the water Elevation at the site was 110.00 meters when it planned the work, formulated its bid, designed the containment structures, estimated dewatering costs and began the work. Id. (Plans, sheets 1,4, 5 & 6). The contract documents did not warn bidders that the water Elevation measurement specification might be inaccurate; there was no requirement to verify water Elevation.

Commencement of the Work

Gardner mobilized for the project in June, 2002. MassHighway issued a written stop work order shortly thereafter. See supra p.1, n. 1. One year later, in June, 2003,

Gardner remobilized. Neither Gardner nor MassHighway measured the water Elevation before Gardner began the work.

The specifications required that the demolition of the old bridge and construction of the new foundations be done within two dewatered containment areas, on the east and west banks. MassHighway approved Gardner's design for the containment structures (steel sheeting) and its dewatering plan (sump pumps, interlocking steel sheeting).

The containment structures were semi-circular coffer dams built by driving overlapping steel sheeting from upstream to down stream bank and paid under Item 952 (Steel Sheeting) at the bid unit price. The soil on both easterly and westerly riverbanks was sandy. After dewatering the containment structures Gardner demolished the existing abutments and piers and began to drive piles for the new footings for the abutments of the new bridge. Dewatering continued day to day during this work, paid under the lump sum Item 991.1 (Control of Water).

<u>MWRA Releases From the Quabbin</u>

The MWRA is required to discharge a minimum of 20 MGD from the Quabbin Reservoir into the Swift to maintain mandated water levels in the Connecticut River.[16] If conditions of flow in the Connecticut River so require, releases up to 77 MGD may be required. The Releases from the Quabbin Reservoir into the Swift River are measured by the United States Coast and Geodetic Survey (USGS) at its West Ware gauge (Gauge) upstream of the work. The accuracy of measurements taken at the USGS gauge (Gauge) in 2003 is uncontested and unrebutted.

[16] The MWRA now releases water from the Quabbin in cooperation with the Department of Conservation and Recreation, which was established by St. 2003, c.26, s.290. See MassHighway Ex. #9 & 10. Releases in the Swift River were first authorized as part of the state reservoir system by St. 1927, s. 321.

Gardner introduced a chart (Chart) summarizing hydraulic data collected by day and hour at the Gauge. Gardner Ex. # 9. The Chart correlates the daily average flow of the Swift River in cubic feet/second (CFS), the water discharged by the MWRA from the Quabbin in millions of gallons per day (MGD), the water elevation of the Swift River (Elevation) and the deviation in Elevation in inches each day from the 110.00 meters specified on MassHighway's contract plans. Id. The following excerpts from the Chart show data before, during and after peak Elevations reached on September 3 and 4, 2003:

Date	Gauge	CFS	MGD	Elevation	Deviation
8/18/03	1.98	840.48	22.6	110.66	2' 2"
8/27/03	2.64	2502.23	67.4	110.81	2' 8"
9/01/03	1.98	854.46	22.9	110.66	2" 2"
9/02/03	2.00	866.60	23.3	100.663	2' 2"
9/03/03	2.66	2619.76	70.6	110.8205	2' 8"
9/04/03	2.66	2813.00	75.8	110.8385	2' 9"
9/05/03	2.01	1107.74	39.8	110.684	2' 3"
9/06/03	2.01	901.20	24.3	110.666	2' 2"

Gardner did not know when it bid or began the work that the MWRA artificially controlled both the water Elevation and flow rate of the Swift River. The contract documents make no reference to the MWRA or its obligation to maintain the water level of the Connecticut River. The record does not reveal whether MassHighway knew of the MWRA's releases when it published the contract plans or when it awarded the contract.

Damage To the Containment Structure

On August 12, 2003 Gardner notified District 2 that it had measured the water Elevation at the work site at 110.66 meters and asked it to confirm the water Elevation for itself. MassHighway declined. Gardner Ex. #4. MassHighway conceded at the hearing that the water Elevation at the site was never less than 110.66 meters at any time during the summer and fall of 2003. I find that the actual average water Elevation was at

least 00.66 meters, or 2 feet 2 inches higher, than the specified 110.00 meters shown on the plans. During the summer of 2003 the average MWRA release was 22 MGD, which resulted in the "normal" water Elevation of 110.66 meters. See Gardner Ex. #9.

Gardner noticed as work continued that the water Elevation and flow rate of the Swift River varied from day to day. Gardner's foreman saw that the Swift's water level typically rose during dry spells. "I couldn't figure it out," he said. In "mid August" 2003 Gardner first learned that the MWRA controlled the water Elevation and rate of flow of the river. Gardner then began to communicate directly with MWRA engineers. On August 27, 2003 an MWRA engineer told Gardner it would discharge that day 67.5 MGD, which was three times the 22 MGD average release.

The August 27, 2003 release increased seepage into both containment structures due to increased hydrostatic pressure on the steel sheeting and on the river bed. As a result Gardner had to pump more water than usual from the containment structures. MassHighway determined that the existing sedimentation basins did not have the capacity to filter the increased volume pumped on August 27, 2003 and so ordered Gardner to cease pumping when the capacity of the desedimentation basins was attained.

On September 3, 2003, following a dry spell of five days, MWRA released 70.4 MGD from the Quabbin into the Swift River, an increase of 48.4 MGD over the 22 MGD average release. As a result the water Elevation of the Swift River rose to 110.8205 meters, 2 feet 9 inches above the Elevation specified on the plans. Gardner Ex. #9. The flow rate increased to 2,619.76 CF/sec that day from an average of approximately 850 CF/sec. Id.

The MWRA release of September 3, 2003 resulted in the flooding of the east containment structure: the sandy soil on east bank collapsed at the junction of the sheeting and river bank on the downstream side; the river then filled the containment structure from "behind" the steel sheeting. See Gardner Ex. #1 (sketch on page 077). The flood was the result of the increased flow and elevated water level of the Swift River. On September 3, 2003 Gardner's subcontractors were welding rods on the pile caps when the east containment structure flooded. As the water rose the six workmen "ran for their lives." The west containment structure did not flood. On September 4, 2003 Gardner notified MassHighway of a "changed condition" and filed a notice of claim.[17]

THE APPEAL

Gardner timely filed a claim at District 2 on September 4, 2003, which was denied on September 16, 2003 because MassHighway deemed that control of water was the sole responsibility of Gardner. On October 2, 2003 MassHighway denied Gardner's request to investigate "the difference in water elevation of the Swift River, which differs substantially from the design elevations as shown on the Plans."[18] Gardner Ex. #4, #5.

Gardner appealed District 2's denial to the Engineer's Claims Committee. The Claims Committee had before it the record of Gardner's costs for post flood clean up and on-going dewatering. On March 8, 2004 Chief Engineer Thomas Broderick (Engineer)

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[17] Gardner cited no authority to support its theory that the discovery of an incorrect measurement of water Elevation is an "actual subsurface or latent physical condition" within the meaning of G.L. c.30, s.39N. In light of the result reached, it is not necessary to address Gardner's theory since the amount of any equitable adjustment that might be due under G.L. c.30, s.39N is identical to the cost of extra work performed.

[18] A claim for an equitable adjustment under Subsection 4.04 of the Standard Specifications incorporating G.L. c.30, s.39N requires that the awarding authority conduct an investigation. In refusing to investigate the District wrote, "the Contract states the contractor is to determine the size and kind of stream diversion needed at the site ….The Contractor therefore should have reviewed the existing site conditions prior to submitting a water control plans for review…."

denied all Gardner's claims on the ground that the water control plan was the sole responsibility of Gardner. See MassHighway Ex. # 7.

On April 4, 2004 Gardner appealed the Engineer's decision to this office. It then timely submitted a Statement of Claim seeking $39,093.51 for "additional water control costs including manpower and equipment." ALJ Ex. #2.

I held an initial conference in 2004. Because the project was not complete and Gardner stated it intended to make a claim for costs due to the one year delay, I stayed the appeal. In due course Gardner appealed the Engineer's denial of the delay claim here. The parties advised that they would attempt to resolve all their differences by negotiation.

On September 13, 2006 the parties reported that they had settled the delay claim but requested a hearing on the extra work/changed conditions claim. On May 2, 2006, I held a final pre-hearing conference.

The appeal was heard on December 19, 2006. Present at the hearing were

Stephen H. Clark	Administrative Law Judge
William Fountain	President, Gardner Engineering, Inc.
Steve Potorski	Gardner Engineering
Steve Doyle	MHD Area Engineer, District 2
Christian Gonsalves, Esq.	Special Counsel, MassHighway
Daniel P. Collins, Esq.	Assistant Counsel, MassHighway

At the hearing Mr. Potorski testified for Gardner and Mr. Doyle testified for MassHighway. The following exhibits were taken into evidence.

Bench Exhibits

ALJ Ex. #1 MassHighway Contract #32160
ALJ Ex. #2 Statement of Claim, and attachments (04/04/04)

Exhibits of Gardner

Ex. #1 MassHighway Resident Engineer Daily Logs (7/18/03 – 12/04/03)
Ex. #2 S. Potorski daily logs (6/16/03 – 6/28/03)

Ex. #3	Gardner letter to District 2 alleging “changed condition” (09/04/03)
Ex. #4	Gardner letter to District 2 requesting survey (09/22/03)
Ex. #5	MassHighway letter to Gardner denying survey request (10/02/03)
Ex. #6	MWRA logs of water releases into Swift River (01/99 – 11/03)
Ex. #7	Conversion tables for MWRA water release logs
Ex. #8	Drawing of DMC Engineer showing pier cap and water elevations
Ex. #9	Comparison of Gauge readings with CFS and Elevation (Chart)
Ex. #10	Conversion table of MGD to Elevation

Exhibits of MassHighway

Ex. #1	Letter of Gardner (Potorski) to District 2 (Stegemann) (11/06/03) stating claim of $39,093.51, with calculation sheets and invoices.
Ex. #2	Contract #32160: Special Provision Item 991.1 (Control of Water)
Ex. #3	Contract #32160: Bid Sheet
Ex. #4	Contract #32160: Plan (“Sheet Piling Plan”) by Loomis and Loomis Inc.
Ex. #5	MassHighway Standard Specifications, Subsection 2.03 (“Examination of Plans ”)
Ex. #6	Contract #32160: Plan (“Proposed Bridge Belchertown-Ware”) by Loomis and Loomis
Ex. #7	Gardner Statement of Claim (04/05/04)
Ex. #8	Gardner letter to District 2 alleging “changed condition” (09/04/03)
Ex. #9	Letter of Massachusetts Department of Conservation and Recreation (Pula) to Daniel P. Collins, Esq. (12/04/06)
Ex. #10	Letter of Massachusetts Water Resources Authority (Coppes) to Daniel P. Collins, Esq.
Ex. #11	Subsection 4.04 of Standard Specifications, including G.L. c. 30, s.39N.

At the conclusion of the hearing the record was left open to receive detailed back up of Gardner’s dewatering labor costs. On January 25, 2007 MassHighway submitted a post-hearing memorandum; on February 5, 2007 Gardner submitted a post-hearing memorandum.   Gardner submitted a reply memorandum on February 19, 2007.

DISCUSSION

The first question is whether the inaccurate water Elevation of 110.00 meters appearing ubiquitously on the plans misled Gardner when it planned, bid and performed the work and whether the extra work it did was attributable to reliance on the erroneous specification for water Elevation.

"It is well established that where one party furnishes plans and specifications for a contractor to follow in a construction job, and the contractor in good faith relies thereon, the party furnishing such plans impliedly warrants their sufficiency for the purposes intended." Alpert, 357 Mass. at 320. This rule of law is often termed the Spearin doctrine after United States v. Spearin, 248 U.S. 132 (1918). See supra, at 2, n.2. A contractor is required to strictly follow the plans and specifications issued by the awarding authority. See G.L. c.30, s.39I. It follows that a contractor is entitled to rely on the plans the government issues as accurate and sufficient. Alpert, 357 Mass. at 320.

Here, two plans unambiguously specified that the water Elevation at the site was 110.00 meters. ALJ Ex. # 1 (sheet 1 of 17 [profile]; sheet 4 of 17 [elevation, showing water level below tops of pile caps]). On two other plans the water Elevation is plainly assumed. ALJ Ex. #1 (sheets 5 & 6 of 17 [elevation, showing abutment weep holes "just above pile cap"]).[19] A water Elevation of 111.00 meters is uniformly represented as a "fact" on every plan of the bridge where water Elevation is given.

The contract did not instruct bidders to verify the water Elevation at the site; it did not characterize any measurement on the plans as "approximate." The specifications and plans contained no exculpatory language that purported to shift the risk of an inaccurate water Elevation measurement to Gardner. Contrary to MassHighway's argument, the contract's site investigation requirements, which are broadly worded, do not require the

[19] Both plans show the top of the footings on the east and west abutments to be 110.25 meters, plainly above the water Elevation of 110.00 meters. Because the actual water elevation was 110.66 meters, dewatering had to continue after the September 3, 2003 flood since work on tops of the footings could not otherwise be done "in the dry." I credit Gardner's testimony that "The actual water level required … [dewatering] during the construction of the abutments [that] was not anticipated in our bid."

bidder to re-measure the water Elevation stated on the plans. [20] MassHighway thus took no effective, affirmative step that might have limited the scope of the implied warranty when it published the contract plans to bidders. Gardner was thus entitled to rely on the water Elevation shown on the plans.

The inaccurate water Elevation on the plans was material. The difference between the correct and the incorrect water Elevation during construction in 2003 at all times was at least 2 feet 2 inches. A sustained water Elevation above 110.00 meters meant greater water volumes, swifter flows and greater hydrostatic pressures than implied by the published plans. For example, the inaccurate elevation of 110.00 meters meant that all work on the tops of the pile caps and weep holes would take place below the actual water elevation of river, not above, as would have been the case had the water elevation been accurately stated. See ALJ Ex. #1 (Plans, sheets 5 & 6). I conclude that, since the water elevation at the site was never less than 110.66 meters during the work in 2003, the plans were erroneous and affirmatively misled Gardner. [21]

The extra work was directly attributable to MassHighway's erroneous plans. The flooding on September 3, 2003 created the need to repair and rebuild the containment structures and extend dewatering operations. Neither cost would likely have been incurred had the given water Elevation of 110.00 meters been accurate. MassHighway is responsible for the extra work made necessary because of its inaccurate plans. See Alpert

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[20] MassHighway points to general language in Subsection 2.03 and argues that this language imposed on Gardner the obligation of verifying the accuracy of measurements. But Subsection 2.03 does not contain a specific requirement to verify measurements and does not warn the bidders that they must not rely on any measurements given. General exculpatory clauses, such as Subsection 2.03, are not effective in these circumstances. See Alpert, 357 Mass. at 321 (contractor entitled to rely on qualities provided "without further investigation irrespective of the general language of several exculpatory clauses in the contract").

[21] The plans show that MassHighway measured the water elevation of the Swift River at 110.00 meters on January 30, 1996. ALJ Ex. #1 (Plans, sheets 1 & 4).

v. Commonwealth, 357 Mass. at 320; Spearin, 248 U.S. at 137 (theory of implied warranty allocates risk to the government when the specifications furnished are not suitable for their intended purpose; contractor entitled to recover costs of increased expenditures caused by the defect, even if minor). Id.

MassHighway argues that the plans were accurate because it disclosed on the plans a 10 year flood level of 111.08 meters.[22] MassHighway's argument misses the mark. The risk of accepting an engineer's calculation that conditions occurring once every ten years in the watershed as a whole may yield flood conditions is not commensurate with the risk that plainly erroneous specifications may lead to substantial extra work due to inadequate design of structures or the need to hire extra men and equipment. The contractor does not bear the risk that plans are materially inaccurate; the government does.

The second question is whether MassHighway is liable for damages on the theory that it failed to inform bidders that the MWRA artificially controlled the Swift River.

Generally, an awarding authority may be liable for breach of an implied duty to disclose information in its possession that is vital for the proper planning and execution of the work when such information is plainly required by a contractor to prepare bids or perform the work. The public awarding authority is not free to stand aside and, without warning of facts known to it, allow a contractor to bid or start work when it knows specifications to be incomplete.

For Gardner to prevail here it must show (a) that the government knew of circumstances that would adversely affect the performance of the contract at the time the

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[22] MassHighway argues, "This figure [111.08 meters] gave Gardner enough guidance to design a water control system to absorb the 110.66M [water] elevation that it claims it encountered at the site."

contract was awarded; (b) that the contractor neither knew nor should have known those facts; and (c) that the government was or should have been aware of the contractor's ignorance but nonetheless failed to disclose the pertinent information. See Helene Curtis, 312 F.2d at 777 (failure to disclose knowledge of method needed to mass-produce disinfectant and allowing contractor to use another method it knew might not work); See also J.A. Jones Construction Company v. Unites States, 390 F.2d 886 (1968) (government's failure to disclose known labor shortages in area that would require mandatory overtime contract provisions).

MassHighway is not liable to Gardner merely because it failed to mention the MWRA in the contract documents. See S.T.G. Construction Co. v. United States, 157 Ct. Cl. 409, 416-17 (1962) (attribution of knowledge to one government agency of files contained in another "absurd" in absence of meaningful connection). While Gardner is entitled to rely on the affirmative representations MassHighway made, it does not follow that MassHighway is per se liable for omissions. Only where the government consciously omits to share superior knowledge in its possession and knowingly allows the contractor to proceed without information it knows would lead the contractor astray is liability possible. Even then the contractor must further show that the withheld knowledge is "vital" to perform the contract and that the contractor could not reasonably expect to obtain the knowledge from another source. Cf. Appeal of Wilner Construction, 83-2 BCA P 16886 (1983). Gardner failed to prove the required elements.

Damage Due To The MWRA Releases

The MWRA releases increased both Elevation and rate of flow at the work site. The data demonstrate unambiguously that the greater the MGD of water discharged, the higher the Elevation and the greater the rate of flow in CFS. Gardner Ex. #9.

The parties agree that a higher water Elevation "increase[s] … hydrostatic pressure on whatever dewatering system" is used in the containment structures and that such pressure would cause a "proportional" increase of water seepage from the river bottom into the containment dams. Increased rates of flow and water Elevation also increase seepage from the sides of the containment structures and scour of the sandy river bank. Together, these factors destabilized the banks to the point of collapse.

The MWRA release of 75.7 MGD on September 3, 2003 subjected the weakened east river bank to exceptional downstream scour at the junction of the bank and the steel sheeting of the east containment structure. That release caused the collapse of the east bank and flooded the east containment structure, bringing in earth, debris and water. See Gardner Ex. #1 (sketch on page 077). The west containment structure was not materially damaged.

Cost of Extra Work: Clean Up and Additional Dewatering

Gardner seeks costs of extra work performed after September 3, 2003 to clean up the flood damage, extend the steel sheeting 12 feet into firmer soil on both banks, and dewater for approximately two additional months with more powerful pumps, all needed so work on pile caps, wingwalls and abutments could be completed. MassHighway argues that all costs for extra work, except the $5,897.75 paid to Rain-for-Rent, must be disallowed since such work was included within lump sum items for steel pipe (Item 943.13) or water control (Item 991.1).

MassHighway's contention is without merit. To the contrary, the extra costs Gardner incurred were due to damage attributable to the September 3, 2003 incident and its aftermath, including on-going dewatering. The clean up and need for continued dewatering are tasks that are outside the scope of work in Items 943.1 and 991.1 because the original work was planned, bid and attempted in reliance that the correct water Elevation was 110.00 meters. I find the following extra costs.

Labor: Gardner substantiated direct labor costs of $5,200.00 to re-excavate and clean up debris from 9/3 washout (east abutment), repair containment structures, reconstruct a silt basin (west abutment), and extend dewatering (9/3/03-10/23/03).[23]

Materials: For tremie pour mix Gardner paid (including 10% overhead) $1,340.90 for extra work on September 30, 2003.

Subcontractors: Crane service $4,590, September, 2003.[24]

Equipment: Allowed equipment costs: Rain for Rent= $5,897.75; Advanced Corp. = $1,170; Harold's Garage = $1,000; Ind. Concrete Pumping = $1,050), for a subtotal of $9,117.75.[25] Adding 10% for overhead, total equipment is $ 10,029.53.

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[23] At the hearing Gardner expressly limited its claimed costs for extra work done after September 3, 2003. Potorski testimony ("costs incurred for work…repairing … damage done after the [9/3/03] breach"). I disallow 22 hours of labor incurred between 8/18/03 and 9/2/08 because that labor was included within Item 991.1 (Control of Water).

[24] I disallow $2,400 requested for four hours of "downtime" incurred by the crane subcontractor on August 29, 2003 and disallow $3,276.80 for steel sheeting installed after September 3, 2003 since Gardner conceded at the hearing that it had already been paid for that steel sheeting under Item 952 (Steel Sheeting).

[25] I disallow $2,400 (Advanced Corp.) and $2,918.40 (Matlasz Construction) as the record plainly shows these costs were incurred in August, 2003 or not supported by invoices, or both. I disallow $150 (Advanced Mobil) because there was no invoice and because Gardner's witness did not know what that firm did or what work was done.

TOTAL ALLOWED EXTRA WORK [26]

Total Labor	$5,200.00
Total Materials	$1,340.90
Total Subcontractor Costs	$4,590.00
Total Equipment	$10,029.53
Total Benefits	$1,796.80
Total Costs	$22,957.23
10% of Total Costs	$2,295.72
GRAND TOTAL	$25,252.95

CONCLUSION

MassHighway should pay Gardner $25,252.95 for the costs of extra work it had to perform due to the inaccurate specification of water Elevation.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: July ___, 2008

[26] See Appendix A for a detailed breakdown and calculation of allowed extra work.

APPENDIX A

EXTRA WORK CALCULATIONS

Labor

	Total Hours	Rate	Amount
Laborer	168.5	$27.10	$4,566.35
Operator	5	$32.23	$161.15
Subtotal Direct Labor Costs			$4,727.50
10% of Direct Labor for Overhead			$472.50
			$5,200.00

Materials

	Quantity	Units	Unit Price	Amount
Concrete	26.5	CM	$46.00	$1,219.00
Subtotal Material Costs				$1,219.00
10% if Material costs for Overhead				$121.90
Total Material Costs				**$1,340.90**

Total Subcontractor Costs

	Quantity	Units	Unit Price	Amount
Northeast Downtime	5	hr	$600.00	$3,000.00
Northeast Remob. & Demob.	1	LS	$1,590.00	$1,590.00
Total Subcontractor Cost				**$4,590.00**

Equipment

	Amount
Rain for Rent	
Invoice No. 863280	$2,214.60
Invoice No. 987651	$3,204.35
Invoice No. 870738	$478.80
Advanced Corp.	$1,170.00
Harold's Crane	$1,000.00
Ind. Concrete Pumping	$1,050.00
Subtotal Equipment Costs	$9,117.75
10% of Equiment Costs	$911.78
Total Equiment Costs	**$10,029.53**

Health, Welfare, SS, Workers Comp. Ins., Liability Insurance

	Total Hours	Rate	Amount
38% of hourly wage			
Laborer (38% x $27.10)	168.5	$10.30	$1,735.55
Operator (38% x $32.23)	5	$12.25	$61.25
Total H,W, INS. BENEFITS			**$1,796.80**

TOTALS

Total Labor	$5,200.00
Total Materials	$1,340.90
Total Subcontractor Costs	$4,590.00
Total Equipment	$10,029.53

Total Benefits	$1,796.80
Total Costs	$22,957.23
10% of Total Costs	$2,295.72
GRAND TOTAL	**$25,252.95**

Lawrence-Lynch Corporation (Lawrence-Lynch), aggrieved by the denial of its claim before the claims committee of the Massachusetts Highway Department (Department) for the cost of extra work in the amount of $15,527.76 to resurface a 6.5 mile 8 foot wide bike path adjacent to Vineyard Haven/Edgartown Road (Road), appealed. Its claim originates from Department contract #98402 (Contract) to widen, reconstruct and resurface 6.5 miles of the Vineyard Haven/Edgartown Road, from Tisbury through Oak Bluffs to Edgartown.

I find that the appeal of Lawrence-Lynch has merit. The Department ordered Lawrence-Lynch to perform bike path repaving work that was not specified in the Contract. Although the bituminous concrete materials used in the bike path work were identical to those used in the Road resurfacing (Item 460), Lawrence-Lynch was entitled under the Contract to be compensated for the additional labor and work needed to complete the bike path since the "lay down" costs were outside the specifications upon which it bid, were significant and were without doubt different from the bid work.

Statement of the Case

This appeal was filed on July 6, 2000 following the June 26, 2000 action of the claims committee, which denied Lawrence-Lynch's claim because its "description of [the extra] work … failed to substantiate the higher lay-down costs."

Lawrence-Lynch filed its Statement of Claim on October 2, 2000. Thereafter, a hearing was held in two parts. The first hearing was held on February 11, 2003 before Chief Administrative Law Judge Peter Milano. Present were

Peter Milano	Chief Administrative Law Judge
Isaac Machado, Esq.	Deputy Chief Counsel
Michael Broderick	MHD Resident Engineer
Erica Dorsey	MHD District 5
Chris Lynch	Lawrence Lynch
Gerald Lynch	Lawrence Lynch

The following exhibits were admitted into evidence.

Ex. #1	Contract #98402
Ex.#2	Statement of Claim filed by Lawrence Lynch

At the conclusion of the hearing, Judge Milano requested post-hearing submissions from the contractor and the Department. On April 7, 2003 Lawrence-Lynch submitted a memorandum to support its claim. Thereafter, the Department, in support of its position, submitted a copy of the Resident Engineers Change in Design, Specifications or Preliminary Estimate Features.

The hearing was continued on February 12, 2004 before John McDonnell, Acting Chief Administrative Law Judge. Lawrence-Lynch argued that its costs to lay down bike path pavement were higher than it bid costs for roadway paving. It asserted that it had never planned for or bid upon the bike path resurfacing work, since it was not included in the bid documents. The Department maintained that the bike path resurfacing work was shown on the Contract plans and that the resurfacing work was incidental to the roadway paving work because the added quantity of paving material was included in the estimated quantifies of Item 460 ("bituminous concrete"). The Department also maintained that Lawrence-Lynch had failed to show that there was a "higher lay-down cost" for the bike path paving work.

Following the second hearing the office of the Administrative Law Judge requested further information from the Department, namely a copy of the Calculation Book, so-called, and the tape recording of the pre-construction conference before the Contract began. See G.L. c.16, s.5.

Findings of Fact

Substantial evidence on the record, which consisted of oral tape recorded testimony, two exhibits, the Calculation Book and the tape recording of the pre-construction conference, supports the following findings of fact, which I recommend the Commissioner adopt.

1. Lawrence-Lynch entered into Contract #98402 with the Department on May 15, 1998. The work specified was to widen, reconstruct and resurface the Road over a total roadway length of 10.54 kilometers (6.5 miles).

2. Bike path repaving along its 6.5-mile length was not referred to in the Contract specifications, plans or drawings.

3. One plan required Lawrence-Lynch to widen and re-pave a specified 100 meter stretch of the bike path in Tisbury from 5.5 feet to 8 feet (between Road stations 9+30 and 10+29).

4. When Lawrence-Lynch submitted its bid for the Contract it was not aware that resurfacing the bike-path was part of the contract scope of work.

5. At the pre-construction meeting held on July 30, 1998, the Department stated that the bike path resurfacing work was not included within the original specifications.

6. At the meeting the Department was represented by Bob Fierra, Assistant District Construction Engineer; Mike Broderick, the Resident Engineer for the Project, was also in attendance. Town representatives Fred LaPiana, Tisbury DPW, and Laurence Mercier, Edgartown DPW, were present. The town representatives specifically asked whether the bike-path would be resurfaced as part of the project. Bob Fierra responded by stating that the bike path resurfacing was not part of the project scope, that there was no detail in the Contract that showed such resurfacing, and that if resurfacing was part of the Contract there should be a separate unit price payment item since bike path resurfacing should be with a 35mm (1 ½ inch) bituminous concrete pavement overlay, which was not the same as for the Road.

7. At the preconstruction meeting the Department requested that the town representatives submit any information that it had in its files about the bike path resurfacing. At that meeting Department representatives stated it would notify the town representatives and Lawrence-Lynch

whether it would order bike path repaving work. At the meeting Lawrence-Lynch first became aware that it might have to re-pave the bike path.

8. Relevant to the contested costs of repaving the bike path the Contract contained the following bid prices: for Item 460 (Class I Bituminous Concrete Pavement, Type I-1) $67.77; for Item 472.1 (Class I Bituminous Concrete Mixture) $67.77; and for Item 420 (Class I Bituminous Concrete Base Course, type I-1) $50.96.

9. In January 1999, the Department verbally directed Lawrence-Lynch to resurface the entire 6.5-mile length of the bike path along the Edgartown/Vineyard Haven Road.

10. In response to the Department's verbal directive to resurface the bike path, Lawrence-Lynch submitted, on January 28, 1999, a written unit price proposal for bituminous concrete paving, stating in part "[t]his price reflects the additional costs included in achieving the desired quality pavement mat within an 8-foot wide bike path layout."

11. On February 8, 1999 the Department rejected Lawrence-Lynch's assertion of extra work. The Department told Lawrence-Lynch that resurfacing the bike path would be paid under the contract at the bid price of Item 460 or Item 472.1, each $67.77/metric ton, and that the Department would not pay any additional compensation for the bike path work. The Department further stated that any claim for additional compensation in excess of the $67.77 unit price would have to be submitted as a claim for extra work.

12. Lawrence Lynch performed the bike-path resurfacing work during the 1999 construction season. It prepared a "Change Order Request" identifying a cost of $15,527.76 for claimed extra "lay down" costs and forwarded it to the Department on February 8, 2000. Lawrence-Lynch repeated its claim that the bike-path resurfacing was extra work.

13. The Department paid Lawrence-Lynch under Item 460 for the material used in resurfacing the bike path. Item 460 specifies that the pavement shall be placed in two 45 mm binder courses and one 35 mm top course.

14. The paving work the Department ordered for the bike path resurfacing required the placement of a single 35 mm layer of pavement over the top of the existing paved bike path. The Department did not require the application of two 45 mm courses and a final 35 mm layer on the bike path, as specified by Item 460 for the roadway.

15. In directing the Contractor to perform the resurfacing work as part of the Contract the Department relied on two facts: first, that the Calculation Book for the Contract included material quantities calculated expressly on the assumption that the bike path was to be repaved and, second, a sketch showing a typical section for bike path widening on page 101 of the Contract.

16. A Calculation Book is a document that is prepared for internal use by the Department. It contains tabulations of the estimated quantities of material to be incorporated into a construction project for use by the Department when it develops plans, details, specifications, and estimates. The Calculation Book for Contract #98402 contained the estimated quantities of paving materials that would be required to resurface the entire 6.5-mile length of the bike path. The Calculation Book was not available to Lawrence-Lynch prior to its bid on the Contract.

17. Lawrence-Lynch developed the lay down cost for the Road resurfacing in accordance with its estimating process. Lawrence-Lynch used an average unit price cost method to calculate the $67.77 per metric ton price it bid for Items 460 and 471.2 for the Road. It did so by calculating the areas shown on the drawings, estimating the quantities of material, determining what equipment was necessary to perform the work, and determining the amount of labor required to perform the paving operations.

18. In its estimating process Lawrence-Lynch determined the production rate expected from its crew and equipment when paving a 26 to 30 foot wide roadway, using the type of paving equipment and rollers that would be needed for that width of road. In its estimating process Lawrence-Lynch also determined the production rates that it expected for the work required to perform Items 460, 470, 472.1 and 703.

19. Lawrence-Lynch then combined the labor, materials, equipment, and production rate to derive a unit price. From this the contractor determined a final bid price for those Items based on its professional experience, including such factors as the estimated production rate for locations on the Road that had to be widened, and the rates for binder and surface courses. For the Road resurfacing Lawrence-Lynch based its estimate on such facts as 30,000+/- metric tons of bituminous concrete was to be included, that road mix was to be placed with a machine, and that handwork was required for driveways.

20. To resurface the bike path Lawrence-Lynch required a smaller spreader than would be required for the Road resurfacing. The smaller pavement spreader must be capable of applying pavement in an 8-foot width, as opposed to the standard 10-foot pavement spreader (expandable to 14 feet) used for the Road. The larger spreader could be modified to spread pavement in the 8-foot width necessary for the bike path.

21. The bike path was separated from the roadway by a grass strip, which limited the access and egress of the trucks delivering pavement to the spreader used for that work. Because Lawrence-Lynch used a smaller spreader to pave the eight (8) foot wide bike path, its "lay-down cost" of paving was more labor intensive per ton of bituminous concrete applied. Lawrence-Lynch determined that the lay-down cost of the bike path was greater than the comparable unit cost involved in resurfacing the 28 foot wide Road.

22. At the hearing the Department concurred with the contractor's assertion that the lay-down costs using the smaller spreader box paving equipment for the bike path would be greater than that of the larger spreader box.

23. The estimated quantity of item 460 in the bid documents was 30,500 metric tons. The final quantity used on the project was 32,855 metric tons, including the bike path resurfacing work.

24. Lawrence-Lynch used 2001 metric tons of Item 460 material in the work of bike path resurfacing. On a unit basis the extra cost of Lawrence-Lynch for the resurfacing work of the bike path using Item 460 materials was $7.76 per metric ton.

25. Lawrence-Lynch total extra cost of paving the bike path was $15,527.76 (2001 tons X $7.76/ton).

Discussion

The question for decision is whether the work of resurfacing the bike path was extra work or was work included within the original Contract.

Lawrence-Lynch claims that its extra costs to resurface the 6.5 mile 8 foot wide bike path that runs adjacent to Vineyard Haven/Edgartown Road were significant and that the work was not included within or incidental to the work on the Road described in the contract. It further asserts that the bike path resurfacing work was not shown on the Contract plans or described in the specifications on which it bid. Lawrence-Lynch thus seeks compensation for the costs of performing the extra work of paving the bike path, which it contends was $7.76 more per metric ton than the unit bid price for Item 460.

In support Lawrence-Lynch points to several facts. First, the Contract documents gave it no notice whatsoever when it submitted its bid that resurfacing 6.5 miles of bike path was included in the Contract. Second, it first received notice that the Department might order bike

path resurfacing at the pre-construction meeting after the Contract had been executed. Third, the only sketch referring to the bike path by its terms did not apply to the 6.5 miles of pike path but only to the work between station 9+30 and 10+29 in Tisbury. Fourth, to perform the extra work Lawrence-Lynch had to use different equipment, which had higher associated lay down costs than the equipment used for paving the Road, because of configuration of the pike path, difficulty of access to the area and comparatively more hand work. Fifth, Lawrence-Lynch has adequately demonstrated it increased unit price costs for "laying down" the bike path.

The Department asserts that bike-paving work was not extra work and that Lawrence-Lynch may not recover more than the unit price of payment Item 460 for roadway paving. To support its contention that the bike path work was included in the Contract, the Department relies on two facts. First, that the project designer's Calculation Book contained an estimated a quantity of bituminous concrete that includes an amount appropriate for the bike-path resurfacing. Second, that the Contract documents contain a typical section and plan that put bidders on notice that the Contract required resurfacing the entire bike path.

For the reasons that follow, I find that the Department's position has no merit. I find that Lawrence-Lynch's appeal should be allowed.

It is true that the Calculation Book contains a calculation showing material quantities for 6.5 miles of bike path resurfacing. However, that fact does not demonstrate what work was in the Contract specifications. The Calculation Book is a document for internal Department use. Its contents were never disclosed to Lawrence-Lynch or any potential bidder. The fact that the Department calculated certain sums of materials to be used is not dispositive of the scope of the Contract work.

To determine what work is included in the Contract one must instead look to the written plans and specifications published by the Department. See Albre Marble & Tile Co., Inc. v.

Goverman, 353 Mass. 546, 549 (1968) (contractor held by law to "to act in strict accord" written specifications). The Contract documents here do not describe the work of resurfacing 6.5 miles of bike path. One searches in vain for any reference to extensive bike path work. Certainly, no specification describing repaving 8-foot wide bike path over its entire length exists. I credit the testimony of Lawrence-Lynch that it was not until the pre-construction conference that it first discovered that bike path repaving was even being considered. At the pre-construction meeting the Department plainly stated that bike path repaving was not within the original specifications and would let Lawrence-Lynch and the town representatives know later whether that work was to be done.

The Department relies on a single sketch to support its contention that the Contract documents should be construed to include the pike path work. Properly read, however, that plan detail on its face refers not to repaving 6.5 miles of pike path, but to the construction of a single 100-meter portion of the bike path in Tisbury. At that location the plans in fact require Lawrence-Lynch to widen the bike path and repave. But, contrary to the Department's argument, the plan does not purport to be a typical section of the bike path. Nothing appearing on the plan could support a finding that the Contract required 6.5 miles of bike path repaving, from Vineyard Haven to Edgartown. I find that the Tisbury sketch did not direct bidders to include within their estimates the costs of resurfacing 6.5 miles of bike path.

I agree with Lawrence-Lynch that the original Contract documents did not require it to bid on the cost to resurface 6.5 miles of bike path. The Department admitted as much at the pre-construction meeting. The Department could not simply add the bike path work to the Contract work after it had received bids and awarded the Contract. Case law prohibits the awarding authority from changing the scope of work after bidding. See e.g. Sciaba Construction Corp. v. City of Boston, 35 Mass. App. Ct. 181, 190 (1983) (G.L. c.30, s.39M normally precludes an

awarding authority from changing the scope of the proposed work after the competitive bidding process has been completed). A 6.5 mile paving project is a change in scope.

These facts require a finding that bike path resurfacing was not included in the original Contract but was extra work. See Richardson Elec. Co. v. Peter Francese & Son, Inc., 21 Mass. App. Ct. 47, 51-52 (1985) (failure in specification to warn subcontractor of need to dig 11,000 foot trench across rocky terrain to accommodate a cable entitled subcontractor to additional reimbursement).[1]

I credit the evidence that Lawrence-Lynch submitted to show its extra costs of laying down paving over the length of the bike path. That evidence fully supports the contention that its lay-down costs were in fact higher on the bike path than on the Road. The Department agreed that Lawrence-Lynch's costs would be different for that work and admitted that they might be higher. It did not offer any evidence on the issue. I find that the bike path lay down work required different equipment, was more costly and was not included in Item 460. I find that Lawrence-Lynch demonstrated by substantial evidence that its extra cost for the bike path work was $15,527.76.

FINDINGS

The pike path repaving was extra work. Lawrence-Lynch sustained costs of $15,527.76 in performing that work at the direction of the Department.

RECOMMENDATION

The Board should adopt the findings of fact set forth above.

[1] The record supports the conclusion that the Department had at one time considered including the bike path resurfacing work in the Contract but that it ultimately failed to describe that work in the Contract documents put out to competitive bid.

The Board should order that Lawrence-Lynch appeal for claimed extra work in the amount of $15,527.76 be accepted.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: August 30, 2004

To: Secretary Daniel A. Grabauskas, EOT

Through: Commissioner John Cogliano, MHD

From: Stephen H. Clark, Administrative Law Judge

Date: March 24, 2005

Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

Mccourt, a general contractor under MHD contract #95284 engaged to construct City Square Park and associated roadways in Charlestown, appealed the Department's refusal to pay it $29,280.00 for the furnishing and installation of a granite seat wall in one part of the park. The appeal has merit and should be allowed. The plan details of the contract establish that the contract intended that payment for the disputed section of granite seat wall should have been paid under Item 719.12 ("Granite Seat Wall"), as McCourt contends. The Department was not entitled to rely on what the project designer subjectively intended when it drew up the plan details. Accordingly, I recommend that the Department pay McCourt for 97.6LF of granite seat wall installed at the bid price of $300/LF, or $29,280.00.

INTRODUCTION

McCourt Construction Company, Inc. (McCourt) seeks payment of $29,280.00 under Massachusetts Highway Department (Department) contract #95284 (Contract) for work of supplying, fabricating and installing 97.6 linear feet of curvilinear granite wall functioning as a bench ("Granite Seat Wall") at City Square Park in Charlestown. A 97.6 linear foot portion of the Granite Seat Wall, which faces inward toward a fountain in the center of the park, abuts a granite and concrete retaining wall, thus forming a double wall ("Granite Double Wall").

McCourt appeals from the Department's refusal to pay it the bid price of $300/ LF for the 97.6 LF of installed Granite Seat Wall under payment item 719.12 ("Granite Seat Wall"). The Department's refusal was based on its contention that payment for constructing the Granite Seat Wall where it abutted a 97.6 linear foot section of a Granite Double Wall should be paid for under payment item 719.11 ("Granite Double Wall").

McCourt's appeal has merit. The Contract plans and specifications, construed as a whole, support McCourt. The Contract's plans and plan details, upon inspection, show plainly that the Granite Seat Wall should have been paid under item 719.12 ("Granite Seat Wall"). That structure is not included under pay item 719.11 ("Granite Double Wall") because the plan detail for the Granite Double Wall expressly incorporates by reference the plan detail for Granite Seat Wall to be built in accordance with a separate plan detail. Because the Contract's special provisions contain a payment item for that plan detail work—Item 719.12 ("Granite Seat Wall")—McCourt correctly understood that the Contract intended all such work was to be paid under the same payment item.

I conclude that the work of constructing 97.6 LF of Freestanding Granite Seat Wall along the Granite Double Wall should be paid under item 719.12 ("Granite Seat Wall") at the bid price of $300/foot. I recommend that the Department pay McCourt $29,280.00 ($300 X 97.6).

BACKGROUND

Statement of the Appeal

McCourt filed an appeal to the Board of Contract Appeals (Board) on April 28, 2003 following denial by the Department of its claim for compensation under pay item 719.12 for 97.6 LF of Granite Seat Wall. The Contract is governed by the Standard Specifications for Highways and Bridges (1988 ed) (Standard Specifications), as well as the Department's 1977 Construction Standards.

A hearing was held on February 5, 2004 before Acting Chief Administrative Law Judge John McDonnell. Present were

John McDonnell	Acting Chief Administrative Law Judge
Isaac Machado, Esq.	Deputy Chief Counsel, MHD
Stephen Frick	McCourt Construction, Project Manager

The following documents were admitted into evidence.

Ex. #1	McCourt Statement of Claim
Ex.#2	Contract #95284
Ex. #3	McCourt correspondence file[1]

[1] The file consists of (1) June 20, 1995 letter of McCourt to MHD; (2) July 5, 1995 letter reply of designer Halvorson Company to McCourt's June 20th letter; (3) July 13, 1995 letter of DEM to Department project coordinator enclosing Halvorson letter; (4) July 26, 1995 letter of MHD to McCourt refusing to agree with McCourt's proposed interpretation set forth in June 20th letter; (5) July 27, 1995 letter of McCourt asserting claim under Subsection 7.16 of the Contract; (6) payment items 719.01 through 719.19 on page 87 of the special provisions of the Contract and details on Contract plan sheet 5; (7) January 27, 1997 letter from McCourt to Department filing claim under item 7.16; (8) December 4, 1997 letter from Department to McCourt denying claim; (9) January 21, 1998 letter of the Engineer to McCourt setting forth position of claims committee denying McCourt's claim.

The matter was taken under advisement at the end of the hearing. On March 1, 2004 the undersigned was appointed Chief Administrative Law Judge. On July 21, 2004, through St. 2004, c. 196, s. 5 (Act), the Legislature abolished the Board and, so far as is pertinent here, conferred its prior functions on the Secretary of Transportation and the Commissioner of the Department (Commissioner). See G.L. c.16, s. 1(b), as appearing in the Act. This report and recommendation, decided with the participation of Mr. McDonnell, is made through the Commissioner to the Secretary.

Findings of Fact

The record discloses the following facts, which I recommend be adopted.

The Contract required McCourt to construct a new park and associated roadways at historic City Square in Charlestown. The Department awarded McCourt a Contract for $1,984,713.00 for the project. The project was completed at a final cost of $2,350,923.43, as shown on the Final Estimate dated February 19, 2003. The project was substantially completed on September 30, 1997.

(1) The Contract Department Contract #95284 was for the work of constructing City Square Park, including earthwork, drainage, granite wall installation, paving, fencing, a fountain, artwork, landscaping and related work. The specifications called for bidders experienced in custom granite fabrication and installation, as well as the installation a fountain and site-specific artwork. The Department supervised the creation of the roadway design for the project; the Department of Environmental Management (DEM)[2] created the specifications and plans for the new park through its

[2] DEM was consolidated with the Metropolitan District Commission in 2003 becoming the Department of Conservation and Recreation (DCR) through St. 2003, c.26, s.63, amending G.L. c. 21, s. 1.

consultant, the landscape architect firm of The Halvorson Company (Halvorson). The Department put the Contract out to bid and managed the construction.

(2) Location of The Granite Seat Wall The resolution of this appeal requires an understanding of the locations where the Granite Seat Wall was constructed in the new park. The general layout of the area of the park at issue is seen on the plan attached at Exhibit A.[3] Generally, that plan shows an elliptical paved area (Ellipse) surrounded by two structures, one colored blue and one yellow. The colored structures are the Granite Seat Wall (yellow) and the Granite Double Wall (blue). Pedestrians may enter the Ellipse on four walkways that cut through those two granite structures. There is a granite fountain at the center of the Ellipse. See Ex. A.

The park slopes from south to north. The Ellipse is level, with the result that the Granite Double Wall functions in part as a retaining wall to hold back the earth on the higher, southerly slope. The Granite Double Wall has two structural components. See Ex. A (blue). One component is a retaining wall holding back the hill on the southerly side; the second component is a granite bench, which is built along 97.6 LF of the retaining wall and faces inward toward the center of the Ellipse. The plan detail of the Double Granite Wall, detail 5 of sheet 12 ("5/12"), plainly shows the two structural components. See Ex. B, attached.

By contrast, the granite structure on the downhill, northerly side of the Ellipse--and along two of the southerly pedestrian entrance paths--has only one component, the Granite Seat Wall. See Ex. A (yellow). The Granite Seat Wall stands alone in these

[3] Note: On Ex. A the top of the page is southeast, not north.

locations since no retaining wall is required. See Ex. A. A plan detail of the Granite Seat Wall is shown on detail 3 of plan 12 ("3/12"). See Ex. C, attached.

The parties agree that only one payment item applies to the Granite Seat Wall constructed on the northerly side of the Ellipse, namely Item 719.12 ("Freestanding Granite Seat Wall").[4] The parties agree that the Department has paid McCourt in full to build the Granite Seat Wall at those locations colored yellow on Ex. A. The parties also agree that the physical characteristics of the Granite Seat Wall on the northerly side of the Ellipse are identical to the characteristics of the Granite Seat Wall on the southerly side, where it has been installed in front of the retaining wall. The Granite Seat Wall surrounds the plaza and fountain in the center save where the four pedestrian walks provide access. See Ex. A (yellow and blue).

(3) The Special Provisions The proposal the Department offered for bid contained 19 separate pay items relating to granite stonework. The 19 pay items were grouped together within special provisions "Items 719.01 Thru 719.19." Among the 19 special provisions 3 bear directly on the outcome of this appeal, namely

"ITEM 719.10	GRANITE WALL	LINEAR FOOT
"ITEM 719.11	GRANITE WALL WITH SEAT	LINEAR FOOT"
"ITEM 719.12	GRANITE SEAT WALL	LINEAR FOOT

The caption on the bid sheet for Item 719.10 is "Granite Retaining Wall"; for Item 719.11 "Granite Double Wall"; and for Item 719.12 "Freestanding Granite Seat Wall."

Nowhere within the special provisions is there any language that directly or indirectly describes which payment item should be used to pay for the work of building

[4] Although labeled "*Freestanding* Granite Seat Wall" on the bid sheet, plan detail "3/12" does not depict a freestanding structure. The structure drawn on "3/12" and referred to in special provision 719.12 are both labeled "Granite Seat Wall." I refer to that structure throughout this report as "Granite Seat Wall" for clarity.

the 97.6 LF portion of Granite Seat Wall along the Granite Double Wall on the southerly side of the Ellipse.

The text of the special provision for "Items 719.01 Thru 719.19" is found at pages 127-135 of the Contract. Those special provisions are devoid of any written specification that describes the work to be done under Items 719.10, 719.11 or 719.12.[5] The special provisions are devoted to directives concerning materials, samples to be submitted for approval, the material to be used, construction methods, finishes etc.

(4) <u>The Plans and Plan Details</u>

The layout plan for the park expressly references plan details (Plan Details). See Ex. A. The plan keys to the plan details of both the Granite Seat Wall and the Granite Double Wall. See Ex. A, referencing Plan Detail "5/12" captioned "Granite Double Wall" [See Ex. B, attached] and Plan Detail "3/12" captioned "Granite Seat Wall" [See Ex. C, attached].

Both Plan Details "5/12" and "3/12" employ the usual practice of indicating materials by symbols incorporated into the plan drawing. See "5/12" and "3/12" showing granite, concrete, gravel backfill, compacted subgrade, stainless steel dowel and brick paving. Plan Detail "3/12," captioned Granite Seat Wall, is fully drawn with all details and components. See Ex. C. Thus, "3/12" contains every detail needed to build the

[5] The only mention in the special provisions of the work to be done under 719.10, 719.11 or 719.12 is under "Measurement," where the disputed items are referenced as follows: "Quantities of [] Granite Wall, Granite Wall With Seat, Granite Seat Wall [] shall be measured in place and along the centerline of the Item by the Engineer." Similarly, under the provision for "Payment" there is a reference by implication: "Payment of work shall be paid for at the contract price per unit indicated under items 719.01 [] through 719.19 [] which includes full compensation for providing all materials (including reinforced concrete bases and foundations) [] required to complete the work in accordance with the Drawings and as directed by the engineer." Other than under these two references there is nothing in the special provisions that bears on the scope the pay items numbered 719.11 and 719.12.

Granite Seat Wall.[6] The plan at Ex. A shows that "3/12" work is to be done on both the downhill, northerly side of the Ellipse and on the uphill, southerly side. "3/12" makes no cross reference to "5/12" or any other plan or detail. The estimated quantity for Item 719.12 ("Granite Seat Wall") on the bid sheet is 140 feet.

"5/12," captioned "Granite Double Wall," is not fully drawn. "5/12" shows that the "Granite Double Wall" has two component parts: (1) a fully drawn plan detail of the retaining wall portion to be built by capping a concrete footing with a shaped granite piece tied by a stainless steel rod, and (2) an outline (not fully drawn) of the Granite Seat Wall to be constructed in front of the retaining wall component. "5/12" depicts the retaining wall component in full detail, but leaves the Granite Seat Wall component blank. See Ex. B. The Granite Seat Wall component of "5/12" is cross-referenced to plan detail "3/12": an arrow captioned "Granite Seat Wall 3/12" points to the unshaded component. The cross-reference in "5/12" to "3/12" is clear. See Ex. B.

"5/12" only shows only the information needed to build the retaining wall component of the Double Granite Wall. The details needed to build the Granite Seat Wall component, shown in outline on "5/12," are found only on detail "3/12."[7]

Nowhere in the Contract documents—specifically including the pages 87-101 of the special provisions governing all specialty stone work---is there any writing directing

[6] The shading within "3/12" shows a 1' 4" wide "granite seat wall," the front of which is beveled to approximately quarter round. "3/12" also shows the brick paving of the Ellipse, the height above grade, the stainless steel dowel which anchors the granite to the concrete footing, the "compacted gravel borrow" underlying the footing and the "compacted" "subbase." Where the back of the shaped granite or concrete footing meets grade, the Plan Detail 3 "gravel backfill." The "granite seat wall," as drawn, shows a height of '12" @ lawns,' and '24" @ beds.' "3/12" plainly shows that the granite seat wall is not be "freestanding" at all places where it to be built.

[7] "5/12" shows that both components of the Double Granite Wall rest on "compacted gravel borrow" on top of a "compacted" "subbase." "5/12" also shows that, where the back of the retaining wall component meets grade, "gravel backfill" is to be supplied. The estimate quantity for Item 719.11("Double Granite Wall") on the bid sheet is 103 feet.

the contractor to use a named payment item for the work of building the Granite Seat Wall where it is installed in front of the Granite Double Wall.

(3) Estimated and Final Quantities

The Contract documents show that McCourt bid as follows on the pay items for 719.10 ("Granite Retaining Wall"); 719.11 ("Granite Double Wall") and 719.12 ("Freestanding Granite Seat Wall").

ITEM	ESTIMATED QUANTITY	FINAL QUANTITY	UNIT PRICE
719.10	100.00	164.69	$250/LF
719.11	103 LF	97.61	$400/LF
719.12	140 LF	92.99	$300/LF

Halvorson admits that the estimated quantities of 719.10 and 719.12 were incorrect. Its July 5, 1995 letter states "The total quantity of these two bid items is 240 lf, although it appears that the quantities between the two are flipped (719.10 should be (±) 140 lf and 719.12 should (±) 100 lf." The quantities estimates of provided by Halvorson were substantially incorrect for many bid items.[8]

DISCUSSION

The Legal Standard

The familiar principles governing the construction of a written contract, including the interpretation of plans, drawings and plan details included in the contract documents, are well settled. The interpretation of an unambiguous contract is a question of law. See Robert Indus., Inc. v. Spence, 362 Mass. 751, 755 (1973); Freelander v. G. & K Realty

[8] Item 390.1 3 Irrigation Sleeve: 40Lf (est), 140 Lf (actual); Item 506 Granite Curb VB Straight: 20 LF (est), 220 LF (actual); Item 706.01 Brick Paving on Mortar Setting Bed: 1,316 SY (est), 500 SY (actual); Item 719.055 Granite Fence Post Base: 30EA (est), 50EA (actual).

Corp., 357 Mass. 512, 516 (1970). Thus, where the contract at issue is found to be unambiguous, a court will determine the meaning of the contract as a matter of law.

In construing an unambiguous contract the judge must consider "the particular language used against the background of other indicia of the parties' intention," and must "construe the contract with reference to the situation of the parties when they made it and to the objects sought to be accomplished…. Not only must due weight be accorded to the immediate context, but no part of the contract is to be disregarded." Starr v. Fordham, 420 Mass. 178, 190 (1995) (internal citation omitted).

A contract "should be construed to give it effect as a rational business instrument and in a manner which will carry out the intent of the parties." Id. at 192, citing Shane v. Winter Hill Fed. Sav. & Loan Ass'n., 397 Mass. 479, 483 (1986). Where a contract consists of separate parts or sections, all of them must be considered together so as to give reasonable effect to each. See S. D. Shaw & Sons, Inc. v. Ruggo, Inc., 343 Mass. 635, 640 (1962). The principal guide to contract interpretation is what appears within the text of the document. See Citation Ins. Co. v. Gomez, 426 Mass. 379, 381 (1998). There is no dispute that these rules of construction apply to both words and to drawings, plans and plan details.

Discussion

The question for decision is whether or not the Contract required separate payment for the Granite Seat Wall at locations where it fronted on the Granite Double Wall. McCourt contends that the two components of the Granite Double Wall shown on Plan Detail "5/12" are paid by two separate payment items—viz. the retaining wall component is paid through Item 719.11 ("Granite Double Wall") while the granite bench

seat is paid through Item 719.12 ("Granite Seat Wall"). The Department contends that it "intended" that all work shown on "5/12" should be paid under Item 719.11 ("Granite Double Wall"). For the reasons set forth below, I find McCourt's appeal has merit.

Although the parties disagree about what the Contract Plans and Plan Details mean, they do not argue that the Plans or Plan Details at issue are in and of themselves ambiguous. Thus, I accept that the Contract should be construed in accordance with its plain meaning. I look to the contents of the Contract itself in order to determine the intent of the specific Plans and Plan Details that govern the outcome of this appeal.

Two critical Plan Details in this Contract require scrutiny: Detail 5 of Plan 12 ("5/12") and Detail 3 of Plan 12 ("3/12"). Together these two Details explicate the work of constructing the Granite Double Wall on the southerly side of the Ellipse; standing alone neither "3/12" or "5/12" accomplishes that purpose. There is no doubt that at that the Granite Double Wall consists of two component parts: a retaining wall and a granite bench seat as "5/12" clearly shows. See Ex. B.

The fact that the retaining wall component—but not the granite bench seat component--is fully drawn on Detail "5/12" is of determinative significance: all information needed to build the retaining wall component is present while none of the information needed to build the granite bench seat appears. The express cross reference in "5/12" to "3/12," where the granite seat component is fully drawn, indicates that two separate pay items apply. See Ex. B & C, attached.

That the Contract intends two separate pay items for the work of the Granite Double Wall is confirmed by the plan details "5/12" and "3/12" read together, as "5/12" indeed instructs. "5/12" requires the contractor to look to "3/12" to build the Granite Seat

Wall component of the Double Granite Wall. Nothing in plan detail "5/12," the specifications or special provisions contradicts the logical conclusion that payment for constructing 97.6 linear feet of Granite Seat Wall in front of the retaining wall portion of the Granite Double Wall should be made in the same manner that all identical work is be paid. The arrow in "5/12" points directly to the unshaded portion of the Double Granite Wall leading to detail "3/12"--"Granite Seat Wall"--and nothing else. Where there is no contravening special provision or plan detail, a contractor reading "5/12" would reasonably conclude that identical Granite Seat Wall work would be paid under the identical item, Item 719.12 ("Granite Seat Wall").

I think that a "competent mechanic or contractor"[9] reading "5/12" would at his peril assume that "3/12" work would be paid under "5/12." Nothing in the special provisions clarifies that "5/12" "intends" for a contractor to bid the Granite Double Wall as if the explicit reference to "3/12" did not exist. A blank, unshaded area on "5/12" to which an arrow labeled "3/12" points indicates Item 719.12 work, and could not be ignored. To the contrary, a competent contractor would justifiably assume that identical structures to be built in various locations within a project are to be paid by a single payment item expressly designated for all such work. Here, where the identical granite seat wall surrounds the Ellipse on both its northerly and southerly sides, and where no construction detail for the Granite Seat Wall is shown in "5/12," McCourt correctly understood that the Contract intended it to build (and the Department to pay for) the Granite Seat Wall wherever the plans expressly indicated that work. Accordingly, all granite seat wall work must be paid under Item 719.12 ("Granite Seat Wall").

[9] The Standard Specifications (1988 ed.) provide in subsection 2.03: "The Department will prepare plans and specifications giving directions which will enable any competent mechanic or contractor to carry them out."

The Department's Position

The Department adopted the position of the designer Halvorson in its entirety. It first argues that the language of the caption "Granite Double Wall" must be construed to mean that bid Item 719.11 ("Granite Double Wall") includes payment for both components of the wall shown in "5/12" because the words of the caption infer that the retaining wall and the granite seat wall are both parts of the "double" wall. That argument fails because it ignores what is plainly shown in Plan Details "5/12" and "3/12." The Contract provides in Subsection 5.04 of the Standard Specifications (1988 ed.) that "In the event of any discrepancy between the plans and the specifications, the plans are to govern." Here the specifications and special provisions are silent with the result that the plan details read together control. "5/12" and "3/12" construed together show that the Granite Seat Wall, constructed at various locations, is to be paid under its own item.[10]

Second, the Department argues that Halvorson "intended" that pay item 719.11 ("Granite Double Wall") include both the retaining wall component and the granite bench component within it. As proof of Halvorson's "intent" the Department relies on (1) Halvorson's own statement to that effect and (2) the fact that Halvorson stated that its own internal design cost estimates made before bidding corroborate that intent. But what

[10] The argument that the caption "Granite Double Wall" should control the outcome of this appeal is particularly troublesome in the context of the ways in which the captions in this Contract were written.

	Written Spec	Bid Sheet	Plan Sheets	Consultant Interpretation
719.10	Granite Wall	Granite Retaining Wall	[None]	"Granite Seat Wall (with earth)"
719.11	Granite Wall w Seat	Granite Double Wall	Granite Double Wall	"Double Wall (3/12 & 5/12)"
719.12	Granite Seat Wall	Freestanding Granite Seat Wall	Granite Seat Wall	"Granite Seat Wall (w/o earth)"

Halvorson subjectively believed about the plans it drew at the time it drew them does not control. "[T]he crucial question is 'what [the claimant] would have understood as a reasonable construction contractor,' not what a drafter of the contract terms subjectively intended." Corbetta Constr. Co. v. U. S., 461 F.2d 1330, 1336 (Ct. Cl. 1972).

Halvorson's unshared, private cost estimates said to prove Halvorson's intent that the Granite Double Wall was an item that included the separately referenced work of the Granite Seat Wall was not apparent in the Contract and was never disclosed to bidders. The Department introduced no evidence of Halvorson's internal cost estimates at the hearing.[11] Accordingly, Halvorson's arguments—and the Department's--must fail.

CONCLUSION

McCourt correctly construed the Contract Plan Details to require all payment for the work of constructing the Freestanding Granite Seat Wall to be made under payment item 719.12.

RECOMMENDATION

McCourt is entitled to be paid $29,280 under payment item 719.12 for the 97.6 LF of Freestanding Granite Seat Wall it built as part of the Double Granite Wall at the bid price of $300/ LF (300 X 97.6 = $29, 280).

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

[11] The Department therefore failed to explain how comparing the cost of item 719.11 (Granite Double Wall") and item 719.10 ("Granite Retaining Wall") "substantiates [the] intent" that the Contract requires that the Granite Seat Wall be paid under Item 719.11.

To: Secretary John Cogliano, EOT
Through: Commissioner Luisa Paiewonsky, MHD
From: Stephen H. Clark, Administrative Law Judge
Date: December 21, 2005

Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

Middlesex Corporation (Middlesex) a general contractor under MHD contract #98182 (Contract) to reconstruct a bridge over the Reserve Channel in Boston appealed from a decision of the Claims Committee on January 31, 2003. The dispute arises over payment for the removal of obstructions in the installation of drilled shaft columns. Middlesex claims that the Department paid it only one half of the amount required under the Contract under Item 945.11 for the 1,387.40 linear feet of obstruction removed. It was paid $693,700 for that work and claims that an additional $693,700 is due.

Middlesex's claim has merit. Item 945.11 required payment for obstruction removal "at a multiple of 2 times the bid price [for Item 945.11]" "per linear foot for each linear foot of obstruction removed." The Department paid Middlesex only once for such work, not at "a multiple of 2 times the bid price" required. As a result the Department paid Middlesex only ½ the amount it was entitled to for obstruction removal. Accordingly, the Department should pay Middlesex an additional $693,700.

INTRODUCTION

Middlesex Corporation (Middlesex) appeals the denial by the Massachusetts Highway Department's Claims Committee on January 31, 2003 of its claim for payment of $693,700.00 allegedly due under contract #98182 (Contract) for the work of removing obstructions from drilled shafts for bridge piers (Obstruction Removal). Obstruction Removal work was performed by Middlesex's subcontractor Millgard Corporation (Millgard).[1] The Contract, with an original bid price of $12,956,297.50, was awarded on November 26, 1997. Generally, the Contract work was to construct a new bridge over the Reserve Channel to link downtown Boston to South Boston via Summer Street. Middlesex's subcontractor, Millgard, was responsible for constructing the bridge foundations, which work included drilling shafts through overburden into bedrock and constructing steel reinforced concrete pier columns in the shafts.

Middlesex's claim alleges that, because the Department incorrectly construed the measurement and payment provisions of special provision for pay Item 945.11 in the Contract (Item 945.11), the Department only paid one half the total amount it should have paid for removing 1,387.40 linear feet (LF) of defined obstructions encountered during the work of drilling and constructing 3,753.73 LF of drilled shaft columns. The Department contends that it paid all that it should have paid under Item 945.11.

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[1] Middlesex filed a Notice of Appeal in this office for this Obstruction Removal claim following the written decision of the Engineer. Following Middlesex's Notice of Appeal, Millgard—not Middlesex—filed on May 6, 2003 a Statement of Claim. Millgard's Statement of Claim purported to assert seven claims (Miscellaneous Claims) in addition to the Obstruction Removal claim. See infra pages 6-7. This office has jurisdiction of an appeal taken by a general contractor from the decision in writing of the Engineer. See Subsection 7.16 of the Standard Provisions. Nothing in this record shows that Middlesex filed a Notice of Appeal in this office from a "written decision" of the Engineer denying any Miscellaneous Claim. I therefore recommend that the Miscellaneous Claims be dismissed. See infra page 10. On January 20, 2004 Middlesex filed an amended Statement of Claim for the Obstruction Removal claim, among other things clarifying that the amount at issue is $693,700. This report and recommendation is based upon the Middlesex amended Statement of Claim.

I find that Middlesex's claim has merit and recommend that the claim be paid in full.

SUMMARY

Item 945.11 governs both (1) payment for drilled shaft complete in place and (2) payment for the removal of defined obstructions found during the construction of the drilled shafts. The parties agree that under Item 945.11 the Department should pay for the work of constructing drilled shaft "complete in place" by multiplying its bid price per linear foot times the total linear feet of drilled shaft work completed. Middlesex bid $500/LF for Item 945.11. Since there were 3,753.73 LF of drilled shaft work "complete in place," the parties agree that the Department correctly paid Middlesex $1,876,865 ($500/LF X 3,753.73) for that work.

The dispute here concerns the legal effect of certain language in Item 945.11 that requires additional payment for Obstruction Removal. The language in contention is: "The Contractor shall be compensated for obstructions at a multiple of two times the bid price [for the construction of drilled shaft] per linear foot for each linear foot of obstruction removed." Item 945.11, Contract p.95.

I conclude that the text of Item 945.11, fairly read, requires the Department to pay for (1) the construction of drilled shaft complete in place at the bid price and, independently, (2) the work of defined obstruction removal at two times the bid price for drilled shaft work. Middlesex removed 1,387.40 LF of defined obstruction. The applicable rate for such obstruction removal is "a multiple of two" times the bid price of $500/LF for drilled shaft work, $1,000 ($500 X 2). The Department thus should pay $1,387,400 (1,387.40 LF X $1,000/LF) for removing defined obstructions. It has paid

only one half that amount. Accordingly, it should pay Middlesex the balance of $693,700.00.

This conclusion is compelled by (1) the plain language of special provision 945.11; (2) the fact the Department paid Middlesex for obstruction removal under an identical payment scheme in another contract involving drilled shaft work;[2] and (3) the fact that the Department paid for obstruction removal on the same basis that the Contract here requires on at least three other general contracts during the time in question.

BACKGROUND

Middlesex bid $12,956,297.50 to construct a new bridge carrying Summer Street over the Reserve Channel, together with roadway approaches.[3] Middlesex was awarded the Contract on November 26, 1997. The Contract was executed on December 5, 1997 with an original completion date of July 16, 2000.

The prosecution of the work was infected with unanticipated circumstances. There were design flaws requiring correction that resulted in an unanticipated delay of 12 months.[4]

The foundation work from which this appeal arises required, among other things, installation of a caisson, driving permanent steel casings ½" thick, placing therein steel reinforcing cages and concrete to construct the reinforced cement columns of 36" diameters. Each drilled shaft column was to be anchored six inches in sound bedrock and

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[2] "The contractor shall be compensated for obstructions at a multiple at one and a half times the bid price for drilled caissons per linear foot for each linear foot of obstruction removed." Item 945.11 in MHD #93318, School Street, Lowell [1992].

[3] The winning bid was 9% below the office estimate of $14,174,019.50.

[4] Among 16 approved extra work orders totaling $2,309,613 was EWO#7 for $500,000 to correct the original beam seat design error and EWO#9 for $815,000 to compensate Middlesex for its costs incurred due to delays not caused by Middlesex.

extended by a thirty inch round rock socket. The reinforcing steel, which consisted of a spiral "cage" inserted in the casings, was to extend above the column to permit subsequent embedment into the pier caps.

The Department estimated that 3,900 LF of drilled shaft work was required; Middlesex bid $500/LF for Item 945.11 based on that estimate. The actual quantity of drilled shaft pier columns installed was 3,753.73LF.

The drilled shaft foundation work included the excavation of obstructions found. The Contract defined "obstruction" as "a boulder or other natural or man-made object greater than 12" that cannot be drilled by the use of normal earth-drilling techniques or tools." Item 945.11. When Middlesex encountered an obstruction the Contract required it to notify the Engineer, who would determine whether the "obstruction" found was within the definition. The Contract documents provided no estimated quantity of obstruction to be excavated.

Middlesex was also required to maintain a detailed log to record the "description and approximate top and bottom elevation of each soil or rock material" and the time and "progress through to removal of the obstruction [encountered]." Id. Middlesex duly logged 1,387.40 LF of defined obstructions removed.

Prior Conduct of the Parties: The Middlesex-MassHighway Contract #93318

Middlesex was also the general contractor for the Department in MHD #93318 (School Street, Lowell) which called for drilled caisson work. As here Millgard performed the subcontract foundation work. The Lowell contract contained a special provision[5] that provided

[5] Also for pay item 945.11.

> The Contractor shall specifically log the time and progress through to removal of the obstruction after designation as an obstruction by the Engineer. The contractor shall be compensated for obstructions at a multiple of one and a half times the bid price for drilled caissons per linear foot for each linear foot of obstruction removed.

On the Lowell contract the Department paid Middlesex at the bid price for the full length of 562.7 LF of the drilled caissons. During that work Middlesex removed 112.8 LF of obstructions. The Department paid for obstruction removal by adding 169.2 LF of drilled shaft to be paid, which was calculated as (112.8 X 1.5). This was done so that obstruction removal could be paid at the rate of 1.5 times the bid price. In all, the Department paid a total quantity of 731.9 LF (562.7 + 169.2) for drilled caisson work, including the additional work of obstruction removal, at the bid price for Item 945.11.

Obstruction Removal Payment in Contemporaneous MassHighway Contracts

HUB Foundation Company, Inc. (HUB), a subcontractor on four MHD contracts that involved installation of drilled shafts, was compensated under general contracts with the Department for obstruction removal on the basis of a multiple of the bid item for drilled shaft over and above payment made at the bid price for drilled shaft work paid. The Department paid HUB through general contracts that contained a provision for obstruction removal virtually identical to that in the instant Contract and the Lowell contract. The three general contracts under which HUB worked were executed and performed during the same time frame as this Contract. Original Statement of Claim.

The Department contracted for obstruction removal in contracts that each contained an obstruction removal provision virtually identical to that here. See MHD contracts #98254 (Taunton), #98319 (Millbury/Worcester) and #98393 (Millbury). These contracts were executed and performed during the same time frame as this

Contract. Department witnesses testified that payment was made for obstruction removal to general contractors on the same basis that the Department contends is correct here. The Department did not proffer documentary evidence of payments made for any of these contracts.

Millgard's "Pass-Through" Claim

On September 25, 2002 Middlesex, on behalf of its subcontractor Millgard, filed a "pass through" claim in District 4 seeking additional compensation under Item 945.11. Middlesex asserted that the Contract required separate payment for the work of Obstruction Removal at the rate of $1,000/LF based on the bid price of $500/LF for Item 945.11.[6] Statement of Claim, Tab. 19.

On January 24, 2003 the Department, through its district highway director, rejected the Middlesex's pass-through claim. "We have on numerous occasions denied this extra work as it is clearly within the contract and specification language. " The letter stated that the district "will forward your request to the claims committee for further review." Statement of Claim, Tab. 18.

On January 31, 2003 the Department's Claims Committee, under Chief Engineer's Broderick's signature, memorialized in writing the final decision of Middlesex's claim for additional payment under Item 945.11. It said

> "The Contract states that obstructions will be paid at two times the bid price per linear foot of each drilled shaft. The method of payment claimed by The Middlesex Corp. would result in obstructions paid at three times the unit price of the shaft, which would be in violation of the Contract terms."

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[6] I note that Middlesex's subcontract with Millgard obligated it to pay Millgard $360/LF for Item 945.11 work.

The Appeal

On February 4, 2003 Middlesex filed a de novo appeal in this office. Its notice of appeal--re "Obstruction Claim"--noted the "decision" in the January 31, 2003 Broderick letter. On February 11, 2203 then Administrative Law Judge, Peter Milano, notified Middlesex that it must complete and return a Statement of Claim. On May 6, 2003 Millgard, not Middlesex, filed a Statement of Claim.

In addition to Middlesex's noticed "pass-through" claim for Obstruction Removal, Millgard purported to raise seven additional Miscellaneous Claims in its May 6, 2003 Statement of Claim. The seven Miscellaneous Claims are (1) $13,240.50 for a delay of the work on July 1, 1999; (2) $19,092.80 for "changed conditions" in the excavation of unexpectedly hard rock ("diabase") in the rock socket excavation at the end of three particular shafts; (3) $1,211.87 in consulting fees to present its "changed conditions" claim next above; (4) $10,592.40 for obstruction removal ("rip-rap") "just below the surface" on drilled shaft at 18C2; (5) $84,769.21 for idle equipment, tool storage, mobilization and demobilization during an "unscheduled project delay of approximately 1 year due to design issues with the bridge"; (6) $6,354.83 for the cost of non-destructive testing of the columns in place; and (7) $43,995.77 to repair voids in the reinforced concrete columns.

Middlesex did not proffer a written decision of the Engineer denying any of the seven Miscellaneous Claims. No Miscellaneous Claim was referred to in the January 31, 2003 written decision of the Obstruction Removal claim.

Judge Milano resigned in July 2003 and was succeeded by Acting Administrative Law Judge John J. McDonnell. Acting Judge McDonnell held a hearing on the appeal on

December 3, 2003. At the hearing, at the request of Millgard/Middlesex the parties limited their presentations to the obstruction removal claim. Present were

David Skerrett	Middlesex
David Coleman	Millgard
Charles Schwab, Esq.	Attorney for Middlesex and Millgard
Thomas Manning	MHD
Richard DeSantis	MHD
Kenneth Talanian	MHD
Isaac Machado, Esq.	Deputy Counsel, MHD

The following exhibits were admitted in evidence

Ex #1	MHD Contract #98182
Ex. #2	Millgard Statement of Claim (May 6, 2003)
Ex. #3	Middlesex Statement of Claim (January 20, 2004)

On December 12, 2003, Acting Judge McDonnell asked the parties to submit on January 24, 2004 a proposed statement of fact, legal citations and argument on the Obstruction Removal claim only, which the parties accordingly filed.[7] Middlesex filed an amended Statement of Claim relating to the Obstruction Removal claim on January 20, 2004. On February 25, 2004 Acting Judge McDonnell invited each party to comment on the other's submission. He also asked that Middlesex/Millgard provide the contract numbers for the "projects mentioned in the Hub Foundation letter." See Proposed Findings of Fact, Tab 4.

Acting Judge McDonnell then took the matter under advisement. On March 1, 2004 the undersigned was appointed Chief Administrative Law Judge. On July 21, 2004, through St. 2004, c. 196, s. 5 (Act), the Legislature abolished the Board of Highway Commissioners and conferred its prior functions on the Secretary of Transportation

[7] Among other things, Acting Judge McDonnell requested Middlesex to submit an amended statement of claim limited to the Obstruction Removal claim only, stating "At this time its [Miscellaneous Claims] will still be pending." Acting Judge McDonnell referred to the 7 Miscellaneous Claims as "pending" only because he had not inquired into their procedural basis. See infra page 9.

(Secretary) and the Commissioner of the Department (Commissioner). See G.L. c.16, s. 1(b), as appearing in the Act. This report and recommendation is made through the Commissioner to the Secretary.

DISCUSSION

The Miscellaneous Claims

To assert a claim under the Contract, a contractor must follow the procedures set forth in Subsection 7.16 of the Standard Provisions for Highway and Bridges (1995 Ed.) (Standard Provisions). Subsection 7.16 requires a contractor (1) to file a notice of claim within "one week" after sustaining injury or damage (Claim Notice), and, separately, (2) to file an "itemized statement" of the claim by the 15th day of the next month (Itemized Statement).[8] Thereafter, the Department's district highway director addresses the claim. If unsatisfied by the decision of the district highway director the claim is forwarded to the Chief Engineer, whose Claims Committee makes a final decision in a writing signed by

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[8] Subsection 7.16 provides, in pertinent part:

> All claims of the Contractor for compensation … must be made in writing to the Engineer within one week after the beginning of any work or the sustaining of any damage on account of such act, such written statement to contain a description of the nature of the work performed or damage sustained; and the Contractor shall, on or before the 15th day of the month succeeding that in which such work is performed or damage sustained, file with the Engineer an itemized statement of the details and amount of such work or damage and unless such statement shall be made as required, his claim for compensation shall be forfeited and invalidated, and he shall not be entitled to payment on account of any such work or damage.
>
> The Engineer shall determine all questions as to the amount and value of such [contract] work, and the fact and extent of such damage and shall so notify the Contractor in writing of his determination. Such determination of the Engineer may be appealed to the Board of Contract Appeals in accordance with General Law, Chapter 16, Section 5b, as amended.
>
> The appeal shall set forth the contract number, city or town project is in, the name and address of the contractor, the amount of the claim (and breakdown of how amount was computed), a clear concise statement of the specific determination from which appeal is taken, including the reasons for appealing the determination and shall be signed by the Contractor.
>
> The Commission Secretary shall record the date and time any such appeal is received, and shall keep the appeal on record. He shall forward a copy of the appeal to the Hearing Examiner who shall set the matter down for hearing in accordance with rules adopted by the Commission.

the Chief Engineer (Written Decision). The contract provides that a contractor may appeal the Written Decision to the Board of Contract Appeals (now Secretary). Subsection 7.16. The contract gives jurisdiction to the "Board of Contract Appeals" (now Secretary) through a "hearing examiner" (known as Administrative Law Judge) to conduct a de novo investigation and hold a hearing on the contractor's appeal from the Written Decision. See G.L. c. 16, s. 5, as amended by St. 2004, c.196, s.5.

With respect to the seven Miscellaneous Claims, the record is devoid of evidence that Middlesex complied with Subsection 7.16 either in filing a Claim Notice or in filing an Itemized Statement. See Millgard's Statement of Claim and supporting documents, Tabs 1 through 28. There is no basis to find that Middlesex properly filed any Miscellaneous Claim "in writing to the Engineer within one week after the beginning of any work or the sustaining of any damage …." Subsection 7.16.

Nor does this record contain a Written Decision denying any Miscellaneous Claim. Millgard, by filing a Statement of Claim that sets forth the Miscellaneous Claims for the first time, certainly did not alter the fact that Middlesex failed to obtain a Written Decision of the Engineer from which an appeal could be taken. Middlesex's amended Statement of Claim was for underpayment of Obstruction Removal only, as only that claim was the subject of any written decision of the Engineer. I conclude that Middlesex did not file a proper appeal of any Miscellaneous Claim to this office.[9]

[9] Subcontractor Millgard has no right under the Contract to file a claim or take an appeal to this office. Under the Contract only the general contractor Middlesex could appeal the Written Decision of the Engineer. Typically, a general contractor asserts the rights of its subcontractors by filing a "pass through" claim. Middlesex in fact did this with respect to the Obstruction Removal claim on September 25, 2002. Following an adverse decision by a Written Decision of the Engineer on that claim, it filed on February 4, 2003 a timely Notice of Appeal in this office. On January 20 2004 Middlesex filed an amended Statement of Claim setting forth the details of the pass-through Obstruction Removal payment claim.

Since Middlesex's appeal to this office may only be based upon a timely filed Claim Notice, Itemized Statement and Written Decision, the fact that the record shows no jurisdictional basis of an appeal of any Miscellaneous Claim is fatal. See Glynn v. Gloucester, 21 Mass. App. Ct. 390, 393 (1986) and cases cited. Any rights Middlesex may have asserted with respect to the Miscellaneous Claims were "forfeit" by the failure to timely file a Claim Notice and Itemized Statement. Subsection 7.16. Accordingly, I recommend that all seven appeals set forth as Miscellaneous Claims be dismissed.

The Obstruction Removal Claim

The gravamen of the Obstruction Removal claim is that the Department failed to correctly calculate payments due Middlesex for that work under Item 945.11 of the Contract. In substance, Middlesex claims that the Department should have paid $1,000 for each linear foot of defined obstruction removed, not the $500/LF paid.

The Plain Meaning Standard

"When the words of a contract are clear, they alone determine the meaning of the contract …." Merrimac Valley Nat. Bank v. Baird, 372 Mass. 721, 723 (1977). An unambiguous contract must be enforced according to its terms, which are construed in accordance with their ordinary and usual sense. See Schwanbeck v. Federal Mogul Corp., 412 Mass. 703, 706 (1992) and Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20, 29 (1981). The Department and Middlesex each argue that the special provision for Item 945.11 is clear and unambiguous; each argues that, properly construed, the plain meaning of the language in Item 945.11 requires a decision in its favor. It is the function of the judge to determine the meaning of unambiguous Contract terms as a question of law.

Robert Indus., Inc. v. Spence, 362 Mass. 751, 755 (1973) (Robert Industries) ("interpretation of integrated agreement is a matter of law").

The particular language to be construed is:

> The Contractor shall specifically log the time and progress through to removal of the obstruction after designation as an obstruction by the engineer. The contractor shall be compensated for obstructions at a multiple of two times the bid price per linear foot for each linear foot of obstruction removed. Item 945.11.

Positions of the Parties

Middlesex

Middlesex argues that the disputed language constitutes a "form of" compensation specifically inserted to govern the work of obstruction removal. It contends that compensation for obstruction removal is independent of payment otherwise required in Item 945.11 for drilled shaft pier column work. It says the fact that the language specifying a separate payment scheme for obstruction removal makes no reference to the pier column payment scheme shows that the Item 945.11 intends two separate payment schemes, one for obstruction removal only and one for all other drilled shaft work. Hence, the meaning of the words that the contractor is to be paid "for obstruction at a multiple of two times the bid price for each linear foot of obstruction removed" must be read independently of the words indicating payment for all other work in Item 945.11. Thus, the correct price to be paid for obstruction removal is $500/LF times 2, or $1,000/LF "for each linear foot of obstruction removed." Middlesex Brief, p. 2.

The Department

The Department argues that drilled shaft foundation work expressly includes the work of excavating all obstructions found during the drilling of shaft columns since that

work is paid "complete in place." Thus it contends that the Item 945.11 language means "Upon the occurrence and removal of obstructions (defined in the contract), the contractor is to be paid only a multiple of two times the bid price for the obstruction removed." Brief p. 2. The language "complete in place" indicates that all the work under 945.11—including obstruction removal work—can not be construed to mean a payment for obstruction removal at "three times the item for encountering an obstruction." "The language is clear that the contractor is to be paid only two times and not in effect three times the bid price for a removal of an obstruction." Department Brief, p. 2.

Analysis

The purpose of special provision 945.11 is revealed in the summary of work to be done. Item 945.11 is entitled "DRILLED SHAFT PIER COLUMNS LINEAR FOOT." The special provision taken as a whole is plainly intended to govern all the work required to construct drilled shaft pier columns "complete in place."[10] The contractor is directed to completely perform the whole work, including "[e]xcavation, backfilling and disposal of existing obstructions within the area of the drilled shaft foundation." Among other enumerated tasks the special provision requires installing the caisson, controlling water flow, auguring the shafts, anchoring the drilled shaft columns, installing the reinforced steel "cage" in the shaft, and pouring specialized cement in the drilled shafts to construct the piers. The text of the special provision for pay Item 945.11 contains no language within its terms that purport to govern extra payment for any of the tasks just listed.

[10] Item 945.11. Cognate work included in the special provision is for the drilling of sockets into the bedrock, which is paid under bid Item 945.111 ("ROCK SOCKETS (30 INCH DIAMETER) LINEAR FOOT"). Since this appeal does not involve a dispute about payment for rock socket work, I omit all reference to 945.111 for sake of clarity.

For all those tasks the Contract certainly intends that full payment for all work will be made at the bid price for Item 945.11. The actual amount of payment the Department is to make under Item 945.11 is determined by applying the measurement and payment provisions of Item 945.11. The Item reads

> Measurement for ITEM 945.11 DRILLED SHAFT PIER COLUMN shall be per linear foot measured from the bottom of the pier caps to the top of sound bedrock.
>
> Payment for ITEM 945.11 DRILLED SHAFT PIER COLUMN shall be at the Contract Bid price per linear foot, complete in place from the bottom of the pier caps to the top of sound bedrock.

With respect to "measurement" of the linear feet to be used to calculate the payment the words "from the bottom of the pier caps to the top of sound bedrock" impart an exact meaning. Similarly, the "payment" language, which specifies a payment rate "at the Contract Bid price per linear foot," plainly intends payment for work done "complete in place."

The work of obstruction removal (Obstruction Removal) alone is singled out within special provision 945.11 for particular treatment.

The meaning of the disputed language is best understood by first focusing on the meaning of certain key phrases, as indicated.

> The Contractor shall <u>specifically log</u> the time and progress through to removal of the obstruction <u>after designation</u> as an obstruction <u>by the engineer</u>. The contractor shall be compensated for obstructions <u>at a multiple of two times</u> the <u>bid price</u> per linear foot <u>for each linear foot of obstruction removed</u>. (Emphasis added.)

The underlined phrases set forth set forth measurement and payment methods provided only for defined obstruction removal. Generally, potential obstructions are to

be first investigated and designated; then, the time and progress of removal work is to be specially logged.[11] Payment for obstruction removal is to be made at a specified rate.

In the first sentence the words "specifically log" and "after designation … by the engineer" establish two preconditions to meet before the exceptional payment provision even comes into effect: (1) a "designation" of an defined obstruction; and (2) a foot by foot log of the "progress through" the each particular obstruction. Within Item 945.11 only <u>defined</u> obstructions are authorized for additional payments at all; all smaller obstructions are plainly paid within the bid price.

The second sentence provides the mechanism to compensate the contractor for removal of designated obstructions by establishing (1) a payment rate (2) and a unit of measurement to which the rate should be applied. There is no doubt that in the context of Item 945.11 the words "bid price" refers to the price Middlesex "bid" for "drilled shaft pier column" (here, $500/LF). The words "at a multiple of two times" intend the "bid price" be doubled. Multiplying the bid price times two sets the rate. The rate for obstruction removal is thus $1,000/LF ($500/LF X 2).

The phrase "for each linear foot of obstruction removed" plainly specifies the measured quantity to which the stated rate is to be applied.

The plain meaning of the critical sentence thus reads in context "The contractor shall be compensated for [defined] obstructions [removed] at [a rate calculated as] a multiple of two times the bid price [or, 2 X the bid price/LF for Item 945.11] per linear foot for [e.g. times] each linear foot of obstruction removed."

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[11] Item 945.11 also provides (1) "Subsurface obstructions encountered in drilled shaft excavation shall be removed using tools and procedures such as but not limited to chisels, boulder breakers, core barrels, air tools and hand excavation"; and (2) "Drilling tools which are lost in the excavation shall not be considered obstructions and shall be promptly removed by the contractor without compensation. All costs due to lost tool removal shall be borne by the contractor."

I conclude that the plain language in Item 945.11 intends a separate and distinct measurement and payment term within the whole that separately applies to defined obstruction removal.

The Department's position is not tenable for two essential reasons: (1) its argument is not based on a textual construction of 945.11; and (2) its argument is contradicted by its own behavior in paying contractors (including Middlesex) for obstruction removal under the very payment scheme it now asserts is incorrect.

The Claims Committee's written decision itself reveals the flaw in the Department's position. The Claims Committee said, "The Contract states that obstructions will be paid at two times the bid price per linear foot of each drilled shaft." Emphasis added. But text of Item 945.11 does not so state. The language of 945.11 actually states that "obstructions" will be paid "at a multiple of two times the bid price per linear foot for each linear foot of obstruction removed" not "per linear foot of each drilled shaft."[12] Emphasis added.

The heart of the Department's argument is that Item 945.11 establishes an upset limit of twice the "bid price" for all work under the Item. But the words "at a multiple of two times the bid price per linear foot" do not refer to an upset limit that the Department must not exceed in paying for all drilled shaft work "complete in place." In fact, no words in the text of Item 945.11 support that contention. To the contrary, reading Item 945.11 as a whole demonstrates that the words "at multiple of two times the bid price per linear foot" are intended solely to establish the payment due for the difficult and expensive work of defined obstruction removal, nothing more.

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[12] The Claims Committee's statement that Middlesex's "method" "would result in obstructions paid at three times the unit price of the shaft, which would be in violation of Contract terms" is also incorrect. The words of Item 945.11 do not specify a multiple of the bid price that may not be exceeded.

The Department's own behavior during the time this Contract was in force fatally undermines its position. I find the evidence of the prior course of dealing between the parties to be particularly persuasive. Not only had the Department in the past adopted the identical interpretation of Item 945.11 that Middlesex now advances, the documentary evidence proves that the Department paid Middlesex for obstruction removal on that basis. The evidence amply supports the finding that the Department in fact paid Middlesex in the Lowell School Street contract involving obstruction removal under an identical payment formula on the precise basis that Middlesex contends is correct here.

In construing a contract provision "where the parties act[ed] on a particular construction of a written instrument 'such construction will be of great weight and will usually be adopted by the court.' " See C.K. Smith & Co., Inc., v. Charest, 348 Mass. 314, 319 (1965) quoting Canadian Club Beverage Co. v. Canadian Club Corp., 268 Mass. 561, 569 (1929). Here, the prior course of dealings of the parties establishes that the Department acquiesced in the very payment scheme for obstruction removal that it now opposes. Because the payment schemes in the two Middlesex contracts are the same the Department's conduct in paying for obstruction removal in the prior Lowell contract must be given great weight. See also Restatement Second Contract, s. 202, Rules in Aid of Interpretation ("Where an agreement involves repeated occasions for performance by either party with the knowledge of the nature of the performance and the opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement"); Martino v. First National Bank, 361 Mass. 325, 332 (1992) ("There is no surer way to find out what

parties meant when they entered into a contract than to see what they have done") (internal citation omitted).

Finally, the conclusion I reach and the recommendation I make is supported by the fact that the Department made payments for obstruction removal on the precise basis it now opposes on other general contracts—in addition to the Lowell contract--performed during the same time period. While that evidence is not alone determinative, it certainly corroborates the Department's own interpretation of Item 945.11 in the Lowell contract. It also tends to establish a pattern of Department conduct. The Department counters that on still other general contracts it paid for obstruction removal in accordance with the theory it now advances; but at the hearing it did not offer detailed payment records as proof. The Department's evidence at best only supports the proposition that it inconsistently paid for obstruction removal work under identical payment schemes.

In sum, substantial evidence in this record supports the conclusion that the Contract specifies that obstruction removal should be paid separately from and in addition to drilled shaft work at "a multiple of two times the bid price per linear foot for each linear foot of obstruction removed." Here, there were 1,387.40 LF of obstruction removed; two times the bid price is $1,000/LF. Middlesex should have been paid $1,387,400 ($1,000/LF X 1,387.4LF). To date the Department has paid Middlesex ½ of that amount, or $693,700. Thus the Department should pay Middlesex $693,700 ($1,387,400 (-) $693,700 = $693,700).

CONCLUSION

The Miscellaneous Claims should be dismissed because they were not made or appealed in accordance with the Contract.

For the reasons set forth above the Department should pay Middlesex $693,700.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

To:	Secretary John Cogliano, EOT
Through:	Commissioner Luisa Paiewonsky, MHD
From:	Stephen H. Clark, Administrative Law Judge
Date:	December 21, 2005
Re:	Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

Middlesex Corporation (Middlesex) a general contractor under MHD contract #99121 (Contract) to reconstruct Rte. 146 in Worcester appealed from the October 3, 2001 decision of the Claims Committee. The dispute arises over the payment for obstruction removal and rock socket drilling in the installation of drilled shaft columns for a bridge over the Blackstone River. Middlesex claims $708,311.34 for (1) an equitable adjustment under G.L. c. 30, s.39N for the cost of drilled shaft work and obstruction removal; (2) additional payment for "increased quantity" of obstruction found; and (3) additional payment due under Item 945.6 for obstruction removal and rock socket drilled.

The first two claims have no merit. (1) An equitable adjustment is barred because Middlesex deviated substantially from Contract requirements by deliberately deviating from the requirement to interpret pre bid and post bid soil test borings by the VIS method mandated by the Contract. (2) There is no basis for additional payment for increased quantities because the Contract did not include an engineer's estimate for the quantity of obstruction to be removed.

The third claim has merit. Item 945.6 required payment for obstruction removal "at a multiple of 2 times the bid price [for Item 945.6]" for each linear foot of "obstruction removed" or "socket [drilled] into rock." The Department paid Middlesex $290,667, which was at a multiple of "1" for such work, not at "a multiple of 2 times the bid price" required by the Contract. As a result the Department paid Middlesex only ½ the amount it was entitled to for obstruction removed and rock socket drilled.

Accordingly, the Department should pay Middlesex an additional $290,667.

INTRODUCTION

Middlesex Corporation (Middlesex) appeals the denial by the Massachusetts Highway Department (Department) on October 3, 2001 of claimed payment to Middlesex of $708,311.34 arising under Middlesex-MHD contract #99121 (Contract) for the work of removing defined obstructions (Obstruction Removal) and rock socket drilled (Rock Socket Work)[1] in the construction of drilled shaft bridge piers for a railroad bridge over the Blackstone River during the reconstruction of Rte. 146 in Worcester. The original price bid for the whole project was $19,266,099.20; the final authorized cost to date for the whole work is $40,585,927.36. Obstruction Removal work was performed by Middlesex's subcontractor Millgard Corporation (Millgard) engaged to construct drilled shaft foundations of cylindrical concrete columns to support the bridge superstructure. Middlesex prosecutes the Millgard claim here on a pass-through basis. I refer to the claimant as "Middlesex" throughout except where clarity requires the use of Millgard by name.

In substance Middlesex makes three claims: (1) for an equitable adjustment under G.L. c.30, s.39N (Section 39F) because of purported unforeseen conditions found at the site; (2) for additional payment due to "increased quantities" under Subsection 4.06 of the Standard Specifications Highways and Bridges (Standard Specifications); and (3) for additional payment due under pay Item 945.6 of the Contract for Obstruction Removal and Rock Socket Work on the theory that the Department incorrectly interpreted the language governing how payment should be calculated.[2]

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[1] Rock sockets provide firm footings in bedrock for drilled shafts.

[2] Middlesex's Statement of Claim raises a potpourri of other, generalized claims not tied by it to any provision of the Contract and not specifying any particular theory of recovery. In the interest of fairness I have addressed these miscellaneous claims. See infra, page 2, n.3 and page 30.

I conclude that no equitable adjustments are due under Section 39N and that no payment is due for increased quantities under Subsection 4.06.[3] I also conclude that the Department failed to pay Middlesex the correct amount under Item 945.6 for Obstruction Removal or Rock Socket Work because it misinterpreted the language of that Item. Correctly construed, after adjustment is made for amounts paid to date, I find that the Department should pay Middlesex the additional sum of $290,667.[4]

SUMMARY

Middlesex's claims for an equitable adjustment under Section 39N have no merit. The Contract documents required Middlesex to interpret both pre-bid boring logs and post bid boring logs by a method known as "visual identification of soils" (VIS) to assess site conditions, including the quantity and quality of obstructions that might be present. Middlesex willfully ignored this contract requirement; it admitted that it never performed the VIS analysis on pre-bid test boring logs before it bid $1,300/LF for Item 945.6,[5] or on post-bid test boring logs before it ordered materials or submitted its proposed drilling plan. These failures led Middlesex to bid and begin construction in ignorance of what the test boring logs plainly showed—that the site contained a high concentration of

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[3] I also conclude that all other stated (or implied) claims under the rubric of "reserved claims," "obstruction impacts," "added costs," "cost impacts," equipment "damage and repair," claimed "amendments" to the Contract, "extended schedule—holidays," "out of town pay premium—drill operator," "casing fabrication," "equipment failure," "extra work" and "owner related delays" are without merit. I recommend that all of these "claims" be denied since none were properly brought under the Contract. See infra, page 30.

[4] The Department did not introduce any as built or pay quantities at the hearing and did not challenge the quantities submitted in evidence by Middlesex. The quantities stated here are based on the evidence on the record, as stated infra, page 13.

[5] The drilled shaft work under Item 945 consists of two payment items, one for 4.5 foot diameter shaft [Item 945.45] and one for 6 foot diameter shaft [Item 945.6]. This dispute only concerns pay item 945.6.

boulders—as much as 40%--that could obstruct drilled shaft work. Middlesex's acts constituted willful, substantial deviations from specific Contract requirements.

Recovery under Section 39N is not permitted for two reasons: first, the fact that Middlesex admittedly deviated from the Contract's requirements in material ways prelude any equitable adjustment; and, second, even if not barred as a matter of law, the 44.9% obstruction rate found during Millgard's work[6] (or the higher 50% overall rate for the project) did not constitute a substantial and material deviation from the 40% obstruction rate the pre-bid Contract documents disclosed.

No adjustment in the Contract price should be made under Subsection 4.06 of Standard Provisions on the theory that quantities exceeded 125% of pre-bid estimated quantities. The actual quantity of drilled shaft in place did not exceed 125% of the 440 LF that the Department estimated. To the contrary, the as built total of 386.86 LF was actually less than the estimate.[7] Because the Contract did not contain an estimated quantity of obstruction to be removed Middlesex cannot claim any Subsection 4.06 equitable adjustment for increased quantities for that work.

The Department incorrectly paid Middlesex under Item 945.6. That item governs (1) payment for drilled shaft complete in place, (2) payment for Obstruction Removal, and (3) payment for Rock Socket Work. The payment scheme specified for Obstruction Removal and Rock Socket Work under Item 945.6 is separate and apart from the payment at the bid price for drilled shaft complete in place. The item provides "The

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[6] Millgard only installed 6 of the 8 drilled shafts. It then quit. Another subcontractor finished up the work. See Claim Notebook, "Introduction," page 1.

[7] Both the 440LF estimate and the 388.86 LF as built quantity of drilled shaft includes the length of Rock Socket Work, which is 56LF.

Contractor shall be compensated for obstructions at a multiple of 2 times the bid price [for Item 945.6] per linear foot for each linear foot of obstruction removed [5 feet below the ground].” See Item 945.6 at Contract page 252.[8] Middlesex bid $1,300/LF for Item 945.6.[9]

The Department paid for Obstruction Removal and Rock Socket Work at the incorrect rate of $1,300/LF. The correct rate is “2 times” the bid price, or $2,600/LF ($1,300/LF X 2). Applying the correct rate to Obstruction Removal and Rock Socket Work, the Department should have paid $435,734 for Obstruction Removed ($2,600/LF X 167.59LF) and $145,600 for Rock Socket Work ($2,600/LF X 56LF). It paid only ½ that amount. The Department should thus pay Middlesex an additional $290,667.

BACKGROUND

Drilled Shaft Work

The bridge that gave rise to this claim was to carry a railroad spur line over the Blackstone River. The bridge, W-44-155, required the installation of eight (8) six-foot diameter steel caissons, which, after the insertion of a “cage” of reinforcing steel, would be filled with concrete to construct completed drilled shaft foundations. Three drilled shaft piers each were required for the east and west abutments and two drilled shafts for the center pier.

The completed drilled shaft work was to be constructed and paid pursuant to special provision 945.6 under pay item 945.6 (collectively, “Item 945.6”) for which

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[8] The same payment scheme is separately set forth for Rock Socket Work: “Rock Sockets will be paid for at a multiple of two (2) times the bid price [for Item 945.6] for each linear foot of socket into rock.” Item 945.6, Contract, page 258.

[9] The office estimate for Item 945.6 was $1,500/LF. Other bidders offered $1,200 (Roads), $1,600 (Cashman) $1,600 (E.T. & L.) for the item.

Middlesex bid $1,300/LF. Item 945.6 also contained specific language governing the associated work of Obstruction Removal and Rock Socket Work, and set forth a separate payment scheme "at a multiple of 2 times the bid price" for that work. Contract, pages 252; 258.

The Contract defined Obstructions as "boulders that exceed volume of 1 cu. ft. [and other material] that cannot be drilled by the use of normal earth-drilling techniques or tools." Item 945.6 "Installation Methods," Contract, page 252. "The Contractor shall specifically log the depth, time and progress through to removal of the obstruction after designation as an obstruction by the Engineer." Id. "The Contractor shall be compensated for obstructions at a multiple of 2 times the bid price per linear foot for each linear foot of obstruction removed deeper than five (5) feet below the ground surface." Id.

The separate provision governing payment for Rock Socket Work states: "Rock sockets will be paid for at a multiple of two times the bid price per linear foot for each linear foot of rock socket into rock." Item 945.6 ("Measurement and Basis of Payment"), Contract, page 258.

The Contract documents estimated the total length of drilled shaft to be 440 LF inclusive of the length of Rock Sockets installed; thus, each drilled shaft was to be approximately 55 LF in length for each (440 LF /8). Actual length of each drilled shaft and each rock socket varied. The Contract documents did not provide a separate estimate of total length of Rock Socket, but the plans indicated a length of 7LF per shaft, for a total of 56LF (7LF X 8). The Contract documents did not provide a separate estimate of the total length of Obstructions but noted their existence in words, stating, "Boulders, and

concrete slabs in excess of 1 cu. ft. of volume were encountered in test borings drilled at the site." See Item 945.6, Contract, page 252. The record supports a finding that that language was inserted specifically to "warn" bidders that "boulders" [e.g. "defined" Obstructions] were present.

Pre-Bid Boring Logs

The Department distributed on the Contract plans to all bidders the results of the Department's three pre-bid test borings on logs clearly set forth. See e.g. Sheet 3 of 16 Bridge No. W-44-155. The actual soil samples could be viewed at the Department's laboratory.[10]

The VIS System To Interpret Logs

The Contract documents specified that the test borings were to be done in accordance with Subsection 190 of the Standard Specifications at the locations shown on the plans.[11] See Ex. 2. Subsection 190 requires, among other things, that a detailed boring log be created and described "in accordance with the Department's Visual Identification of Soils Table," known as VIS. See Subsection 190.62. The pre-bid boring logs in the Contract documents, properly interpreted by VIS, in fact revealed the nature of

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[10] The parties argued vociferously whether Middlesex had actually visited the lab. Middlesex testified under oath that it had inspected the soils from the test borings before it bid. The Department cast doubt on that testimony because the laboratory's sign-in log did not contain the signature of any Middlesex representative. As neither party called an employee of the laboratory to testify, no direct corroborating evidence was adduced. Because Middlesex plainly failed to adhere to the principal Subsection 190 requirements, it is unnecessary to decide the point.

[11] The record discloses that certain specialty contractors do the work of test borings as their principal line of work. Expert testimony established that test boring work requires subtle judgments of the test boring contractor to correctly "read" what is found deep underground and record those findings in ways that geotechnical engineers may later use. Among other things, test borings logs must be read consistently, using all the information disclosed in the logs. Test boring logs are recorded in a particular defined "language" that must be strictly understood by those who would wish to use it. See generally Standard Specification, Subsection 190. "You have to trust" the judgments made by the expert test boring contractor, which are recorded quite precisely in the technical language of the log, as the Department's expert, Mr. Ernst, explained. See Ex. 5.

the soil in the overburden in the vicinity of the drilled shaft foundation work in both words and drawings.[12]

Subsection 190.62 addresses the requirement of VIS in detail. See Subsection 190.62 (para 5). The Department has employed the VIS system for 20 years. The VIS method, properly employed, reasonably describes subsurface conditions. Multiple test borings at a site may be used together to yield reliable engineering data.

The Department's expert presented clear, cogent and credible opinion evidence on the subject of the VIS method and what the test boring logs demonstrated when correctly interpreted. Taken as a whole, Mr. Ernst's professional opinion was that the logs disclosed an "obstruction rate" of 40% at the site.[13] The basis of his opinion was that the pre-bid boring logs plainly revealed numerous "boulders" of sufficient size to be classed as defined Obstructions under the Contract. The VIS system in Subsection 190--through the use of key words, blow counts, actual refusals, rock fragments and notations—read together indicated that "boulders" might be present in quantities of 40% or more.

The Contract estimated a quantity of 440LF of drilled shaft. Applying the 40% obstruction rate to total length of drilled shaft to be installed (after adjusting for the length of rock socket) suggests the quantity of defined Obstruction that should be found

[12] It is unnecessary to precisely describe the test boring logs in this report since the record is clear and convincing that Middlesex simply ignored all test boring logs and never even attempted to apply the VIS system until the day of the hearing. Suffice it to say that a boring log includes, among many other things, a description of the depth and contents of various soil strata, soil types and "grain" size, what was encountered at various drilling depths, blow counts to punch through obstacles encountered (including defined obstructions), "coring" through obstacles, "practical refusal" (measured by excessive blow counts), and more. Detailed notes are also part and parcel of the log. Defined Obstructions are sometimes noted by name and sometimes inferred by proper reading of the logs.

[13] An obstruction rate is a matter of opinion as well as a matter of calculation. A rough calculation of an obstruction rate is found by dividing the total length of obstructions found by the total length of the test borings through overburden. But judgment must be exercised as well, since the totality of information contained in the logs, experience in like environments, and geotechnical expertise in soils etc. all bear on the professional conclusion.

at the site. Based on the boring logs and expert opinion of what the logs showed by the VIS method, 40% of the total estimated length of drilled shaft (minus the 56 feet of rock socket) suggests that 154 LF of total defined Obstructions could be present (440LF (-) 56 LF = 384 LF X .40). In fact, 167.59 feet of obstructions were encountered out of a total length of 332.86 drilled shaft (net of rock socket), showing a rough mathematical obstruction rate of 50% (167.59/332.86). [14]

Middlesex's Actions

Middlesex did not use the VIS system required by Subsection 190.62 to derive an obstruction rate before it bid. Middlesex admitted (through Millgard's corporate officer Mr. Coleman) that it did not in fact analyze any of the pre-bid boring logs by the VIS method. [15] Nor did Middlesex develop an obstruction rate using the results of a VIS analysis of the pre-bid boring logs. Instead, Middlesex derived an obstruction rate by applying its own method. That method was to use only the length of "cored" boulders (Core Method) to derive an obstruction rate.[16] The Standard Specifications did not approve the Core Method. Middlesex never sought Department approval to use the extra-contractual Core Method.

By using only "cored" boulders Middlesex derived an obstruction rate of 4.5% from the pre-bid boring logs. It asserted repeatedly at the hearing that, based on its

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[14] Millgard abandoned the drilled shaft work after completing 6 of 8 shafts. The obstruction rate on its portion of the work was 44.9%. See Claim Notebook, "Analysis of Obstructions," page two (106.4 feet of obstructions encountered in 237.2 feet of overburden).

[15] Mr. Coleman also admitted at the hearing that he was unfamiliar with the VIS method and that Millgard had not engaged any geotechnical expert before it bid. Another Millgard employee, Mr. Cardoza, admitted that he gave "no weight" to the pre-bid test boring logs because he thought the method unreliable.

[16] "Coring" through an obstruction is like "coring" an apple; the result is a "core" sample obtained in cylindrical form.

experience of 40 years "throughout the world," only an obstruction rate derived by the Core Method could accurately calculate an obstruction rate from test borings. Middlesex testified that drilled shaft work was always a risk: "We always take a risk, and we either get it very right or very wrong," Mr. Cardoza said. Mr. Cardoza admitted that by not applying the VIS method the company was taking a risk in submitting a bid.

Post-Bid Borings

The Contract required that, before the drilled shaft contractor made shop drawings, mobilized, or started the drilled shaft work, it make additional post bid test borings.[17] See Contract, page 97. The additional borings, "shall conform [] to Section 190" and "shall be taken before developing shop plans for reinforcement to determine rock elevations [at the abutments and center pier]." Id. The Contract provided: "…these additional borings shall be taken before reinforcing steel for the drilled shaft is ordered." Contract, page 97.

Expert testimony established that the VIS method applied to the post-bid boring logs showed an "abundance" of "boulders" and an undulating bedrock surface. Testimony of Mr. Ernst. It also showed that certain drilled shaft columns needed to be marginally longer than shown on the plans to reach bedrock.

Middlesex's Actions

Middlesex did not employ the VIS method to analyze any post bid test boring at any time. Middlesex in fact performed post bid borings "just prior to the start of drilled shaft production work." Testimony of Mr. Coleman. It ordered steel and made shop

[17] The text of Items 191 and 193 provides, "Additional borings, as shown on the plans, shall be taken before developing the shop plans for reinforcement to determine rock elevations at the following locations [ ]; three additional borings, one per pier and abutment … shall be taken before reinforcing steel for the drilled shafts is ordered." The borings were done on May 6, 1999.

drawings before it performed its own Core Method analysis. Statement of Claim, Sheet Q-10, #4.

Middlesex erroneously assumed that the post bid borings were necessary only for the purpose of verifying the bedrock quality and condition. Testimony of Mr. Coleman. Middlesex admittedly ignored the Contract requirement that the calculation of bedrock elevations, the making of shop drawings and the ordering of reinforcing steel and casings all were to be done after the post bid borings had been made and analyzed. Id. The Department approved without comment Millgard's drilling plan on April 29, 1999. Middlesex performed its post bid test borings on May 6,1999.

Findings

Middlesex submitted to the Department for approval its drilling plan, ordered steel and mobilized its forces without first analyzing the post-bid borings.[18] Middlesex's failure to adhere to the post bid test boring and other task sequencing requirements led it to adopt a construction method (the "vibratory hammer method") that it would later have to modify.[19] Statement of Claim, Q-10 #5. The installation technique it selected was inappropriate for a site with many large, defined Obstructions.

Middlesex's failure to properly estimate the quantity of obstructions found in the post-bid boring logs according to the VIS method compounded its failure to properly analyze the pre-bid borings and together ultimately caused its failure to properly determine the shape of the undulating bedrock, the length of certain drilled shafts, the

[18] It used the Core Method to analyze the post bid boring logs and found a 19% obstruction rate, but this apparently was not done until after it had filed its claim. See Claim Notebook, "Analysis of Obstructions (November 10, 1999)."

[19] Millgard intended to use a permanent steel casing below a temporary top casing and to drive the permanent steel casing by means of a vibratory hammer.

correct amount or size of material to be ordered or the quantity of Obstruction to be removed.

Middlesex's deliberate refusal to use the VIS method to analyze pre-bid and post bid boring logs before it chose an installation method was the cause of construction delays, broken tools, underestimating quantities and the need to alter its construction methods.

Performance

It is unnecessary to detail the difficulties Middlesex encountered during performance of the drilled shaft work. Millgard performed drilled shaft work from July 30, 1999 through February 4, 2000 and completed 6 of the required 8 drilled shafts. It then quit the work.[20]

Millgard characterized the work it did as fraught with difficulty, mainly because of the need to remove Obstructions encountered. Shaft by shaft, as the work progressed, Millgard encountered work it considered "extra" as a result of Obstructions encountered at the site. It repeatedly characterized the conditions it found "unexpected" and "unforeseen."

Among other things, Millgard experienced repeated refusals, "unanticipated" need to remove obstructions, obtain additional drilling equipment (and casings), repair equipment, obtain additional forces, change installation methods, and the like. Other difficulties encountered include "unanticipated conditions" of steeply sloping bedrock, differing rock type and hardness, radical changes of bedrock elevations over short

[20] Millgard's Statement of Claim recites: "On February 4, 2000 Millgard stopped all operations because of the financial stress caused by the extra effort and materials required to remove the obstructions…. Middlesex elected to issue a notice of termination to Millgard and contract the remainder of the work with another firm."

horizontal distances, and “significant confusion” with the identification of the top of bedrock due to large boulder obstructions immediately above.[21]

On August 9, 1999 Millgard notified Middlesex of its claim for “unanticipated conditions” at the site. At that time it had been on the job for nine days and was working on the 1st shaft. Thereafter, Millgard asserted that all job difficulties it encountered at the site were the result of “unforeseen conditions.” The Department does not contend that Middlesex failed to timely notify the Department of the “pass-through” claim.

On October 29, 1999 Middlesex submitted a revised installation procedure to the Department for approval.[22] As detailed below, Middlesex then made three claims for “extra work” totaling $326,064.82 on December 10, 1999, and an additional claim for “equipment repair for $21,166.40” on December 23, 1999, all on the theory that the conditions found at the site were “unforeseen.” The District, recognizing the fact that Millgard was proceeding with the work under protest, timely ordered time and materials records kept.

The Department’s geotechnical experts investigated the site and reviewed the information available at the time of the bid while Millgard continued its work. They determined that the information available at bid time was representative of conditions Middlesex actually encountered during construction. The Department reported the results of its investigation in writing to Middlesex on February 9, 2000.

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[21] Among the additional woes Middlesex attributes to “unforeseen” conditions are: “mis-location” of permanent casing; damage to casing bottoms requiring extraction and replacement; driving equipment damage and breakdown; “excessive” drilling tool repair; revision of the drilled shaft excavation procedure.

[22] The new method required a larger diameter top casing and a secondary casing, which would better facilitate removal of obstruction and placement of the permanent steel casing to bedrock.

The quantities of work performed for Item 945.6 purposes asserted in Middlesex's Statement of Claim—and not disputed by the Department on the record--are:

Estimated

Engineers Estimated Quantity Item 945.6	440 LF

As Built

Drilled shaft through overburden	332.86 LF
Rock socket drilling	56.00 LF

Quantities For Payment Purposes

Drilled Shaft (LF)	332.86 LF
Obstruction Removal	167.59 LF
Rock Socket Drilling	56.00 LF

The Middlesex Claim

In substance, Middlesex's claim for "unforeseen" conditions is comprised of costs due to (a) breakage to tools and drill equipment repair cost; (b) damage to vibratory hammer requiring replacement; (c) additional trucking cost to retool-extend permanent casing lengths and drill platform; (d) "extended overheads due to schedule extension"; and (e) additional materials--"rock teeth." See Statement of Claim at Q-10 #6. In addition to its claims for (1) equitable adjustment due to unforeseen conditions and (2) payment for increased quantities and (3) correct payment under Item 945.6, Middlesex's Statement of Claim purports to reserve still other claims.[23]

[23] It states: "The total additional cost to Millgard for [the reasons asserted in its principal claims] amounted to $708,311.34 not including other impacts and indirect expenses, the rights to which are reserved in the event an equitable adjustment is not made. Additional costs associated with harder rock drilling have not been included either; rights are also reserved." I recommend summary denial of both these "reserved" claims. The record nowhere shows that Middlesex properly made either such claim in conformance with Subsection 7.16. Failure to comply with notice, claim and adjustment provisions of the contract precludes recovery. See Lawrence-Lynch Corp. v. Department of Environmental Management, 392 Mass. 681, 686 (1984) (failure to make required filing bars claim).

The Statement of Claim is approximately 40 (unnumbered) pages in length. In form the claim consists of the Department supplied Statement of Claim (2 pages) that was signed but not completed. For information the Department required the Statement of Claim refers the reader to other referenced documents and attachments. The referenced documents are attached to the Statement of Claim in ten "parts" (Parts); those Parts also contain attachments. Following the last, tenth Part, Middlesex appends additional attachments, A through L, with no statement of their relevance or utility. Middlesex makes no clear, concise or cogent statement of the whole claim in the Statement of Claim.

Middlesex's Statement of Claim also includes by separate attachment a 600 notebook, in ten sections (Claim Notebook).[24] The Claim Notebook itself purports to state new claims. The Statement of Claim and Claim Notebook are not cross-referenced. Nothing in the text in the Claim Notebook asserts the basis of the claims included or explains the relevance of the voluminous documents supplied. The claims include "changed conditions-misc.," "owner related delays," "request for time extensions."

The administration of Middlesex's claim proceeded as follows. On December 17, 1999 the District denied all claims submitted to date because (1) the contract contained unit prices for all work; and (2) obstruction removal was to be paid for as specified under Item 945.6. On February 9, 2000 the District denied a December 30, 1999 request for extra work as a "changed condition" on the basis of a review of the site and "the [Department] information available at bid time," finding "this information is

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[24] The sections are: (1) Introduction; (2) Chronology By Location Summary; (3) Change Order Request Summary; (4) C.O. Request Supporting Documentation; (5) Obstruction Removal; (6) Sloping Rock & Rock Profile Fluctuations; (7) Misc.; (8) Owner Related Delays; (9) Request For Time Extensions; and (10) Back Up Cost Support.

representative of conditions encountered during construction of the shafts." On August 7, 2001 the District forwarded the claim to the claims committee "with a recommendation of denial" based on the reasons stated in the District's December 17, 1999 and February 9, 2000 letters.

On October 3, 2001 the Claims Committee, under the signature of the Department's Chief Engineer, rejected the claim, stating:

> The boring data, core samples and adjacent MHD contracts all indicate an abundance of boulders in the area. Geotechnical reports also indicate the presence of an undulating bedrock surface. The Department provided a well-defined scope of work for pre-drilling the shafts and will not participate in any additional costs perceived by your company.

The Appeal

Middlesex filed a notice of appeal in this office on October 9, 2001. This office requested on November 14, 2001 that it file a Statement of Claim, which was in fact done on August 22, 2002.

A hearing was held on this matter on March 6, 2003. Present were

Peter Milano	Administrative Law Judge
David Skerrett	Middlesex
David B. Coleman	Millgard (Vice President)
Edmund J. Cardoza, Jr.	Millgard
Helmut Ernst	MassHighway
Isaac Machado, Esq.	MassHighway

At the hearing five exhibits were entered into evidence:

Ex. #1	Contract #99121
Ex. #2	Middlesex Statement of Claim
Ex.#3	Claims Committee Decision (10/3/01)
Ex. #4	Record of Visitors To MHD Soils Laboratory
Ex. #5	MHD Visual Identification of Soils

Judge Milano took the matter under advisement. In 2003 Judge Milano resigned and was succeeded by Acting Administrative Law Judge John J. McDonnell. On

September 4, 2003 Millgard submitted a post-hearing memorandum dated July 31, 2003 setting forth an analysis of its claim, without legal analysis. Neither Judge Milano nor Acting Judge McDonnell prepared a report or recommendation.

On March 1, 2004 the undersigned was appointed Administrative Law Judge. On July 21, 2004, through St. 2004, c. 196, s. 5 (Act), the Legislature abolished the Board of Highway Commissioners and conferred its prior functions on the Secretary of Transportation (Secretary) and the Commissioner of the Department (Commissioner). See G.L. c.16, s. 1(b), as appearing in the Act. This report and recommendation is made through the Commissioner to the Secretary.

DISCUSSION

Differing Site Condition Claims

Section 39N provides, in skeletal form[25]

> If, during [] the work, the contractor [] discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents [] the contractor [] may request an equitable adjustment in the contract price [for that part of the work]. A request for such an adjustment shall be in writing and [] delivered [] as soon as possible []. Upon receipt [] the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans [] and are of such a nature as to cause

[25] Section 39N reads, in pertinent part, "If, during the progress of the work, the contractor [] discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents [] the contractor [] may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim as soon as possible after such conditions are discovered. Upon receipt [] the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans [] and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase [] in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price…."

> an increase or decrease in the cost of performance of the work or a change in the construction methods [] which results in an increase [] in the cost of the work, <u>the contracting authority shall make an equitable adjustment</u> in the contract price….[Emphasis added.]

Generally, Section 39N provides for two types of equitable adjustment: Type I, where the site conditions differ "substantially or materially" from what is shown on the plans and contract documents; and Type II, where the conditions found differ "substantially or materially" from those "ordinarily encountered" and "generally recognized as inherent" in the work shown on the plans. Middlesex makes both a Type I and a Type II claim here.

<u>Positions of the Parties</u>

Middlesex bases its Type I Section 39N claim on the "fact" that the three pre-bid boring logs revealed an obstruction rate of only 4.5% at the site. Since the actual obstruction rate during construction was approximately 50%, Middlesex argues, the plans and Contract documents misled it to the extent that (a) it did not know the obstruction rate or the quantity of obstructions to be anticipated; (b) it had to revise its planned construction methods, increasing its costs, (c) it was forced to order new and additional materials, (d) it damaged or destroyed its construction equipment; and (e) it had to pay increased labor costs due, among other things, to costly delays in prosecuting the work. All these factors resulted in quantifiable increased costs to Middlesex of $708,311.34, it says.

The Department responds that the unknowns, difficulties and additional costs of which Middlesex complains were all brought about by Middlesex's own failures. Specifically, the Department contends that Middlesex failed to follow express Contract

requirements (a) to use the VIS system to interpret the three pre-bid logs that in fact demonstrated an obstruction rate of 40%, and, (b) to use the VIS system to interpret the post-bid boring logs before it made shop drawings, ordered steel or determined its drilling plan.

Middlesex bases its Type II Section 39N claim solely on the oral opinion of Millgard's corporate officer that, in a working lifetime of 40 years performing drilled shaft work "all over the world," he had never encountered the volume of obstructions encountered here. The Department responds that such an opinion is a mere belief and not a proper basis to sustain a Section 39N claim.

Analysis

Middlesex gave its first notice to the Department of "unforeseen conditions" on August 9, 1999, just days after it began the work. It summarized its claimed extra costs on December 13, 1999.[26] As Section 39N contemplates, the Department made an investigation of the site and of the information available to Middlesex when it bid and on February 9, 2000 found no equitable adjustment was warranted.

I conclude that the Department's investigation correctly concluded that the conditions found at the site did not as a matter of fact differ substantially or materially from the Contract plans and documents. After a thorough review of the claim, the evidence adduced at the hearing and the contract documents I think substantial evidence on the record fully supports the ultimate finding that Middlesex in fact failed to review or take notice of the pre-bid or post bid boring logs in the manner required by the Contract.

[26] It is unnecessary to determine whether these notices fulfilled the notice requirement of Section 39N since the Department did not contest the validity of the various "notices" given. See generally, Sutton v. MDC, 423 Mass. 200 (1996).

See New Boston Garden v. Board of Assessors of Boston, 383 Mass. 465, 466 (1981). I conclude that such failures preclude any recovery under Section 39N.

Middlesex/Millgard candidly admitted at the hearing that it had not used the VIS system required by the Contract to analyze soils or assess the quantity of obstructions that might be found.[27] The record is not ambiguous: Middlesex did not perform the VIS analysis on either the pre-bid or post-bid boring logs. It used an unapproved method to obtain a 4.5% obstruction rate; and it inconsistently applied its own method so that an unwarranted low-ball result was obtained.[28]

The Department, by contrast, consistently applied the VIS method. Its expert's testimony was convincing: properly used, the VIS method—combined with the application of professional judgment based on boring logs and soil samples—is an adequate means to obtain an acceptable obstruction rate that fairly indicates what the site might contain. The obstruction rate of 40% argued as correct by the Department is supported by credible expert testimony based on the data in the boring logs. The Department's opinion testimony on the VIS method was credible and unrebutted.

I think that the Department's VIS analysis of the boring logs, properly interpreted, supports its conclusion that an obstruction rate of 40% at the site was in fact disclosed in the Contract documents on which bidders relied. Middlesex's own records show that the actual obstruction rate in the six drilled shafts installed by Millgard before it abandoned the work on February 4, 2000 was 44.9%, a number materially identical to that yielded by

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[27] Nowhere in the Statement of Claim does Middlesex contend that it in fact reviewed the pre-bid boring logs in accordance with the VIS system.

[28] The first document it produced to support its principal contention--that it used a 4.5% obstruction rate from a "boulder-cored" analysis before it bid--is dated November 10, 1999, long after performance began.

the VIS method. See Claim Notebook, Analysis of Obstruction (November 10, 1999), page 2.[29]

Middlesex argued at the hearing that the Department's use of the VIS method did not suffice to accurately inform bidders about the quantity, type or frequency of obstructions. Its argument was based on the opinion of a Millgard officer who admitted he did not know how to use VIS. I think substantial evidence on this record established that the VIS method is reliable and accurate. However, whether or not Middlesex's preferred Cored Method is a better way of determining an obstruction rate is beside the point.

The point is that the Contract required use of the VIS system and clearly referenced Subsection 190 requirements in the Contract documents. The Department was entitled to specify a uniform system to interpret test borings; it could and did require the use of VIS. Middlesex never asked the Department to approve a different method. Unless it did so, recovery is barred. See G.L. c. 30, s.39I ("No willful and substantial deviation from said plans and specifications shall be made unless authorized in writing by the awarding authority…."); D. Frederico v. Commonwealth, 11 Mass. App. Ct. 248 (1981) (untimely filing of claim bars right to extra compensation).

Whatever the efficacy of the Cored Method, the fact remains that Middlesex admitted that it willfully and knowingly failed to utilize the required VIS method. The

[29] "To date, six of the eight shafts for the subject bridge have been drilled through 237.5 feet of overburden wherein 106.4 feet of obstructions, 44.9% of the length of the overburden, were encountered."

evidence is uncontradicted that Middlesex did not even know of the Contract's VIS system before it bid and made no attempt to hire anyone that did.[30]

Substantial evidence also supports the finding that Middlesex's deviations were both deliberate and willful. Instead of attempting to apply the VIS method, Middlesex ignored it. Instead of integrating its preferred "coring" method with the VIS requirements, Middlesex chose its own method, which it then proceeded to apply inconsistently. It contends that the VIS system was unreliable but admitted it never hired a geotechnical engineer to actually apply VIS.[31] It admitted that it ordered caissons and mobilized for the work before looking at the post-bid test borings.

Middlesex's deliberate failures determine the outcome of its Section 39N claims. It is the settled law of the Commonwealth that contractors on public contracts must perform the work without substantial deviation from the plans and specifications. See G.L. c.30, s.39I; Albre Marble & Tile Co. v. Goverman, 353 Mass. 546, 549 (1968). The Standard Specifications required that bidders examine the plans and specifications; as a matter of law bidders are deemed to know what the plans contain. See Subsection 2.03 of the Standard Specifications. Here, a "competent mechanic or contractor" reading the plans would have known without doubt that test boring logs were to be interpreted by the VIS method set forth in Subsection 190 and referenced documents. Id.; See S. D. Shaw

[30] At the hearing Mr. Coleman and Mr. Cardoza, an officer and employee of Middlesex's subcontractor Millgard, respectively, were unclear about the meaning of the "key" words employed by the VIS system to register in the boring logs the relative amounts of secondary materials found. Compare supra, page 6, n.11.

[31] Mr. Coleman of Millgard admitted that he was not qualified to apply VIS and was not familiar with it. He testified that he refused to depend on "illegible" boring logs. Mr. Cardozo of Millgard admitted that he gave the comments in the boring logs "no weight" in preparing the bid and that he was entitled to "disregard" the boring logs based on his experience in drilling all over the world. Middlesex's attempts at the hearing to discredit the results of both pre and post bid boring logs by challenging the VIS method are not determinative of the outcome here in light of the unrebutted fact that Middlesex in fact wholly ignored the logs both before it bid and before it began the work.

& Sons, Inc. v. Ruggo, Inc., 343 Mass. 635, 640 (1962) (contractor bound to follow specific contract provisions).

"If any claim arises from the contractor's willful and substantial deviation from the plans and specifications, there can be no recovery without a showing of compliance with the requirements of G.L. c. 30, 39I." Glynn v. City of Gloucester, 9 Mass. App. Ct. 454, 461 (1980). Middlesex never obtained an approval in writing from the Department that would excuse its deviation from the Contract in accordance with G.L. c.30, s.39I. Accordingly, Middlesex is precluded from recovery.

Middlesex's Type II Section 39N claim—that the site conditions differed substantially or materially from those ordinarily encountered and generally recognized as inherent in drilled shaft work—fails for the same reason, namely, the deliberate deviation from the Contract's specifications. As a matter of law, a contractor may not recover on a Type II differing site condition claim if it knew or could have reasonably anticipated the condition. Southwest Eng'r Co. v. U.S., 206 Ct. Cl. 892 (1975). A separate ground for rejection of the Type II claim exists. Middlesex did not adduce any substantial evidence that tended to show what obstruction rate was "ordinarily encountered" in this type of work. There is no "evidence such as a reasonable mind would find adequate to support a conclusion" of what is 'ordinarily encountered.' See New Boston Garden v. Board of Assessors of Boston, 383 Mass. 465, 466 (1981). Mr. Coleman's belief based on his experience worldwide is not a "rational articulable basis" to support a finding that a Type II condition existed. Id. at 473. Middlesex failed to present any relevant evidence of ordinary obstructions that are found in this part of the world—New England, central Massachusetts. The Type II claim fails for lack of proof.

The Increased Quantity Claim

Subsection 4.06 provides, in pertinent part,

> Where the quantity of a Unit Price pay item in this Contract is an estimated quantity and where the actual quantity of such pay item varies more than twenty-five (25) percent above or below the estimated quantity stated in the Contract, an equitable adjustment in the Contract Price shall be negotiated upon demand of either party.

Positions of The Parties

Middlesex asserts that the drilled shaft quantity exceeded the estimated quantity for drilled shaft by more than 125% and is so entitled to an adjusted Contract price under Subsection 4.06. [32] It also contends that the quantity of obstructions encountered at the site was 935% greater than the quantity indicated by its 4.5% obstruction rate applied to the 440LF of drilled shaft. See Claim Notebook, Analysis of Obstructions (November 10, 1999), p. 2.

Middlesex states that the relevant quantities to be compared for Subsection 4.06 purposes [see Statement of Claim Sheet Q-10, #4] are

Estimated	
Engineers Estimated Quantity Item 945.6	**440LF**
As Built	
Drilled shaft through overburden	332.86LF
Rock socket drilling (56 X 2)	112.00LF
Obstruction Removal (167.59 X 2)	335.18LF
Total	**780.04LF**

Middlesex compares 780.04 LF with 440 LF and derives (after an adjustment) an overrun of 230.04 LF, an excess more than the 125% tipping point.

[32] It also claims that the "as built" quantity overrun "provides additional support for a differing site condition whereas the Department relied on the subsurface data to determine pay quantities." Statement of Claim Sheet Q-10, #4. I do not agree. Middlesex uses Department quantities to measure the work.

The Department maintains that Item 945.6 provides a quantity estimate of 440LF pertains only to drilled shaft installed. Thus only 440LF (and no other number) can be compared with the "as built" quantity of drilled shaft in place, here 332.86 LF, which quantity is actually less than 440 LF. With respect to asserted increased quantities for Obstruction Removal, the Department points out that the Contract has no estimated quantity of a unit price pay item for that work. Thus, its says, Subsection 4.06 does not apply.

Analysis

I think Middlesex's contentions are without merit. To combine the "actual" 440 LF quantity estimated for the total of 8 drilled shaft with the "constructive" quantities used only for pay purposes--viz "at a multiple of 2 times the bid price" for Obstruction Removal and Rock Socket Work--is not a correct method to determine whether a Subsection 4.06 quantity limit of 125% has been exceeded.

The Contract estimate refers to an actual, measurable quantity: "The length of a drilled shaft shall be measured as the total length in place from the bottom of the shaft or rock socket [] to the limits shown on the plans." Item 945.6 "Method of Measurement," Contract, page 257. By contrast, the "112LF" quantity Middlesex lists for Rock Socket Work and the 335.18LF it lists for Obstruction Removal work are mere "constructive" quantities stated to fulfill the Contract's payment requirements for those items "at a multiple of 2 times the bid price." 112LF and 335.18LF are not actual quantities measured in the field.

The "constructive" number of LF does not measure actual quantities. Rather, it is a "construct," a fictitious LF number that, properly employed, yields correct payment for

Obstruction Removal and Rock Socket Work. To combine actual and constructive quantities in the manner that Middlesex advances is as logically valid as it would be to combine, say, 5 apples with 6 kangaroos and obtain a result of 11 apples. Middlesex's calculations for its Subsection 4.06 quantity claim is fundamentally flawed since it adds actual and constructive figures that cannot be logically combined.

Middlesex does not disclose how it calculated the claimed 935% increase in quantity for obstruction removal. It merely refers to the reader to Table I contained in its Claim Notebook following its "Analysis of Obstructions" (November 10, 1999). That document does not explain the method used and so is not credible evidence to support Middlesex's Subsection 4.06 claim.[33]

The Department is also correct in its contention that, because the Contract contained no separate bid pay item for Obstruction Removal—and thus no Engineer's estimate—, Subsection 4.06 can not apply. See Subsection 4.06.

I think the fact that Middlesex willfully ignored the test boring data provided by the Department concerning the nature of the site also precludes any recovery under Subsection 4.06. Renaming an impermissible "unforeseen conditions" claim as a claim for "increased quantities" does not change its essential nature. See Reynolds Bros. v. Commonwealth, 412 Mass. 1 (1992) (re-labeling precluded claim does not make it cognizable). The Subsection 4.06 claim has no merit.

The Claim For Payment Under Item 945.6

The gravamen of the Obstruction Removal and Rock Socket payment claim is that the Department failed to correctly calculate payments due Middlesex under Item 945.6.

[33] Middlesex argued at the hearing that the Contract "should" not apply to "unlimited quantities" of obstruction encountered, but cited nothing to support that contention.

Middlesex contends that the Department should have paid at the rate of $2,600/LF for each linear foot of Obstruction Removed or Rock Socket drilled, which is double the bid price of $1,300/LF.[34] The bid price for Item 945.6 was $1,300.00; the Department's certified quantity of the total number of LF of Obstruction Removed is 167.59LF. The length of Rock Socket drilled is 56LF.

The Applicable Legal Standard

"When the words of a contract are clear, they alone determine the meaning of the contract …." Merrimac Valley Nat. Bank v. Baird, 372 Mass. 721, 723 (1977). An unambiguous contract must be enforced according to its terms, which are construed in accordance with their ordinary and usual sense. See Schwanbeck v. Federal Mogul Corp., 412 Mass. 703, 706 (1992) and Edwin R. Sage Co. v. Foley, 12 Mass. App. Ct. 20, 29 (1981).

The contested language in Item 945.6 governing Obstruction Removal[35] payment is

> The Contractor shall specifically log the depth, time and progress through to removal of the obstruction after designation as an obstruction by the engineer. The Contractor shall be compensated for obstructions at a multiple of 2 times the bid price per linear foot for each linear foot of obstruction removed deeper than five (5) feet below the ground surface.
>
> Drilled shaft will be paid for at the Contract unit price per linear foot of each shaft complete-in-place.

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[34] Middlesex asserts "The Department to date has paid only one times the unit price, leaving a balance of 167.59 feet at the unit price of $745.00 per linear foot, for a balance due of $124, 854.55." Ex. 6 at page 6 attached to Middlesex submittal dated July 31, 2003 (Coleman letter to Skerrett, October 30, 2002). The unit price of $745.00 apparently refers to the price in the subcontract between Middlesex and Millgard.

[35] The language governing payment for Rock Socket drilling is: "Rock sockets will be paid for at a multiple of two (2) times the bid price per linear foot for each linear foot of socket into rock." As the principles governing the interpretation of the payment provisions of Rock Socket and Obstruction Removal are identical I principally analyze in detail the provision for Obstruction Removal. The result of the analysis applies to both.

Positions of the Parties

Middlesex contends that the meaning of the words "shall be compensated for obstructions at a multiple of 2 times the bid price per linear foot for each linear foot of obstruction removed []…." is obvious on its face. That is, the Department should pay 1 times the bid price for drilled shaft work, and pay, separately and in addition, 2 times the bid price for obstructions "for each linear foot of obstruction removed."

The Department contends that Item 945.6 means that Obstruction Removal should be paid at 2 times the bid price, which means, it says, one multiple is for payment of drilled shaft and the second multiple is for payment of obstruction removal: ergo Obstruction Removal is paid at a multiple of 2 times the bid price.

Analysis

I note at the outset that the legal analysis of the precise question to be addressed here has been addressed at length in a companion report and recommendation submitted by Middlesex in a claim in MHD Contract #98182. The same result is reached in both reports and the reader is referred to the report in Middlesex #98182. I conclude that the Department failed to interpret the payment provisions of Item 945.6 correctly.

The purpose of the special provision and Item 945.6 is to pay for all work needed to complete installation of 8 supporting drilled shaft columns. One component of that work is constructing the drilled shaft itself, which is paid for at the bid price of $1,300/LF. Measurement of LF for payment of drilled shaft is expressly set forth:

> The length of a drilled shaft shall be measured as the total length from the bottom of the shaft or rock socket into competent bedrock with a depth as indicated on the plans and to the limits shown on the plans. Item 945.6, "Method of Measurement and Basis of Payment," Contract, page 257.

Payment for drilled shaft work is also expressly addressed:

> Drilled shaft will be paid for at the Contract unit price per linear foot of each shaft complete-in-place. Item 945.6, "Method of Measurement and Basis of Payment," Contract, page 258.

The text within the measurement and payment provision following the language quoted sets forth with specificity the tasks included within the payment language of the drilled shaft unit price. Among other things, the list of tasks includes "submittal, excavating, removing excavated material off site"; "furnishing, placing and extracting" (1) casing, (2) bentonite slurry, (3) reinforcing steel and concrete "as required"; "backfilling"; "testing and quality control"; and "for all labor, materials, equipment, tools, accessories and incidentals necessary to complete the work." The description plainly intends to list all work of every kind needed to complete Item 945.6 except Obstruction Removal and Rock Socket Work. Those jobs are not listed. Instead, unlike the tasks enumerated exhaustively within payment for drilled shaft work, Obstruction Removal and Rock Socket Work are each the subject of particular, separate and special payment language specified elsewhere in Item 945.6. Contract, pages 252 and 258.

The fact that only Obstruction Removal and Rock Socket Work are singled out within special provision 945.6 for a separate and unique payment scheme has legal significance. It demonstrates that the Contract intends that such work—which is difficult, time consuming and expensive—is purposefully subject to a discrete payment scheme. That is why, for example, the separate payment scheme addresses with particularity special conditions that must be met before the additional payment scheme applies: "[t]he Contractor shall specifically log the depth, time and progress through to removal of the obstruction after designation as an obstruction by the engineer." This language effectively sets forth a stand alone measurement and payment method provided only for

defined Obstruction Removal. Only after potential obstructions are investigated and designated does the "multiple" payment provision apply at all; and only then if the time and progress of removal work is specially logged.

Payment for Obstruction Removal is to be made at a rate particularly derived as "a multiple of 2 times the bid price per linear foot [for Item 945.6]." There is no doubt that in the context of Item 945.6 that the words "bid price" refers to the price Middlesex "bid" for "drilled shaft pier column" (here, $1,300/LF). "A multiple of 2 times the bid price [of $1,300] per linear foot" can only be $2,600/LF. That is the "rate" the Contract sets for Obstruction Removal work.

The amount of payment is determined by applying the rate to the correct number of LF of Obstruction Removed. The Department certified the total of Obstruction Removed in the Contract to be 167.59LF. Thus, the correct payment is $2,600 X 167.59, or $435,734. The quantity of Rock Socket Work is 56LF. Thus, the correct payment is $2,600 X 56, or $145,6000.

While the structure and context of Item 945.6 must be read together, the phrase "for each linear foot of obstruction removed" is particularly telling. That language signifies the unit of measurement to which the stated rate is to be applied, namely, the number of linear feet "<u>of obstruction removed</u>."[36]

In sum, the plain meaning of the critical sentence thus reads in context "The contractor shall be compensated for obstructions [removed] at [a rate calculated as] a multiple of two times the bid price [or, 2 X the bid price/LF for Item 945.6] per linear foot for [e.g. times] each linear foot of obstruction removed."

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[36] The Rock Socket Work payment scheme also contains clear language that specifies to what measured thing the payment rate should apply: "Rock Sockets will be paid for at a multiple of two (2) times the bid price per linear foot for each linear foot <u>of socket into rock</u>." Emphasis added.

The Department's position ignores the plain text of Item 945.6 and is at odds with its plain language. There is simply no support within the text of Item 945.6 for the Department's position that one multiple of payment for Obstruction Removal is subsumed within the payment for the principal work of constructing drilled shaft. I can not find either textual or contextual support for that contention.

The Miscellaneous Claims

Middlesex purports to have filed a number of "miscellaneous" claims. See supra page 2, n. 3. I conclude that all the miscellaneous claims should be rejected.

Subsection 7.16 requires a contractor (1) to file a notice of claim within "one week" after sustaining injury or damage (Claim Notice), and, separately, (2) to file an "itemized statement" of the claim by the 15th day of the next month (Itemized Statement). Middlesex has not proved that it filed any Claim Notice or Itemized Statement for any of the miscellaneous claims within the time permitted. It is a fact that the miscellaneous claims were not filed until August 16, 2000, long after Millgard completed its drilled shaft work.[37]

Failure to "comply with the notice provisions" set forth in Subsection 7.16 "bars the contractor from relief." Marinucci Bros. v. Commonwealth, 354 Mass. 141, 144-145 (1968); accord Glynn v. City of Gloucester, 21 Mass. App. Ct. 390, 392-93 (1986) (claim for compensation "shall be forfeited" by failure to follow notice provision of Subsection 7.16). As a separate ground for rejection, I point out that none of the miscellaneous

[37] Millgard was terminated by Middlesex on February 4, 2000 for refusal to continue with the work. See supra page 3, n. 6.

claims specify the Contract provision under which they are brought, also a violation of the Contract. See Subsection 7.16.[38]

CONCLUSION

The Section 39N claims should be denied. The claims for increased quantities under Subsection 4.06 of the Contract should be denied. All "miscellaneous" claims should be denied. The "reserved claims" should be denied.

The Department should pay Middlesex $217,867 under Item 945.6 for Obstruction Removal.

The Department should pay Middlesex $72,800 under Item 945.6 for Rock Socket drilling.

Accordingly, the Department should pay Middlesex a total of $290,667 ($217,867 + $72,800).[39]

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

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[38] Insofar as Middlesex has filed a timely "change order request" [Nos.3384 and 3405] for "owner-related delay" I recommend that the Secretary exercise his discretion not to provide relief under Subsection 8.05. The claim for owner related delays was asserted as part of Middlesex's claim under Section 39N. As with all other parts of Middlesex's Section 39N claim, it has no merit.

[39] The dollar amount is predicated solely on the quantities proved by Middlesex on the record of the March 6, 2003 hearing. The Department did not contest the quantities that Middlesex offered as true. See supra, page 2, n. 4 and page 13.

To: Secretary Jeffrey B. Mullan, MassDOT
From: Stephen H. Clark, Administrative Law Judge
Date: April 8, 2010
Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

N.E.L., Inc. (NEL) seeks $16,814.92 for work that was apparently omitted from the pay items and specifications of contract #39741 for emergency repair of bridges in District 4.

The Contract provided that NEL take no advantage of an error in the plans or specifications and obliged it to "immediately notify the Engineer" of omissions.

NEL knew of the apparent omissions before it bid but did not notify the Engineer or take action that would have allowed the Engineer to correct errors and publish clarifications to all prospective bidders.

A contractor must inquire if he finds an obvious error. If a contractor fails to at least ask for clarification before bid he may not rely on the principle that errors, omissions and ambiguities may be held against the government drafter. Because NEL did not ask the Engineer for corrections but acted to take advantage of the omissions it believed existed it is barred from recovery. <u>John F. Miller Co., Inc. v. George Fichera Construction Corp.</u>, 7 Mass. App. Ct. 494, 499 (1979).

I recommend that NEL' s appeal be denied.

INTRODUCTION

N.E.L., Inc. (NEL) appeals from two decisions of the claims committee (Committee) of MassHighway,[1] which denied six claims arising under contract #39741 (Contract). The Contract was awarded to NEL on May 12, 2005 for emergency repair and maintenance of all bridges in District 4.

The Committee first denied NEL's claim for extra work of $2,231.25 for these tasks: (1) jacking and shoring of existing stringers; (2) highway guard removal and reset; (3) fence removal and reset; (4) temporary precast concrete median barrier; (5) cleaning of pier caps/abutments of debris left behind by other contractors. The Committee then denied extra work of $14,583.67 to (6) remove and reset guardrail and "Jersey" barriers.[2] The unpaid work is referred to as "Claimed Extra Work" or "Omitted Tasks."

NEL argues that the Claimed Extra Work was not specified in the Contract. Though the Omitted Tasks were necessary to perform the Contract, it argues the Contract specifications were defective because no plain language or separate bid pay item identified the Omitted Tasks, as had been done in previous District 4 emergency-maintenance bridge contracts. NEL points out that the Omitted Tasks were entirely absent from Special Provision 905.2, "Cement Concrete Masonry."

MassHighway argues that the Omitted Tasks were included within Special Provision 905.2 because they were "incidental" to cement concrete masonry work on the theory that it is not possible to excavate or replace concrete without them. MassHighway also contends that NEL can not claim extra work in any event because it failed before it bid to notify the Engineer

[1] On November 1, 2009, the Massachusetts Highway Department was reorganized as the Highway Division of the Massachusetts Department of Transportation (MassHighway). See G.L. c. 6C, s.40.

[2] Claims 1 through 5 were decided in the Committee's first ruling on March 6, 2006; claim 6 in the Committee's second ruling on December 17, 2006. The appeals are consolidated here.

of the obvious apparent omissions in the specifications, which Subsection 5.04 of the Standard Specifications (Subsection 5.04) requires.

I conclude that it is unnecessary to determine whether the specifications were defective or whether NEL performed extra work because NEL failed to adhere to the requirements of the Contract. Subsection 5.04 prohibited NEL from taking advantage of "any apparent error or omission in the plans and specifications" and placed on it the affirmative obligation to "immediately notify the Engineer" of errors or omissions it discovered so that the Engineer could make needed corrections or interpretations.

When NEL discovered before it bid that obvious tasks needed to excavate and replace concrete to perform bridge repair were apparently missing, it did not notify the Engineer. NEL prevented MassHighway from correcting obvious omissions or clarifying the intent of the Contract to all prospective bidders. Accordingly, NEL is barred from recovery. John F. Miller Co., Inc. v. George Fichera Construction Corp., 7 Mass. App. Ct. 494, 499 (1979).

BACKGROUND AND FINDINGS

NEL submitted the winning bid of $2,052,042 for the Contract to perform scheduled and emergency repairs on all bridges in District 4. The specific bridges in need of repair were not identified in the bid documents; bidders were notified that locations were to be stated at the preconstruction conference.

The Contract generally described the work to be performed as (1) removing deteriorated concrete from stem piers, pier caps, pier columns, wing walls, back walls and abutments; (2) replacing excavated concrete and damaged reinforcing steel with new materials, as specified; (3) replacing existing but damaged slope paving with cement concrete slope paving, as directed, and (4) providing related traffic control. Contract at A0081-1.

NEL and MassHighway disagree about what work is described (or not described) in Special Provision 905.2, "Cement Concrete Masonry."[3]

Special Provision 905.2 provides, among other things

> The work under this Item 905 consists of excavating existing areas, as identified by work order or as directed by the Engineer, and placing 30 Mpa, 10 mm, 425 kg cement concrete masonry of the excavated areas….

The Basis of Payment for Item 905.2 provides:

> All labor, excavation of existing reinforced concrete, materials including bonding grout, tools, equipment, engineering services and <u>incidentals</u> necessary to complete the work… [which] consists excavating existing areas, and placing… concrete… also consists of the removal and disposal of all deteriorated and spalled concrete located at the existing surfaces of the various substructure units. (Emphasis added.)

The Method of Measurement for Item 905.2 states the work "shall be measured by the cubic meter [of concrete], complete in place and accepted."

NEL is an experienced public contractor that has successfully bid and performed many MassHighway district-wide emergency bridge repair and maintenance contracts. NEL knew before it bid that the specifications of MassHighway maintenance contracts varied from district to district.

Mr. Galasso, a corporate officer of NEL, prepared NEL's bid. After reviewing the bid documents Mr. Galasso came to believe that bid items of six tasks--the Omitted Tasks--which had previously been separate bid items on District 4 emergency bridge repair contracts were

[3] The parties argue whether the Omitted Tasks were included in Item 905.2. Their dispute centers on the meaning of the word "incidental" found in Special Provision 905.2. NEL contends the Omitted Tasks can only be incidental to a unit price bid item when explicitly stated, since a "careful description of the work item [is] imperative." It says MassHighway's arguments are "patently untenable" because neither party knew whether the Omitted Tasks would be required at all or in what quantities. MassHighway counters that it intended that all work required to excavate and replace concrete was paid by Item 905.2 as contractors knew that work could never be performed otherwise.

entirely absent. Mr. Galasso noted that Item 905.2 paid for both excavation and replacement of cement concrete but did not expressly refer to any of the Omitted Tasks.

When preparing NEL's bid Mr. Galasso knew that excavating and replacing cement concrete under Special Provision 905.2 would necessitate in every instance NEL to perform some or all of the Omitted Tasks. Mr. Galasso believed that, because six pay items apparently had been omitted from the bid sheet and because that work was not particularly described in 905.2, NEL would be successful in a claim for extra work.

Before NEL bid Mr. Galasso telephoned three MassHighway employees he knew. The first was to the "contracts office." Mr. Galasso told the employee that he believed that unit price pay items for work specified in previous bridge maintenance contracts was apparently omitted from the Contract. The conversation consisted of "whether [pay items for the Omitted Tasks] were purposefully left out of the contract or I considered them a mistake," Galasso testified. According to Mr. Galasso the employee told him MassHighway would take Mr. Galasso's views "under advisement."[4]

Mr. Galasso then separately called two employees in District 4. Mr. Galasso told each that he considered the Omitted Tasks outside the Contract and thus extra work. According to Mr. Galasso neither employee told him whether the Omitted Tasks were included within "Cement Concrete Masonry" bid under Item 905.2.

Mr. Galasso did not make any contemporaneous record of his telephone calls. NEL did not write to MassHighway seeking clarification or explanation. NEL did not attempt to notify the Engineer of the apparent omissions in the specifications it thought existed. NEL did not submit a written question to MassHighway seeking clarification about the work included within

[4] Mr. Galasso testified he was not "absolutely sure" of whom he spoke to in the contract section, though he named the person he "normally" spoke to "when I have those problems."

Special Provision 905.2 or why the anticipated pay items for the Omitted Tasks were unexpectedly absent.

NEL submitted its bid on March 29, 2005. When NEL bid it believed that MassHighway would have to pay NEL extra for performing the Omitted Tasks.

On March 29, 2005 MassHighway opened and read contractor proposals. NEL submitted the lowest bid and was awarded the Contract on May 12, 2005. The notice to proceed was issued on May 26, 2005; the pre-construction conference held on June 3, 2005. On or before June 16, 2005 NEL notified District 4 that there were "missing" bid items in the Contract. On July 18, 2005 NEL began work.

On July 19, 2005 NEL requested a meeting with District 4 to discuss extra work orders "that have already become necessary." On July 28, 2005 NEL formally requested extra work orders for the Omitted tasks, which were denied by District 4 on August 10, 2005. On August 10, 2005, District 4 stated that the Claimed Extra Work was included within Item 905.2. On September 15, 2005, NEL submitted a written "claim" for extra work items "as they become required." The District denied the claim and the matter was forwarded to the Committee, which denied the claim. On May 3, 2006 NEL appealed the Committee's denial here.

On April 14, 2006, NEL notified the District that it claimed additional extra work of $14,583.67 for removal and reset of guard rail and temporary concrete barriers. NEL submitted that claim to this Office on that day. On August 25, 2006, this Office notified NEL that it had no jurisdiction over the claim because the Committee had not ruled. The Committee then heard NEL's claim for $14,583.67, denying it on December 26, 2007. NEL then timely appealed here.

The Hearing

All NEL's claims under the Contract were heard on September 29, 2008, as continued to October 3, 2008.

Present were:

Stephen H. Clark	Administrative Law Judge
Edmund Naras, Esq.	Assistant Counsel, MassHighway
Jane Estey, Esq.	Assistant Counsel, MassHighway
Prem Kapoor	Structure Maintenance Eng. (9/29/08 only)
Michael Deverix	Construction Engineer, District 4
John S. Davagian, II, Esq.	Attorney for NEL
Albert Enos	President, NEL
Michael J. Galasso	Vice president, NEL

The following exhibits were admitted into evidence.

Bench Exhibits

ALJ #1 Contract #39741
ALJ #2 Statement of Claim, May 3, 2006
ALJ #3 District Response to Statement of Claim, May 18, 2006
ALJ #4 Statement of Claim, February 8, 2007
ALJ #5 District Response to Statement of Claim, February 26, 2007
ALJ #6A Memo to Tanya Barros from Judge Clark, August 15, 2007
ALJ #6B Memo to Tanya Barros from Judge Clark, August 15, 2007
ALJ #7 Standard Specification Section 748 (1995 Metric)
ALJ #8 MHD Contract #41856

Exhibits of NEL

Ex. #1 Contract #39741
Ex. #2 Section 100 of Standard Specifications for Highway and Bridges (1995 Metric)
Ex. #3 Section 101 of the Metric Supplemental Specifications (12/11/02)
Ex. #4 Section 901 of Standard Specifications for Highway and Bridges (1995 Metric)
Ex. #5 Section 901 of Metric Supplemental Specifications dated December 11, 2002
Ex. #6 Bid List for Project No. 603678 (Contract #39741)
Ex. #7 Substructure List (06/03/05)
Ex. #8 NEL Statement of Claim 5/3/06
Ex. #9 NEL Statement of Claim 2/8/07
Ex. #10 MHD contract #99192
Ex. #11 MHD contract #99193
Ex. #12 MHD contract #55025

Exhibits of MassHighway

Ex. C-1 Section 700 of Supplemental Specifications (12/11/02) (1995 Metric)
Ex. C-2 Section 900 of Supplemental Specifications (12/11/02) (1995 Metric)
Ex. D-1 Construction Diary, Nat. Ass. of Women in Construction (1991 8th ed.)
Ex. E-1 "Wikipedia" Definitions for construction terms ("Falsework") as of 9/17/08
Ex. E-2 "Wikipedia" Definitions for construction terms ("Shoring") as of 9/17/08

NEL and MassHighway submitted post-hearing briefs.

DISCUSSION

NEL's duty to clarify errors and omissions in the specifications is expressly set forth in Subsection 5.04, which provides

> The Contractor shall take no advantage of any apparent error or omission in the plans or specifications. In the event the Contractor discovers such an error or omission he shall immediately notify the Engineer. The Engineer will then make such corrections and interpretations as may be deemed necessary for fulfilling the intent of the contract.

Generally, provisions such as Subsection 5.04 that obligate contractors before bidding to seek clarification of specifications are designed "to enable potential contractors (as well as the Government) to clarify the contract's meaning before the die is cast." Beacon Constr. Co. v. United States, 314 F.2d 501, 504 (Ct. Cl. 1963) (Beacon). Specifically, the duty to seek clarification during the pre-bid phase is a means of "preventive hygiene" to (1) resolve issues of interpretation and prevent post award disputes; (2) advance "the goal of informed bidding" by putting bidders on an equal footing and encouraging competitive bids based on equal information; and (3) deter a bidder who knows (or should have known) of obvious errors or ambiguities from making a low bid and then "crying 'change' or 'extra' " when the government disagrees with his interpretation after award. S.O.G. of Ark. v. U.S., 546 F.2d 367, 370-71 (Ct. Cl. 1976).

In Massachusetts it is settled law that "[w]here a contractor … is presented with an obvious omission, inconsistency or discrepancy, he should at least ask for clarification" if he

expects to rely on his pre-bid interpretation of a specification to support a later claim. John F. Miller Co., Inc. v. George Fichera Construction Corp., 7 Mass. App. Ct. 494, 499 (1979) (Miller), citing Beacon at 504.[5] Where a contractor fails to properly seek clarification, he can not rely on the principle that all errors, omissions and ambiguities in specifications written by the government will be held against the drafter. Id.[6] Where a mistake is obvious, so that a contractor reviewing specifications should have seen it, he must bring it to the government's attention before bid; but if the mistake is subtle, so that a contractor might be excused for not finding it, the contractor may recover. See Miller at 499-500.

Subsection 5.04 places an affirmative obligation on the contractor to address and resolve errors and omissions that might lead to claims; and it prohibits the contractor from taking "advantage" of obvious errors. In order to prevail on a claim based on its own interpretation of a provision that contains an obvious, apparent omission, the contractor must first discharge his duty to clarify—that is, "at least ask for clarification if he intends to "bridge the crevasse [of a disputed interpretation] in his own favor." Miller at 499, citing Beacon at 504. Subsection 5.04 is the bridge over the "crevasse" which the contractor must cross. If he fails to do so he is "barred from recovery." Beacon at 504.

Here, there is no doubt that NEL knew before it bid that MassHighway had apparently omitted work that NEL knew would have to be done to perform the Contract for emergency bridge repair. The Omitted Tasks were not called out by name in the specifications. The omissions were obvious, indeed glaring, which NEL perceived at the time. But instead of

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[5] Whether the contractor actually knows an obvious omission exists is not necessary to establish, since it is "the obviousness of discrepancy which imposes the duty of inquiry" not the fact of actual knowledge. Chris Berg, Inc. v. U.S., 455 F.2d 1037 (Ct. Cl. 1972).

[6] "The bidder who is on notice of an incipient problem, but neglects to solve it as he is directed to do by this form of contractual preventive-hygiene, cannot rely on the principle that ambiguities in contracts written by the Government are held against the drafter." Beacon at 504.

forthwith notifying the Engineer and seeking a clarification, as obliged by the Contract, NEL took no affirmative steps.

NEL was content that all the apparently obvious omissions were left unresolved before bid. It did not properly seek any pre-bid clarification that would have resulted in the Engineer's pre-bid "corrections and interpretations" published to all prospective bidders. Instead, NEL bid on the Contract believing glaring omissions to exist.[7]

NEL did not write the Engineer seeking clarification; it did not submit a formal question pre-bid that would have elicited the Engineer's written response to all prospective bidders. NEL's phone calls did not satisfy the notice requirement of Subsection 5.04. Phone calls without concomitant written notice to persons charged with the responsibility of finally approving the Contract's specifications before bid are not sufficient to "immediately" notify the Engineer. I think NEL's actions are consistent with an unstated intention that MassHighway would be bound by its mistakes and required to pay for extra work post award should NEL submit the low bid and be awarded the Contract.[8]

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[7] NEL argues without citation that District 4's departure from its practice asking unit price bids for the Omitted Tasks was so great that the changes "should be explicitly stated in the bid documents." The very fact that the apparent omissions were so glaring are a compelling reason that NEL should have notified the Engineer. MassHighway was not required by law to flag the changes made to prior District 4 emergency bridge maintenance Contracts.

[8] There is no evidence on this record to show what other bidders knew before the bid. MassHighway's routine comparison of all bids shows that for Item 905.2, "Cement Concrete Masonry," the office estimated a quantity of 423 cubic meters (CM) at $4,156/CM, for a total estimated price of $1,757,988. The estimate for Item 905.2 was 78% of total office estimate for the entire contract ($2,254,815.00). The bid comparison sheet, which is part of the Contract, shows

	Item 905.2 Quantity (CM)	Item 905.2 $/CM	Item 905.2 Bid Price	Total Bid All Items	Per Cent 905.2 Bid Price/ Total Bid
Office	423	4,156	1,757,988	2,254,815	78
NEL	423	3,854	1,630,242	2,052,042	79
SPS	423	4,905	2,074,815	2,131,940	97
Const. Dyn.	423	5,375	2,273,625	2,664,163	85
MIG	423	7,000	2,961,000	3,132,300	95

I conclude that NEL's pre-bid actions were designed from the outset to take advantage of the obvious, apparent omissions it found. NEL's silence on the one hand and private contacts with public employees on the other worked to vitiate the salutary purpose of Subsection 5.04. The net result was that MassHighway was unable to correct errors, avoid claims or assure that all bidders were privy to the same information. NEL did not bridge the "crevasse in its own favor" and so it is "barred" from recovery for extra work. See Miller at 499; Beacon at 504.

CONCLUSION

Because NEL failed to notify the Engineer of the obvious omissions it found and because its failure precluded MassHighway from clarifying or correcting any error that may have existed in the specifications, NEL should not recover for the Claimed Extra Work.

RECOMMENDATION

NEL's appeal should be denied.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

April ____, 2010

To: Secretary Daniel A. Grabauskas, EOT

Through: Commissioner John Cogliano, MHD

From: Stephen H. Clark, Administrative Law Judge

Date: November 30, 2004

Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

The appeal of Northern Construction Co., Inc., (Northern) for extra work to construct metal bridge rails on the bridge deck on the new bridge over the Acushnet River in New Bedford under Department Contract #31165 should be rejected because that work was included in the Contract plans on which Northern bid and because Northern failed to bring to the Engineer's attention the Department's purported omission of metal bridge rails on the new bridge deck, as the Contract required.

INTRODUCTION

Northern Construction Services, LLC (Northern) entered into contract #31165 (Contract) with the Massachusetts Highway Department (Department) to construct a new bridge over the Acushnet River in New Bedford at a bid price of $3,551,018. Northern now claims extra work of $173,654.91 because, its says, the Contract documents on which it bid did not require it to construct "metal bridge railings on the new bridge deck" (Deck Rails). When the Department required it to install Deck Rails between the sidewalks and the edge of the deck it protested.

The appeal should be denied for two reasons. First, the work of installing Deck Rails was plainly included within the Contract plans and specifications. Second, even if one credits Northern's argument that it overlooked the Deck Rail work because the Department did not show that work on the bridge deck "layout plan," as it customarily did, Northern still should not recover. For Northern to interpret the plans before it bid to mean that the new bridge would have no Deck Rails was such an extraordinary departure from modern bridge design practice that both the Contract and established legal principles obligated Northern to bring such a purportedly glaring omission to the Department's attention. Because Northern never did so, it breached the Contract, which preludes recovery.

BACKGROUND

Statement of the Appeal

On October 9, 2001 Northern notified the district highway director that it claimed $173, 654.91 as "extra work" for supplying, fabricating and installing Deck Rails. On October 23, 2001 the Department's district highway director reviewed and denied Northern's claim, finding that the Deck Rails were shown on the Contract plans. Northern appealed to the claims committee on December 20, 2001. The claims committee denied Northern's claim on April 2,

2002 stating "[t]he plans clearly indicate the required amount of bridge rail to be installed on the project."[1] Northern appealed to the board of contract appeals (Board) on May 14, 2002.

Chief Administrative Law Judge Peter Milano held a hearing on October 29, 2002. At the conclusion of the hearing, Judge Milano requested post-hearing submissions from the contractor and the Department. In July 2003 Judge Milano resigned. On January 24, 2004 the hearing was continued before Acting Chief Administrative Law Judge John McDonnell.

Present at the hearings were:

Peter Milano	Chief Administrative Law Judge
John McDonnell	Acting Chief Administrative Law Judge
Isaac Machado, Esq.	MHD Deputy Chief Counsel
Kevin Cassidy	MHD District 5 Construction Engineer
David Ribeiro	MHD Resident Engineer
John DiVito	Northern Construction
John Toomey	Northern Construction

The following exhibits were admitted into evidence:

Exhibit #1	Contract #31165
Exhibit #2	Statement of Claim
Exhibit #3	Contract Plans
Exhibit # 4	Response to Northern's request for information
Exhibit #5	Northern's December 26, 2002 post-hearing submission

The matter was taken under advisement. On March 1, 2004 the undersigned was appointed Chief Administrative Law Judge. On July 21, 2004 the Legislature abolished the Board. See St. 2004, c. 196, s. 5 (Act). So far as is pertinent here the Act conferred its prior functions on the Secretary of Transportation (Secretary) and the Commissioner of the Department (Commissioner). See G. L. c. 16, s. 1(b), as appearing in the Act. This report and

[1] The claims committee stated in its rejection of Northern's claim: "[Northern's] attention is directed to sheet 12 of 26 of the project plans under the Transverse Section, that shows S3-TL4 rail to be placed on the bridge." See Findings of Fact, infra, page 3 PP 5.

recommendation, made with the participation of John McDonnell, Esq., is accordingly submitted to the Secretary through the Commissioner.

Findings of Fact

Based on substantial evidence on the record I make the following findings of fact, which I recommend that the Commissioner adopt.

1. Northern entered into a contract with the Department on January 23, 2001 to build a new bridge carrying Slocum Street/Wood Street over the Acushnet River between New Bedford and Acushnet (Contract). Northern bid a lump sum price of $3,551,018.00 to construct the bridge and roadway approaches (Project). The original completion date was November 30, 2002; the notice to proceed was issued on February 2, 2001.

2. The plans depicted the work of constructing pedestrian sidewalks on both sides of the roadway approaches and on the bridge deck.

3. The Special Provisions of the Contract provided that a metal bridge railing was to be "supplied, fabricated and installed" "as shown on the plans" as part of the Project. See Item 995 at page A00801-85.[2]

4. 26 plan sheets are included in the Contract documents (Plans). Plan 3, a typical roadway cross-section, shows the metal rail in a cross-section view on both east and west approaches. Plan 4, a plan view, references in words the metal bridge rail on the approaches and cross references Plan 25, which on its face depicts the Deck Rail.

5. Plan 12 shows the metal bridge rail on both the bridge deck and roadway approaches. See details of "Transverse Section" [deck] and "Typical Highway Section" [approaches]. The Bridge Plan detail on Plan 12 does not depict the Deck Rail, contrary to the Department's

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[2] The special provision (Item 995) states, in part, "Metal Bridge Railing (Type S3-TL4). The work shall include the supply, fabrication, and installation of painted galvanized steel, 3-rail Metal Bridge Railing as shown on the plans…."

customary practice.[3] Plan 16, which shows the deck framing, permits the calculation of the length of the bridge deck.

6. Plan 20 shows the dimensions, arrangement of components, materials, method of fastening, maximum post spacing and other details of the metal bridge rail to be used on the Project.

7. Plan 22 ("End Post Plan" and "Elevation At Sidewalk") shows where the metal bridge rail on the roadway approaches terminates. Plan 22, combined with Plans 3, 12 and 16 permits a precise calculation of the quantity of Deck Rail.

8. Plan 23 ("Bridge Construction Staging Plan") shows the five phases of the Project construction. Plan 23, in combination with Plan 12, shows that the Deck Rail is to be installed during phases IV and V.

9. Plans 25 shows at 20-meter intervals three cross sections of the bridge deck. Each cross section shows the Deck Rail as part of the bridge deck work.

10. Plan 19, commonly called the "deck drawing," shows the bridge deck in plan view. Plan 19 does not depict the Deck Rail or a scheme for Deck Rail posts. The lack of a Deck Rail drawing or Deck Rail post spacing scheme on Plan 19 is contrary to the Department's typical practice. On many Department bridge construction projects the "deck drawing" shows a metal bridge rail and the rail post-spacing scheme. See Statement of Claim, Exhibit J; testimony of the Department (Mr. Kevin Cassidy).

11. The quantity of metal bridge rail to be installed on the roadway approaches may be calculated by summing the length of the bridge rail at each of the four quadrants as depicted on Sheet 3. The quantity of the Deck Rail may be calculated by measuring the distance from the

[3] Sheet 12 contains four areas of detail, the "Bridge Plan," "Square Longitudinal Section," "Typical Highway Section," and "Transverse Section." The "Bridge Plan" states that the metal bridge rail is to be located on the bridge approaches but does not so state with respect to the Deck Rails.

centerline of the west abutment to the centerline of the east abutment as shown on Plans 3, 16 and 19. The quantity of Deck Rail is 59.131M for each side, or 118.262M in total.

12. Northern relied exclusively on Plans 4, 12 and 19 in preparing its bid for the Deck Rails to be used in the Project.

13. The Department always installs metal bridge rails (or other protective devices, such as screens or Jersey barriers) between the edge of the travel way and the edge of the bridge deck.

14. Northern's fabricator of bridge rails for the Project, New England Bridge Products (Fabricator), initially submitted shop drawings to Northern that omitted the Deck Rails. The Department did not approve those shop drawings and directed Northern to re-submit shop drawings showing the Deck Rail. For the stated reason that it needed additional information in order to prepare shop drawings, Northern's fabricator requested that the Department provide a "deck layout" plan showing (1) the dimensions of the Deck Rail and (2) the post-spacing requirements. The Department provided such a "deck layout" plan, notwithstanding fact that the Plans already supplied could have in fact been used for such purposes.

15. On September 21, 2001 the Department gave Northern a "deck layout" drawing of the bridge deck showing the Deck Rail and post spacing. See Statement of Claim, Exhibit D.

16. On October 9, 2001 Northern notified the Department it would seek compensation as extra work to fabricate and install 118.167 meters of Deck Rail.

17. The original Contract Plans on which Northern bid gave sufficient directions for a competent contractor to determine the type, design, dimensions, materials, components, location, support and quantity of the metal bridge rail for the roadway approaches and the Deck Rails. See Plans 12, 16, 20, 23 & 25.

18. On October 23, 2001 the Department denied Northern's claim for additional compensation. It "concluded that the project plans do show bridge rail in the areas that [Northern claimed they] did not." The Department determined that the installation of the Deck Rail was not extra work because Plan 12 showed the Deck Rail.

19. Subsection 2.03 ("Examination of Plans, Specifications, Special Provisions and Site of Work") of the Specifications provides (emphasis added)

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

20. Subsection 5.04 of the Specifications provides

> The contractor shall take no advantage of any apparent error or omission in the plans or specifications. In the event the Contractor discovers such an error or omission, he shall immediately notify the Engineer. The Engineer will then make such corrections and interpretations as may be deemed necessary or fulfilling the intent of the Contract.

DISCUSSION

The primary question is whether or not the work of supplying, fabricating and installing the Deck Rail was included in the Contract.[4] A secondary question is whether Northern had an obligation under the Contract to bring to the Department's attention the fact that, when it submitted its bid, it had privately interpreted the Contract Plans to mean that no Deck Rail was to be constructed.

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[4] Northern does not dispute that the plans included the work of fabricating the metal bridge rail adjacent to the sidewalk on the roadway approaches to the bridge.

The Legal Standard

The principles to apply when construing a contract, including the plans and specifications included by reference within it, are well settled. The interpretation of an unambiguous contract is a question of law. See Robert Indus., Inc. v. Spence, 362 Mass. 751, 755 (1973); Freelander v. G. & K Realty Corp., 357 Mass. 512, 516 (1970). Where the contract terms are unambiguous and the claim turns solely on contract interpretation it is appropriate to construe the contract at issue. Here, the parties disagree as to the meaning of the contract plans, but there is no argument that the plans are themselves ambiguous. Thus, it is appropriate to interpret the Contract documents.

The law governing contract interpretation is also well understood. This office must consider "the particular language used against the background of other indicia of the parties' intention," and must "construe the contract with reference to the situation of the parties when they made it and to the objects sought to be accomplished…. Not only must due weight be accorded to the immediate context, but no part of the contract is to be disregarded." Starr v. Fordham, 420 Mass. 178, 190 (1995) (internal citation omitted).

A contract "should be construed to give it effect as a rational business instrument and in a manner which will carry out the intent of the parties." Id. at 192, citing Shane v. Winter Hill Fed. Sav. & Loan Ass'n., 397 Mass. 479, 483 (1986). Where a contract consists of separate parts or sections, all of them must be considered together so as to give reasonable effect to each. See S. D. Shaw & Sons, Inc. v. Ruggo, Inc., 343 Mass. 635, 640 (1962). The principal guide to contract interpretation is the language of the contract itself. "Words that are plain and free from ambiguity must be construed in their usual and ordinary sense." Citation Ins. Co. v. Gomez, 426 Mass. 379, 381 (1998); see Forte v. Caruso, 336 Mass. 476, 480 (1957).

The Definition of Extra Work

Subsection 1.10 of the Contract defines "extra work" as work that

1. was not originally anticipated and/or contained in the contract: and therefore
2. is determined by the Engineer to be necessary for the proper completion of the project: and
3. bears a reasonable subsidiary relation to the full execution of the work originally described in the contract.

The question thus becomes: "Was the Deck Rail "originally anticipated and/or contained in the contract"?

The Deck Rail Was Included In the Project

The Contract requires that the Department supply specifications and plans that "give directions which will enable any competent mechanic or contractor to carry them out." Subsection 2.03 ("Examination of Plans, [etc.]."). Under that provision a bidder "is expected to examine carefully … the plans, specifications [ ], special provisions … before submitting a Proposal." Id. "The submission of a bid shall be considered prima facie evidence that the Bidder has made such examination of the site of the proposed work, plans, proposal, etc. …." Id. By submitting its bid Northern is thus deemed to have "carefully examined … the plans" here.

The Contract special provisions state that the contractor is to "fabricate, supply, and install the bridge railing as shown on the plans." The design and type of metal bridge rail is stated as "type S3 – TL4." See Special Provision Item 995. The Contract documents provide that Northern was to make a "lump sum" bid for the new bridge construction work. That was the context in which bidders were instructed to read the Contract drawings and plans.[5]

Twenty-six (26) Plans were provided to bidders. Read together the Plans provide a picture of what the finished bridge would look like. Three Plans (12, 23 & 25) plainly show a

[5] The Contract provided: "If there is a discrepancy between the plans and the specifications, the plans are to govern." Subsection 5.04 ("Coordination of Special Provisions etc.")

drawing of the Deck Rail while one Plan (20) provides full details of all metal bridge rail components and another (16) provides information needed to determine the quantity of Deck Rail. Together, those five Plans show the type, design, dimensions, materials, components, location, support and quantity of the Deck Rail. Consider the following.

Plan 12 shows the Deck Rail in a transverse section detail. Plan 20 shows the dimensions, arrangements of components, materials, method of fastening, maximum post spacing and other details of the metal bridge rail to be used on the Project. Plan 23, showing construction staging, read in combination with Plan 12, makes plain that the Deck Rail is to be constructed during phases IV and V.

Plan 25 shows three cross-sections of the bridge deck, each of which has a drawing of the Deck Rail in place. The quantity of Deck Rail needed can be determined using Plan 3 in combination with Plan 16 (or 19). In addition, Plan 4, a plan view of the approaches and the bridge deck, contains a specific cross-reference to Plan 25, where the Deck Rail is drawn.

In sum, five Plans show the design and components of the Deck Rail, while one of those five shows where the Deck Rail is to be built during the phased construction. Those five Plans, taken together, show that a Deck Rail is included within the Project. In short, the words and plans provide directions to "a competent mechanic or contractor" install a Deck Rail of specified type, quantity and design. I conclude that the words, specifications and plans together specify that a Deck Rail was "in the contract" within the meaning of Subsection 2.03.

<u>Northern's Argument</u>

Northern argues that the Deck Rail was not in the Contract because it was not specified on Plans 4, 12 and 19, where, according to Northern, it should have been drawn. Plans 4 and 12,

the "layout plans," show that metal bridge rail is to be installed on the roadway approaches.[6] Plan 19 is the cognate "layout plan" for the bridge deck. That plan fails to include a drawing of---or even a reference to—the Deck Rail. Because it was Northern's experience that the Department's customary practice was to include metal bridge rails and post spacing plans on the deck "layout plan" Northern argues that the absence of those features on Plans 4, 12 and 19 persuaded it that no Deck Rail was to be installed.[7] Northern's argument is without merit.

Northern's expectations of where on the Plans the requirements for the Deck Rail might usually be found and the Department's customary practices do not excuse Northern's failure to consider all the Plans. Northern simply ignores what is plainly shown on Plans 12, 23 and 25, which plainly depict the Deck Rail on the new bridge deck. Northern has asserted no legal basis supporting its argument that it is entitled to rely on the purported absence of Deck Rail specifications on Plans 4, 12 and 19 where the presence on that feature is shown on the face of Plans 12, 23 and 25. Northern may not define its obligations under the contract "by isolating [] [certain plans] and interpreting them as though they stood alone." Commissioner of Corporations & Taxation v. Chilton Club, 318 Mass. 285, 288 (1945). That is what Northern does when it insists that Plans 4, 12 and 19 alone govern the result. "Not only must due weight be accorded to the immediate context, but no part of the contract is to be disregarded." Boston Elevated Ry. v. Metropolitan Transit Auth., 232 Mass. 562, 569 (1949). See S. D. Shaw & Sons, Inc. v. Ruggo, Inc., 343 Mass. 635, 640 (1962) (interpretation which gives a reasonable meaning

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[6] Contrary to Northern's argument, the Transverse Section detail on Plan 12 shows the Deck Rail. See PP5 supra page 3.

[7] Northern provided copies of bridge deck layout plans for MHD bridge projects that it had worked in Peabody/Middleton, West Stockbridge, Hadley and Leominster as evidence that the Department usually included the metal bridge rail on the deck and post spacing requirements. Here, these features were shown on Plans 12, 23 and 25 (Deck Rail) and Plan 20 (maximum allow post spacing.) The lack of a particular detail (such as lack of precise post spacing dimensions) on a Plan does not excuse the contractor from carrying a cost of the Deck Rail in its lump sum price.

to all of the provisions of a contract is preferred to one which leaves a part useless or inexplicable).

Northern also argues that the plans were deficient because unclear. As a result Northern says it only became aware of the requirements for the Deck Rail after it bid, when the Department refused to approve its Fabricator's shop drawings. This argument does not avail Northern.

The original Plans and Contract on which Northern bid showed the Deck Rail was to be built, no matter when Northern first carefully read those Plans. When Northern says it discovered that the Deck Rail was to be included in the work is thus irrelevant because Northern was deemed to know what the Plans contained when it bid. Subsection 2.03 ("Examination of Plans etc."). That references to the Deck Rail were missing on the particular Plans where Northern expected to find them does not excuse Northern. The Plans supplied plainly show that a Deck Rail was part of the work—it is unmistakably shown in drawings and cross-references. Northern cannot ignore what the Plans plainly include. I find that a fair reading of the Plans as a whole would lead a "competent mechanic or contractor" to conclude that the Deck Rails were part of the work. See Subsecton 2.03; S. D. Shaw & Sons, Inc. v. Ruggo, Inc., 343 Mass. 635, 640 (1962).

Northern Breached Its Duty To Disclose Purported Discrepancies In the Plans

A second principle of law precludes recovery, namely, the legal duty of Northern to disclose to the Department an obvious omission Northern discovered before it bid. The purported omission of the Deck Rail from the Project Plans is such glaring discrepancy that Northern was required under the Contract to "notify" the Department.

The Contract addresses the contractor's responsibility upon the discovery of "an apparent error or omission." Subsection 5.04 provides in pertinent part

> The Contractor shall take no advantage of any apparent error or omission in the plans or specifications. In the event the Contractor discover such an error or omission he shall immediately notify the Engineer. The Engineer will then make such corrections and interpretations as may be deemed necessary for fulfilling the intent of the contract.

Where a contractor or a subcontractor is presented with an obvious omission, inconsistency or discrepancy, contract clauses such as Subsection 5.04 place the contractor "under an affirmative obligation. He 'should call attention to an obvious omission in a specification, and make certain that the omission was deliberate, if he intends to take advantage of it.' " Beacon Constr. Co. v. United States, 314 F.2d. 501, 504 (Ct. Cl. 1963) (Beacon), citing Ring Construction Corp. v. United States, 162 F. Supp. 190, 192; 142 Ct. Cl 731, 734 (1958). "When presented with an obvious omission, inconsistency or discrepancy of significance, [the bidder] must consult the [awarding authority] "if he intends to bridge the crevasse in his own favor." Beacon 314 F. 2d. at 504.[8] Massachusetts courts have applied the rule in Beacon. See John F. Miller Co. v. George Fichera Constr. Corp., 7 Mass. App. Ct. 494, 499 (1979).

The test for resolving a dispute about a purported error, omission or discrepancy of the drawings or specifications is to inquire of the degree of obviousness of the omission, error or discrepancy. Is the error, omission, or discrepancy obvious or subtle? "If the discrepancy is

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[8] In Beacon the title of the written specification was "weatherstrips for entrance doors." The text of the specifications called for a "weather tight seal on all 4 edges of doors and casement and double hung sash." "Casement" and "double-hung sash" are both terms that pertain to windows, not doors. On one drawing there was a large red arrow, which pointed from the notation "metal weatherstrips – see specifications" directly to a drawing of a double-hung regular window. 314 F.2d. at 502. The contract contained a term stating, "In any case of discrepancy in the …drawings or specifications, the matter shall immediately submitted to the contracting officer …." The court found that it was "undeniable" that there were "surfacial inconsistencies" "within the specifications and between the specifications and the drawing." These discrepancies "were and must have been obvious to plaintiff from the time it began to prepare its bid." Id. The court held in these circumstances that the contractor was obliged to bring the discrepancy to the attention of the owner. In the court's words: "[The contractor] had ample cause and opportunity to seek an interpretation from the government before consummating the agreement, but it did not do so, electing to rest on its own private reading." 314 F. 2d. at 504. This case is governed by principles enunciated in Beacon.

subtle, so that a person furnishing labor and materials, who examines the specifications reasonably conscientiously, might miss a requirement which is out of sequence or ineptly expressed, the burden of the error falls on the issuer of the specifications, usually the owner …..” John F. Miller Co. v. George Fichera Constr. Corp., 7 Mass. App. Ct. 494, 499 (1979) citing Mountain Home Contractors v. United States, 425 F.2d 1260, 1264 (Ct. Cl. 1970). But if the error is obvious, and the contract places the burden on the contractor to bring the discrepancy to the attention of the owner, then the contractor is responsible. Id.

There can be do doubt that the purported omission here is obvious. The error Northern posits is the failure to include a Deck Rail in the work. The record shows that modern highway bridges, with or without sidewalks, always include bridge rails or other barriers between the travel way and the edge of the bridge. Metal bridge rails (or the equivalent) are ubiquitous, a fact that Northern was well aware of.[9] In light of such facts, Northern’s belief that the Department had omitted the Deck Rail in its entirely was such an extraordinary occurrence that Northern was put on notice as a matter of law that something must be amiss. Indeed, the absence of a Bridge Rail between the sidewalk and the edge of the bridge on the Acushnet River should have been a cause of alarm. I conclude that the purported omission of the Deck Rail was obvious, not subtle.

Northern argues that as a bidder it is not required to “comb” the Contract specifications to find provisions that might shed light on an omission it knew of when it bid. However, as general contractor Northern must be deemed to know what was plainly to be seen in the Plans when it bid. See Subsection 2.03. When it made its proposal and signed the Contract, Northern was

[9] The evidence was overwhelming that bridge railings are ubiquitous on bridges the Department builds. The Department’s witness, Mr. Cassidy, gave credible and uncontradicted testimony that in 25 years he had never seen a bridge deck with a sidewalk constructed without a bridge rail. The purported omission of a bridge rail on a bridge with a sidewalk would be a glaring, obvious error.

prohibited from taking "advantage" of the "apparent error" it had already discovered. See Subsection 5.04. That is what Northern attempts to do in its appeal.

Northern's argument that the Deck Rail was not adequately specified in the Plans just points out Northern's obligation under Subsection 5.04. As the court in Beacon noted "If the bidder fails to resort to the remedy proffered by the Government [to bring discrepancies to its attention for resolution], a patent and glaring discrepancy (like that which existed here) should be taken against him in interpreting the contract." 314 F. 2d. at 504.

I conclude that Northern was deemed to know of the purportedly obvious omission of the Bridge Rail both when it bid and when it executed the Contract. It was required to take immediate steps, by way of its own investigation and by inquiring of the Department, to bridge gaps it believed it found in the documents. See John F. Miller Co. v. George Fichera Constr. Corp., 7 Mass. App. Ct. 494, 499 (1979).[10]

CONCLUSION

Northern was not justified in relying on Plans that failed to include the Deck Rail when other Plans plainly included that work. Northern was required to bring purported discrepancies to the attention of the Engineer but did not. For both reasons Northern appeal fails.

RECOMMENDATION

I recommend that Northern's claim for extra work be denied.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

[10] Recently, the Superior Court applied Subsection 5.04 in affirming the obligation of a contractor to bring discrepancies in plans to the attention of the Engineer. See D.W. White Construction Co., Inc. v. Massachusetts Highway Department, SUCV2001-1159, September 29, 2004, Slip Opinion ([Sub]section 5.04 "precludes" contractor from "taking advantage" of error in plans; "any uncertainty" created an "obligation" to bring the matter to the attention of the Engineer").

To: Richard A. Davey, Secretary & CEO
MassDOT
From: Stephen H. Clark, Administrative Law Judge
Date: May 30, 2014
Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation on claim #66679-001 of the Paolini Corporation arising from MassDOT contract #66679 for construction of the Blackstone Canal District in Worcester.

> Paolini seeks $309,366.19 for installing approximately 20,000 linear feet of double-run electrical conduit in single trenches for street lighting. Paolini contends that the correct payment for a double run of conduit is the total linear feet of each of the two conduits, each multiplied by 1.4 times the bid unit price. MassDOT contends that the measurement for payment for double-run conduit is the length of a single run of installed conduit times 1.4 times the bid unit price.
>
> I find that the "measurement for payment" and the bid "unit price" provisions of the Contract, read together, demonstrate that the Contract intends that the measurement for payment for all conduit installed is linear feet of a single run of conduit. Paolini offered a bid unit price inclusive of "all" costs based on the linear feet of a single run of conduit. Compensation for the cost of installing a second conduit in the same trench is provided by the application of an adjusted unit price (unit bid price x 1.40) to the linear foot of a single-run conduit.
>
> Paolini's contended payment formula would require that MassDOT pay twice for the cost of trench work and is irrational because it would be less expensive for MassDOT to require Paolini to dig two trenches and install a single conduit in each than it would be to install two conduits in one trench. Paolini is not entitled to formulate its bid using one "measurement for payment" (single-run conduit) and be paid using a different "measurement for payment" (per every foot of double-run conduit installed). To construe the Contract as Paolini contends would be against public policy.
>
> I recommend that Paolini's appeal be denied.

INTRODUCTION

On February 20, 2014 MassDOT filed a motion for summary judgment "as to liability" on Paolini's claim #3-66679-001 (Claim)[1] "based on the facts as set forth by Paolini in its Statement of Claim and its submission entitled Appellant's Stipulation of Facts." On April 17, 2014 Paolini filed an opposition and a cross-motion for summary judgment seeking $309,366.19. I address the matter as a case stated.

The dispute centers on the "measurement for payment" and "unit price" provisions of the Contract's Bid Sheet and the Special Provision governing payment for the work of installing electrical conduit (Special Provision).[2] Two types of electrical conduit were installed for new street lighting in the Blackstone Canal District in Worcester, Plastic conduit (Item 804.2) and Galvanized conduit (Item 806.2). Some of the conduit was single-run (one conduit in a trench) and some was double-run (two conduits in a trench). The parties only dispute the method (or "formula") to pay for double-run conduit.

MassDOT contends that the correct "measurement for payment" for a double-run of conduit under the Special Provision is the length of a single run of installed conduit times 1.4 times the bid unit price. Paolini contends that the correct "payment" for a double run of conduit is the total linear feet of each of the two conduits, each multiplied by 1.4 times the bid unit price.

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[1] Paolini's claim is being prosecuted by Mark C. Rossi, Esq., Assignee for the Benefit of Creditors of Paolini Corp. See March 19, 2013 letter of Mr. Rossi to Office of the Administrative Law Judge.

[2] The Special Provision was inserted into the Contract through Addendum No. 2 on October 22, 2010. It appears on page A00801-82L of the Contract.

Paolini's claim is without merit. MassDOT correctly measured for payment all double runs of conduit and paid the correct amounts under the Special Provision and the unit price Paolini offered on the Bid Sheet. Paolini's claim should be denied.

BACKGROUND

Contract Provisions

Subsection 2.04(A) of the Standard Specifications provides:

> The Bidder shall submit his/her proposal upon the blank forms furnished by, or approved by the Department. The Bidder shall specify a unit price, in both words and figures, for each item for which a quantity is given, and shall also show the products of the respective unit prices and quantities written in figures in the column provided for that purpose . . . .

The Bid Sheet provided a quantity, a measurement for payment "per foot" and a unit price bid. The quantities and unit prices bid were stated for a single run of Plastic conduit ("2 inch electrical conduit plastic UL") and a single run of Galvanized conduit ("2 inch electrical conduit galvanized steel"). See infra at 3.

The Special Provision relating to pay Item 804.2 (Plastic) and Item 806.2 (Galvanized) on the Bid Sheet provides:

> The work of these sections shall conform to the relevant provisions of Section 800 of the Standard Specifications and the following:
>
> The work shall include the furnishing and installation of electrical conduit for the street lighting system as shown on the plans and as directed and include all labor and materials for installation.
>
> Measurement and Payment
>
> Electrical Conduit will be measured for payment by the foot, complete in place.
>
> Electrical Conduit will be paid for at the respective Contract unit price per foot, which price shall include all labor, material, equipment and incidental costs required to complete the work. In the event that two conduits are placed in the same trench, the compensation shall be 1.4 times the bid unit price.

> No separate payment will be made for sawcutting of pavement, excavation, and backfill but all costs in connection therewith shall be included in the unit price bid.

The Bid Sheet for pay Item 804.2 (Plastic) and Item 806.2 (Galvanized), with Paolini's offered bid shown in brackets, provides:

BLACKSTONE CANAL DISTRICT STREETSCAPE IMPROVEMENTS (ARRA) – ERP -002S (230) X

Item Number	Quantity	Item with Unit Bid Price Written In Words	Unit price	Amount
804.2	20,550	2 Inch Electrical Conduit Type NM – Plastic (UL) At [Twenty one dollars and no cents] PER FOOT	[21.00]	[431,550.00]
806.2	1,930	2 Inch Electrical Conduit Type RM – Galvanized Steel At [Twenty five dollars and no cents] PER FOOT	[25.00]	[48,250.00]

The Bid Sheet provides that payment for a single run of conduit is calculated by multiplying the "respective" unit price bid for Plastic or Galvanized times the length "measured for payment" "per foot" of conduit installed. [3]

The stipulated facts and record before me establish the following measurements:

Item 804.2

Installed quantity of single-run Plastic conduit:	542.50
Installed quantity of double-run Plastic conduit:	16,460.30
Quantity on Bid Sheet of single-run Plastic conduit:	20,550.00
Bid unit price "per foot" for single-run Plastic conduit:	$21.00/LF

[3] Paolini installed only one type of conduit in any one trench—that is, either Plastic or Galvanized, but never Plastic and Galvanized in the same trench. In a memorandum dated August 8, 2013 I noted that legal ambiguity might exist should Plastic and Galvanized conduit be placed in the same trench. The agreed facts make clear that was not the case. No ambiguity exists.

Item 806.2

Installed quantity of single-run Galvanized conduit:	0.00
Installed quantity of double-run Galvanized conduit:	3,851.50
Quantity on Bid Sheet of single-run Galvanized conduit:	1,930.00
Bid unit price "per foot" for single-run Galvanized conduit:	$25.00/LF

Paolini's Claim

Paolini wrote six letters to MassDOT in 2011 disputing the amounts MassDOT paid for installing conduit under Item 804.2 and Item 806.2. No letter specifically stated a claim. Instead, on multiple occasions, Paolini requested "clarification" of the payment formula and "disagreed" with the "measurement for payment" MassDOT used to calculate payment for double-run conduit installed.[4]

On June 17, 2011, the District responded to Paolini's request for a "clarification," explaining:

> From the Special Provisions, Electrical Conduit will be paid for at the respective Contract unit price per foot, which price shall include all labor, material, equipment and incidental costs required to complete the work. In the event that two conduits are placed in the same trench, the compensation shall be 1.4 times the bid unit price. The District's interpretation when two conduits are placed in the same trench is that the Contractor is entitled to 1.4 times the length of the trench not the length of each conduit placed. See Ex. 5 to Paolini's Stipulation of Facts (November 13, 2013).

[4] May 16, 2011 (". . . if two, 100' length, conduits are placed in the in the same [sic] trench the total measurement of conduit is 200 liner [sic] feet. Payment of the 200 feet of conduit should be the bid unit price multiplied by 1.4"); June 14, 2011 ("Paolini is respectfully following up . . . to a request for clarification submitted May 16th 2011, where Paolini Corp feels as though we are not being paid properly for items 804.2 and 806.2"); July 15, 2011 ("Paolini Corp has received your response to the payment method of Items 804.2 and 806.2 and disagree with the states [sic] interpretation"); August 10, 2011 ("Paolini . . . disagree[s] with the states interpretation"); September 12, 2001 ("Paolini . . . disagree[s] with the states interpretation"); October 11, 2011 ("Paolini . . . disagree[s] with the states interpretation"); November 11, 2011 ("Paolini . . . disagree[s] with the states interpretation").

MassDOT's Payments

The District provided a calculation sheet showing the method it used to calculate the total payments to Paolini under Items 804.2 (Plastic) and 806.2 (Galvanized). See Motion, Exhibit 6.

The parties do not dispute that MassDOT correctly paid Paolini for single-run Plastic conduit. No single-run of Galvanized conduit was installed.

For double-run conduit, whether Plastic or Galvanized, MassDOT "measured for payment" the length of a single run of conduit in the trench where double-run conduit was installed.[5] It then multiplied that length by the respective unit bid price times 1.4 to find the payment due, whether Plastic[6] or Galvanized.[7] The amount paid was the length of single-run conduit times the adjusted unit price.

DISCUSSION

The Contract is a practical document intended to bind parties knowledgeable about the public construction requirements of roads and bridges. See Subsection 4.01 of the Standard Specifications. The words of a contract should be understood in their ordinary meaning. See City of Springfield v. Dep't of Telecomm. And Cable, 457 Mass. 562 (2010). A contract is to be read as a whole; no single word or phrase controls its meaning. See Sherman v. Employers' Liability Assur. Corp., 343 Mass. 354, 357 (1961)

[5] The "length of the trench" and the linear feet of a single run of conduit installed are, of course, identical.

[6] The total length of double-run Plastic conduit was 16,460.20. One half of 16,460.20 yields the length of single-run Plastic conduit, 8,230.10 LF. The bid price of single-run Plastic conduit, $21.00, multiplied by 1.4 yields $29.40. Payment for double-run Plastic conduit was thus $241,964.94 ($29.40 X 8,230.10).

[7] The total length of double-run Galvanized conduit was 3,851.50. One half of 3,851.50 yield the length of single-run Galvanized conduit, 1,925.75 LF. The bid price for single-run Galvanized conduit, $25.00, multiplied by 1.4 yields $35.00. Payment for double-run Galvanized conduit was thus $67,401.25 ($35.00 X 1,925l.75).

("An interpretation which gives reasonable meaning to all of the provisions of a contract is to be preferred to one which leaves a part useless or inexplicable."). The meaning of particular words and phrases must be understood in the context of the contract as a whole. Id. No part of the contract is to be disregarded. Starr v. Fordham, 420 Mass. 178, 190 (1995). The text should not be construed in a way that defeats the purpose of the contract or results in an interpretation that yields an absurd or irrational meaning. Id. A correct construction of a contract provision will not defeat the contract's intent or utility. See Rubin v. Murray, 79 Mass. App. Ct. 64, 75 (2011) ("In interpreting a contract, [t]he objective is to construe the contract as a whole, in a reasonable and practical way, consistent with its language, background and purpose.").

The Special Provision and Bid Sheet, read together, require bidders to offer a unit bid price for a single run of conduit installed, "complete in place," whether Plastic or Galvanized. The Special Provision, fourth paragraph, provides that "the unit price per foot" bid "shall include all labor, material, equipment and incidental costs required to complete the work." That language refers to a single run of conduit since the following sentence reads: "In the event that two conduits are placed in the same trench, the compensation shall be 1.4 times the bid unit price." The "measurement for payment" provision, in paragraph three, applies to a single run of conduit, because no mention is made of double-run conduit ("Electrical conduit will be measured for payment by the foot . . . .") and because the Bid Sheet plainly invites bids for single-run conduit.

The Bid Sheet is consistent with the requirements of the Special Provision. The quantities shown on the Bid Sheet are all quantities given for single-run conduit. A bidder's offer of a unit price is predicated on the "per foot" measurement of a single run

of conduit installed, complete in place. Because there is no language on the Bid Sheet that mentions the measurement for payment of double-run conduit, the “unit bid price” offered by a bidder on the Bid Sheet is consistent with the “measurement for payment” provision in paragraph three, which refers only to single-run conduit.

Additional information in the Bid Sheet and Special Provision confirm that the Contract has a single “measurement for payment” for all conduit installed, namely, the linear feet of a single run of conduit, complete in place. Specific language directs how compensation is made for double-run conduit. Paragraph four provides: “. . . compensation [for two conduits in the same trench] shall be 1.4 times the bid unit price.”

The language of the Bid Sheet and Special Provision read together—that is, the unit bid price offered on the Bid Sheet and the “measurement for payment” language in paragraph three—intends that single-run conduit is the basis of both the bid and the measurement for payment. The unit price times the linear measurement of single conduit is plainly intended to include all costs of furnishing and installing conduit— unless the adjusted unit price applies (“in the event that two conduits are placed in the same trench”).[8]

As MassDOT correctly points out: “The Contract contains no separate bid unit price or separate measurement for payment for the installation of multiple conduits in the same trench.” Motion at 3. The Bid Sheet records Paolini’s offer of a unit price for a single run, not a double run. Neither the Bid Sheet nor the Special Provision, paragraph

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[8] The Special Provision plainly provides that the “unit bid price” includes all costs. The second paragraph provides, in part: “The work shall include the furnishing and installation of electrical conduit . . . and includes all labor and materials for installation.” The fifth paragraph provides: “No separate payment will be made for sawcutting of pavement, excavation, and backfill but all costs in connection therewith shall be included in the unit price bid.”

three, which governs the "measurement for payment," makes reference to double-run conduit. By contrast, the Special Provision expressly provides the means of compensation for double-run conduit in the second sentence of paragraph four: "In the event that two conduits are placed in the same trench, the compensation shall be 1.4 times the bid unit price."

Since the unit price bid on the Bid Sheet and the "measurement for payment" in the Special Provision both refer to single-run conduit, and the second sentence of paragraph four expressly directs the compensation for double-run conduit in plain words, the Special Provision and Bid Sheet are in harmony. See Sherman, 343 Mass. at 357; see also Star, 420 Mass. at 190.

The language in the fifth paragraph of the Special Provision fully supports the conclusion that "measurement for payment" for both single-run and double-run conduit is by the linear foot of single-run conduit. The fifth paragraph provides:

> No separate payment will be made for sawcutting of pavement, excavation, and backfill but all costs in connection therewith shall be included in the unit bid price.

This language prohibits double payment for trench work: "no separate payment will be made for sawcutting of pavement, excavation and backfill"; all such costs "shall be included in the unit price bid." Accordingly, "the unit price bid" includes the full cost of the trench in which either single-run or double-run conduit is installed.

Paolini's Arguments Are Without Merit

Paolini contends that every linear foot of each conduit installed in a double run of conduit must be paid at 1.4 times the unit price bid.[9] This construction of the Special

[9] The gist of its argument is: "The Contract Documents clearly and unambiguously state the payment for conduit where two conduits are placed in a trench is '1.4 times the bid unit price.' The 'unit' is a foot of

Provision violates its prohibition that "no separate payment" shall be made for sawcutting, excavation and backfill. By twice using the bid unit price in the formula for payment, as Paolini contends, double payment for trenching must result. That is because Paolini's formula would twice apply "the unit bid price"—once for each run of conduit in the same trench, which requires MassDOT to pay for trenching a second time. Paolini's argued formula in fact results in more than double payment because, it contends, both the first conduit and the second conduit in a double run should be paid at "1.4 times the bid unit price."

Paolini's argument for payment leads to an irrational outcome: it would be cheaper for MassDOT to dig two trenches side-by-side than to install two conduits in the same trench.[10] That Paolini's construction would yield an absurdity should have alerted Paolini that its interpretation of the Special Provision was wrong.[11] See Subsection 2.03 of the Standard Specifications (duty of bidder to carefully examine plans and specifications).

Paolini incorrectly contends that "Electrical Conduit will be measured for payment by the foot, complete in place." (Paolini's emphasis.) Motion at 2. The Contract nowhere provides for "payment by the foot." Instead, the Contract provides,

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conduit. The price is $21 per foot for Item Number 804.2 and $25 per foot for Item Number 806.2. Where two conduits are placed in one trench, the measurement of payment unit does not change—it is per every foot of conduit installed, at 1.4 times the bid unit price. Thus, where two conduits are placed in one trench, Paolini is entitled to $29.40 (1.4 X $21) per foot of Item Number 804.2 and $35 (1.4 x $25) per foot for Item Number 806.2." Motion at 5.

[10] For two Plastic conduits, each 100 feet long installed in two trenches dug side-by-side, MassDOT would pay $4,200.00 ($2,100 (100 X $21) plus $2,100 (100 X $21)). Under Paolini's payment scheme the cost of two conduits installed in one trench would be $5,880 ($21 X 1.4 X100) plus ($21 X 1.4 X 100).

[11] Under the logic of Paolini's theory if 4 conduits were placed in a single trench compensation would be the adjusted unit price bid times the length of each of the four of the conduits. Payment would be 5.6 times the bid unit price. Again, it would be cheaper to dig four separate trenches.

"Electrical Conduit will be measured for payment by the foot." See Special Provision third paragraph. By taking the word "payment" out of context and by ignoring that "Electrical Conduit" refers to the "measurement for payment" of a single run of Plastic or Galvanized conduit, Paolini is able to suggest a method of payment that does not exist in the Contract. [12] Nowhere in the Special Provision does plain language require payment by the foot for every foot of double-run conduit installed.

Paolini makes no attempt to read the Bid Sheet and Special Provision in harmony. It ignores the contextual meaning of two sentences in the Special Provision: first, the sentence that provides "compensation" for double-run conduit "shall be 1.4 times the bid unit price" and, second, the sentence that prohibits "separate payment" for "sawcutting . . . excavation and backfill." [13] Paolini effectively argues that it is entitled to one "measurement for payment" in formulating its bid (single-run conduit) and a different "measurement for payment" in calculating payment ("per every foot of conduit installed, at 1.4 times the bid unit price"). See ante n.12.

MassDOT correctly points out that Paolini construes the Contract in a manner that makes no economic sense. Bidders familiar with the cost of installing conduit know it is

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[12] Paolini arrives at its result by redefining the words in the Contract. It is incorrect to state that "The 'unit' is a foot of conduit," as Paolini contends. The "unit," correctly stated, is "per foot"—the measured linear foot of a single run of conduit installed, complete in place. By changing the meaning of the word "unit" to "foot" Paolini is able to argue that "the measurement of payment unit does not change—it is per every foot of conduit installed, at 1.4 times the bid unit price." Paolini can only make this argument by ignoring the meaning of the "measurement for payment" provision within the context of the Bid Sheet and Special Provision.

[13] Paolini argues, without legal support, that MassDOT altered the Contract by using "the length of the trench, not the length of conduit in the trench" as measurement of payment. Motion at 6. Paolini cites the District's June 17, 2011 letter clarifying the Special Provision. See supra at 5. The District's use of the word "trench" to differentiate between a conduit of "1 run" and "2 runs" within a single trench did not (and could not) waive the terms of the Contract. See Glynn v. Gloucester, 9 Mass. App. Ct. 454, 462 (1980). The word "trench" was obviously intended in the District's letter to rhetorically distinguish to Paolini the difference between the length of one conduit (which would fit perfectly into a "trench" of the same length) versus the length of two conduits, installed side-by-side.

not 2.8 times as expensive to install two conduits in the same trench as it is to install one conduit in that trench. Every bidder also knows that the predominant cost of installing a single run of conduit is the cost of digging the trench ("sawcutting, excavation and backfill"), not the cost of furnishing and installing a second run of Plastic or Galvanized conduit. Under Paolini's payment formula it is more expensive to install two conduits in the same trench than it is to dig two trenches side-by-side with one conduit in each.

Why would an awarding authority issue a specification that required it to pay more than twice as much to install a double run of conduit than it paid to install a single run of conduit in the same trench? [14] Contract language that intended such a result would be contrary to public policy. See D. W. White vs. Massachusetts Highway Dep't., Suffolk Superior Court, No. 01-1159, p. 7 (Sept. 29, 2004) (Fabricant, J.).

Paolini's construction of the measurement and payment provisions is disingenuous because it does not address intent. To believe that the Contract intended to require payments more than two times the bid price for double-run conduit would mean the Special Provision and Bid Sheet contained an obvious mistake, for public policy would not permit a construction of the Contract terms whereby the government would pay more than twice as much to install two conduits in the same trench than it paid to dig two trenches side-by-side and install one conduit in each. Id.

The Contract obligated Paolini to "immediately" bring to the Engineer's attention a plain mistake. See Subsection 5.04 of the Standard Specifications.[15] Failure to do so

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[14] For Item 804.2 Paolini's construction would result in doubling the payment made from $241,964.94 to $483,929.88, an increase of $241,964.94. For Item 806.2 Paolini's method would double the payment of $67,401.25 to $134,802.50, an increase of $67,401.25. The total increase due to double payment for the same work "included in the unit bid price" would be $309,366.19.

[15] Subsection 5.04 provides: "The Contractor shall take no advantage of any apparent error or omission in the plans or specifications. In the event that Contractor discovers such an error or omission, he shall

in a timely manner precludes Paolini from taking advantage of an obvious error or omission. See John F. Miller Co. v. George Fichera Constr. Corp., 7 Mass. App. Ct. 494, 499 (1979), citing Beacon Constr. Co. v. United States, 314 F.2d. 501, 504 (Ct. Cl. 1963).

CONCLUSION

I conclude that, read together, the Standard Specifications, the Special Provisions and the Bid Sheet form a coherent scheme that provides for the measurement and payment of double-run conduit, whether Plastic or Galvanized.

MassDOT correctly paid Paolini under the Contract. Paolini's Claim should be denied.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: May __, 2014

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immediately notify the Engineer. The Engineer will then make such corrections and interpretations as may be deemed necessary for fulfilling the intent of the Contract."

APPENDIX H-1

DECISIONS/RULINGS

Disputes re: VECP Proposal

To: Secretary Richard A. Davey, MassDOT
From: Stephen H. Clark, Administrative Law Judge
Date: August 9, 2013
Re: Report and Recommendation

Please find attached my report and recommendation for claim #61793-001 of David G. Roach & Sons, Inc. (Roach).

MassDOT moved to dismiss Roach's claim for $81,731.25 in incentive payments under a special provision in contract #61793 that permits additional compensation for a "value engineering change proposal" (VECP) that MassDOT accepts and adopts.

MassDOT's motion to dismiss should be allowed.

Roach failed to perform the acts required by the VECP special provision. Although it made a preliminary proposal that, if supplemented, might have qualified for a VECP, it failed to submit any of the required documents MassDOT needed to analyze and review before approving a VECP, including a calculation of the cost savings to be achieved by the specific formula required by the special provision.

No hearing is necessary in this matter to establish facts or make rulings of law. A motion to dismiss is appropriate because Roach's statement of claim failed to allege that it had complied with the special provision.

I recommend that you approve my memorandum dismissing Roach's claim since no facts are alleged which, if true, would entitle the contractor to additional compensation.

INTRODUCTION

The Massachusetts Department of Transportation (MassDOT) moves to dismiss claim #001 (claim) of contract #61793 (contract) of David G. Roach & Sons, Inc. (Roach) for failure to state a claim upon which relief can be granted. Roach was allowed thirty days to file an opposition but did not oppose MassDOT's motion.

Roach seeks to recover 50% of the money MassDOT purportedly saved by supposedly approving a certain Value Engineering Change Proposal (VECP) that Roach offered under a special provision of the contract titled Value Engineering Incentive (Special Provision). In substance, Roach proposed to save MassDOT money by performing the contract in one-phase construction instead of two. MassDOT approved the scheduling change. That approval, Roach alleges, was an approval of its VECP. Because MassDOT allegedly saved $163,462.51, Roach contends it should be paid one half, or $81,731.25, by an incentive payment authorized under the Special Provision.

BACKGROUND

MassDOT awarded the contract to Roach on January 27, 2010 at a bid price of $1,158,692.47. The work was to rehabilitate a bridge in Easthampton, which included the replacement of the top portion of the bridge's substructure. Two-phase construction was originally scheduled to allow one half of the bridge to remain open for travel while rehabilitation work proceeded on the other half. Each construction phase required the demolition and then replacement of structural elements of a section of the bridge, along with other work, such as installing bridge rails, guard rails, drainage and paving approaches.

On March 9, 2010, before the work began, representatives from Roach, MassDOT and Easthampton met at a preconstruction meeting. At the meeting, Roach suggested that MassDOT

modify the project schedule to allow single-phase construction; this meant closing the bridge to traffic and rehabilitating the entire structure.

On March 16, 2010 Roach wrote the District Highway Director proposing to close Hendrick Street and rehabilitate the bridge in one phase so MassDOT could achieve "time savings" of "four weeks or possibly more." Roach's succinct letter only cursorily mentioned safety, feasibility and cost considerations. Attached to its proposal was a one-page spreadsheet titled "MA DOT Price Reduction Worksheet," which appears to show that by partially or entirely deleting 14 pay items for traffic control and other work MassDOT could save $163,462.51.[1]

On March 30, 2010 the District Highway Director responded. He wrote that the project could be performed in one phase provided that Easthampton allowed the street closing. He asked Roach to provide a schedule reflecting "this change." He concluded,

> Also noted in your correspondence is the potential cost savings under the bridge demolition, reinforced concrete excavation, and bridge structure items. Per the terms and conditions of the Value Engineering Incentive proposal contained [in] the Contract Special Provisions these potential savings will need to be quantified.

The record establishes that after March 30, 2010 Roach took no action to supplement its March 16, 2010 proposal; it made no submittal responsive to the District's request that "these potential savings will need to be quantified."

Roach began construction in June 2010; it performed the work in a single phase. The one-phase construction altered the methods of construction and the specific work of two subcontractors. Roach performed the contract under its assumption that the VECP it submitted

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[1] The spreadsheet is undated. From the format of the spreadsheet I infer that the dollar values appearing are linked to bid pay items, not estimated direct costs associated with the work under those items. Most savings appear generated from deleted items for "all" "temporary traffic control, temporary concrete barrier, temporary impact attenuator [and] temporary shoring." Statement of claim Ex. C.

on March 16, 2010 (never supplemented or amended) had been finally approved by MassDOT through the District Highway Director's March 30, 2010 letter.

On May 3, 2011, nearly a year after the work began, Roach wrote the Area Engineer: "Also, how do we proceed with starting to 'apply' for our incentive for doing the project in 1 phase???" The MassDOT Area Engineer wrote back on May 5, 2011, "As for any incentives, I'll be honest and say I need to review the contract for particulars."

On June 7, 2011, the Area Engineer informed Roach that MassDOT had determined after a review that, "because several of the requirements in the Value Engineering section of the Special Provisions were not followed, the Department will not now entertain submittals." Roach responded on June 8, 2011 that MassDOT's decision was "unacceptable and inconsistent with written and verbal communication throughout the project." It requested a formal letter from MassDOT explaining why its VECP was denied.

On July 19, 2011, the District Highway Director wrote Roach and specified the actions Roach had failed to take under the Special Provision.[2] He concluded that, because Roach's VECP had not been submitted in accordance with the Special Provision, it could not be approved. In an undated response referencing the denial, Roach notified MassDOT it would be filing a claim and would send its final costs once determined.

MassDOT acknowledged Roach's purported claim on August 2, 2011 and notified Roach that Subsection 7.16 required it to submit an itemized statement. On August 19, 2011 Roach filed a four page single spaced explanation of its claim with 23 exhibits. On October 25, 2011

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[2] The letter listed four reasons for denying the VECP: (1) Roach's March 16, 2010 letter made no reference to the VE Special Provision and only referred to cost savings for closing Hendrick Street; (2) a VE incentive proposal required "a detailed estimate of the anticipated net savings . . . calculated" according to a specific formula that Roach did not submit; (3) the District's March 30, 2010 letter to Roach "by no means constitutes acceptance" of its VECP; and (4) Roach never submitted a completed VECP that MassDOT could accept or reject.

Roach requested that the Claims Committee review the District's denial. On June 21, 2012 the Claims Committee also denied Roach relief because Roach had not provided "the initial information required under Subsections B.1 thru B.6 of the Special Provisions [specifying the formula to calculate estimated cost savings]" and because Roach's March 16, 2010 letter "does not constitute a VECP under the contract."[3] Roach appealed to this office on July 18, 2012.

THE SPECIAL PROVISION

A Special Provision in the contract created a "Value Engineering Incentive."[4] To obtain the incentive a contractor must propose changes to the general contract that will generate cost savings of $100,000 or more. Generally, if a VECP is finally accepted by MassDOT the contractor is entitled to one half the savings.

To apply for the incentive the subcontractor must initiate, develop and submit a value engineering change proposal (VECP) for review. The VECP must be timely—generally before the work begins—; must contain specific proposed changes to the contract plans and specifications; must identify estimated cost savings according to a stated formula; must be in a form suitable for review by the original project designer; and must contain sufficient detail for MassDOT's review. PP B.

Each VECP must include an analysis of the comparative advantages and disadvantages of both the original and proposed plans (PP 1); a description of the contract requirements to be altered (PP B 2); and a proposed schedule with milestones (PP B 3). The VECP must state the date by which MassDOT must accept the VECP to fully realize the anticipated savings (PP B 3),

[3] The Claims Committee continued: "It is the Committee's position that [Roach's March 16, 2010] letter, along with informal references or discussion at a meeting or in the field regarding a proposed idea for revising the contract, does not constitute a Value Engineering Change Proposal under the contract."

[4] The Special Provision appears on pages A00801-60-62 of the contract.

calculated according to a mandated formula. See PP B 5 (a)-(f). Every VECP must be stamped by a professional engineer. See PP B 6.

Following a VECP submission, the original project designer and MassDOT reviews the VECP, the cost of which is paid by the contractor. If the review is satisfactory, the contractor prepares a formal contract modification, which includes the new specifications and work schedule, ready for MassDOT to issue. Also to be included in the proposed modification is the financial schedule negotiated with MassDOT that sets forth the amount and timing of the incentive payments, which is based on a formula that includes "the final negotiated costs to implement the VECP." PP D. If MassDOT issues the proposed contract modification, final approval takes place when, within 5 days of the issue date, the contractor "re-certifies" its acceptance of the contract modification.

DISCUSSION

Legal Standard

A motion to dismiss in an administrative proceeding is reviewed under the same standard as a motion to dismiss under Mass. R. Civ. P. 12(b)(6). I accept as true all factual allegations contained in Roach's statement of claim, drawing all reasonable inferences in its favor. See, e.g., Iannacchio v. Ford Motor Co., 451 Mass. 623, 636 (2008).

The Special Provision

Roach failed to comply with the requirements of the Special Provision that governs how VECPs are "initiated, developed and submitted." PP 1. Its failures made it impossible for MassDOT to review or approve Roach's cost saving proposal in the manner required by the contract. Roach's statement of claim does not allege that it complied with the Special Provision.

Roach's letter of March 16, 2010 was certainly not a conforming VECP submission since it did not contain "sufficient detail to clearly define the proposed change." Specifically, its letter did not provide the "initial" information that described the "comparative advantages and disadvantages" between the existing and proposed contract requirements (PP B (1) and (2)); the changes in the time required through "a contemporaneous schedule analysis" (PP B(3)); or "the time by which [its] proposal must be accepted so as to obtain the maximum price reduction. . . ." (PP B (4)).

Roach's "MA DOT Price Reduction Worksheet" did not provide a "detailed estimate of the anticipated net saving" calculated under the stated formula set forth in PP B (5) (a-f).[5] Roach's submission was not "stamped by a professional engineer." See PP B (6)).

Roach did not prepare any of the submittals needed for MassDOT review. It provided nothing for the original project designer to review; it did not submit any proposed plans or specifications to alter the contract; it did not submit a draft of a formal contract modification change order that stated the new contract price or identified specific changes in the existing plans and specifications. See PP D (1). Finally, Roach never gave MassDOT the required financial schedule documenting its costs or "the delineation of the shared net savings." See PP D (2).

Roach's failures made meaningful review and approval of a VECP in accordance with the contractual requirements impossible.[6] I conclude that MassDOT never received any of the data, analysis, or proposed new specifications for review that the Special Provision requires.

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[5] The formula to calculate estimated "net savings" is precise. Roach was required to (a) calculate the cost to perform the work "as bid"; (b) calculate the cost of performance under its VECP; (c) state the costs to "implement" its proposal, including the cost of "review time" for MassDOT's "designer of record" to "amend and approve the original design"; (d) estimate MassDOT's costs to "perform engineering reviews and administer" its proposal; (e) estimate all miscellaneous costs associated "with any revisions"; and (f) calculate "the net savings to be split" . . . "as follows": "net savings = a – (b+c+d+e)."

MassDOT's Contentions

MassDOT correctly contends that in Roach's statement of claim "there are no facts alleged by the Contractor, nor can there be, to establish the prerequisite for compensation under the VECP provisions of the contract, namely that there was an approved VECP." The submission of the proposed contract modification and the contractor's subsequent "re-certification" are preconditions to MassDOT's final acceptance of a VECP. Here, where the original project designer had no opportunity to analyze the proposed "net cost savings" and where Roach failed to submit proposed specifications stamped by a professional engineer, Roach's March 19, 2010 letter did not constitute a VECP. Roach did none of things required to support a proposed contract modification for MassDOT to issue and Roach to "re-certify." Roach was solely responsible for all these failures.

The incentive payments are conditioned on review and approval of Roach's submissions. Hence, Roach's failure to make the necessary submissions precludes a finding that MassDOT approved Roach's VECP as a matter of law. Albre Marble & Tile Co. v. Goverman, 353 Mass. 546, 549 (1968) (contractor could not modify the contract's specifications during performance or recover expenses where it deviated from the contract's specifications).

Roach's Contentions

It is true, as Roach points out in its statement of claim, that the work was performed in one phase, not in two as originally planned. But it does not follow that Roach is entitled to the "incentive" payment authorized by the Special Provision. Even assuming MassDOT received

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[6] "Approval of the VECP does not occur until a modification incorporating the VECP is issued by the Department and the Contractor re-certifies that to the current status of the originally proposed cost and/or schedule savings [sic], to be provided within 5 days of the receipt of the Department's approval letter." PP C.

some benefit from the single phase work schedule, the obligation to make an incentive payment never arose because Roach did not discharge express contractual requirements.[7]

Roach's multiple failures to do anything that was required after its preliminary submission is fatal. Incentive payments can only be made after the contractor has fully met the conditions precedent of VECP review and approval. Here, Roach's failure to make the required submissions meant the schedule of "final negotiated costs to implement the VECP" never existed and there was never any contractual basis to make any incentive payment. See PP D ("The VECP will be implemented and paid using the cost and resource loaded schedule as the final negotiated costs to implement the VECP.").

Roach's statement of claim argues that "MDOT reneged on [MassDOT's March 30, 2010] . . . acceptance of the VECP after all work was substantially completed." But the text of the District Highway Director's March 30, 2010 letter shows why that argument has no merit. The letter makes it abundantly clear that the District directed Roach to take further steps to comply with the Special Provision.[8]

Roach's statement of claim finally argues that Roach is entitled to the incentive payment because MassDOT failed to formalize the deletion of certain pay items, which it says remained in effect. But, as MassDOT points out, the Engineer was at all times free to exercise his discretion to delete unnecessary work. See Standard Specification Subsection 4.02.

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[7] Even if a contractor has done everything contemplated under the Special Provision, its terms give the Engineer unfettered discretion to reject a completed VECP. See PP B.

[8] Had Roach read the Special Provision on receipt of the District Highway Director's March 30, 2010 letter it would have understood it had failed to meet these critical requirements: (1) the failure to submit a revised work schedule ("Any changes in the Contract Time(s) or Contract Milestone(s) that will result from acceptance . . ."); (2) the failure to state the date on which its VECP would expire in order for MassDOT to "obtain the maximum price reduction . . ."; and (3) the failure to submit the required "detailed estimate of the anticipated net savings" calculated according to the precise formula the Special Provision requires. See PP B(f) ("The net savings to be split between the Department and the Contractor shall be calculated as follows: net savings = a – (b+c+d+e)").

Where the Special Provision places the onus on the contractor to create and make all required submissions, where Roach failed to provide numerous required submittals and where Roach never alleges that it in fact complied with the Special Provision, Roach's claim should be dismissed with prejudice.

CONCLUSION

MassDOT's Motion to Dismiss is **ALLOWED**.

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Stephen H. Clark
Administrative Law Judge

Dated: August ___, 2013

APPENDIX I-1

DECISIONS/RULINGS

Procedural Rulings

To:	Secretary Daniel A. Grabauskas, EOT
Through:	Commissioner John Cogliano, MHD
From:	Stephen H. Clark, Administrative Law Judge
Date:	January 20, 2005
Re:	Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

HNTB, a consultant that designed the Brightman Street Bridge in Fall River under MHD contract #92607, appealed on October 4, 1999 seeking $717,460.00 in funds "to cover labor escalation costs." The appeal should be dismissed because it is moot. Subsequent to its appeal HNTB and the Department at various times between 2000 and 2004 modified the Contract. Among such modifications were increases to the Contract of approximately $292,000.00. Such increases to the Contract supersede HNTB's appeal. Because the subject matter of the appeal was addressed in subsequent contract modifications, approved by both HNTB and the Department, the appeal has been rendered moot and should be dismissed.

INTRODUCTION

HNTB, a consultant responsible for the design of the Brightman Street Bridge in Fall River-Somerset under MHD contract #92607 (Contract), appealed to this office on October 4, 1999 seeking $717,460.00 "for additional funds [to be added to the existing contract] to cover the escalation in labor costs." HNTB appealed after the Department decided in 1999 that it would not make a cost escalation adjustment to the Contract. Subsequently, between 2000 and 2004, the Department and HNTB agreed to several Contract modifications, including requests for extra costs. Accordingly, this appeal is moot and should be dismissed.

BACKGROUND

At the time it appealed HNTB had since 1992 been under Contract to design a replacement for the Brightman Street Bridge in Fall River. The Contract permitted (but did not require) the parties to renegotiate the contract fee if there was an approved extension of time for more than one year beyond the "specified time period" of performance. In 1998, the year before this appeal, the Department and HNTB had agreed to a $500,000 cost escalation adjustment and a contract increase of $200,000 for added work after the Contract term had been extended. When HNTB appealed the maximum contingent obligation under the Contract was $6,385,000.00. Statement of Claim, Ex. 10.

HNTB styled this appeal as a " non-adversarial claim" to obtain additional funds "to accommodate cost escalation due to [project] extensions." On January 13, 2000, Judge Milano held a conference with representatives of both the Department and HNTB.[1]

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[1] The undersigned replaced Judge Milano on March 1, 2004 and makes this report and recommendation to the Commissioner of the Department pursuant to St. 2004, c. 196, s. 5.

Thereafter, on January 25, 2000, HNTB requested the Department to make a transfer of funds and certain internal budget reallocations within the Contract totaling $185,986.00. The Department agreed to both requests, which the Board of Commissioners (Board) approved on April 19, 2000. Between 2000 and 2004 the Department approved further increases in the total contingent cost of the Contract. By August 19, 2004 the total value of the work done had risen to $6,677,067.90. The Contract is active in fiscal year 2005. The Department's most recent payment (for $16,102.22) was approved on September 29, 2004.

Neither HNTB nor the Department took any action at the office of the Administrative Law Judge following the conference of January 13, 2000.

DISCUSSION

HNTB's appeal was not from a final decision of the Department. Rather, its appeal was apparently made in the context of on-going negotiations. Those negotiations were partially successful since the Board approved the reallocation of existing Contract funds on April 19, 2000. Thereafter, between 2000 and 2004, HNTB and the Department reached additional agreements by which the Contract amount of $6,385,000.00 (at the time of the appeal) increased by approximately $292,000.00 to $6,677,067.90 (by August 19, 2004).

CONCLUSION AND RECOMMENDATION

There is no doubt that HNTB's 1999 appeal is no longer the subject of any present controversy. If HNTB filed a justiciable appeal in this office in 1999, a proposition subject to considerable doubt, that appeal is now moot. The subject matter of

HNTB's 1999 appeal has been entirely overtaken by events, as the Department's subsequent reallocations and additions to the Contract show.

I conclude that the appeal is moot and that for that reason should be dismissed.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

To: Secretary Daniel A. Grabauskas, EOT

Through: Commissioner John Cogliano, MHD

From: Stephen H. Clark, Administrative Law Judge

Date: January 20, 2005

Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

Daniel O'Connell's Sons, Inc. (O'Connell) appealed on March 12, 2002 from the final estimate in Contract #93477. The work was to rehabilitate the Memorial Bridge over the Connecticut River in Springfield. O'Connell's appeal for (1) unpaid interest; (2) release of funds held to guarantee the 5 year warranty for Bridge lighting and (3) certain approved extra work should now be dismissed. Dismissal is appropriate because, after O'Connell released the Department from any claims under Contract #93477, the Department on October 17, 2003 paid in full a mutually agreed final estimate.

INTRODUCTION

Daniel O'Connell's Sons (O'Connell) was awarded contract #93477 (Contract) in 1993 to rehabilitate the Memorial Bridge over the Connecticut River in Springfield (Bridge). The work was completed in 1997 and accepted by the Department on January 11, 2001. O'Connell disagreed both with Department's final estimate sent on April 23, 2001 and its revised final estimate sent on January 2, 2002. O'Connell appealed on March 12, 2002 because the Department (1) incorrectly calculated interest on late periodic payments; (2) failed to apply the correct warranty period on the Bridge lighting and (3) made adjustments to the final estimate that negated payments already made for extra work performed.

A hearing was held on August 20, 2003, at which time the Department and O'Connell came to an agreement about the amount owed. The Department mailed to O'Connell a revised final estimate on August 20, 2003. On August 25, 2003 O'Connell executed final affidavits and releases. O'Connell was paid in full on October 17, 2003.

I conclude that, because O'Connell has been paid in full and has released all claims against the Department, this appeal should be dismissed.

BACKGROUND

The Contract work began on May 24, 1993 and was apparently fully completed on June 2, 1997 (the Bridge had opened for traffic on November 16, 1995). For reasons not explained, the Department did not accept the work as satisfactory until January 18, 2001.

O'Connell appealed the Department's revised final estimate of January 2, 2002 for three reasons. First, O'Connell disputed the method of calculating interest for late

payments for work completed in 1994, 1995 and 1996. The Department calculated interest due from January 18, 2001, the date of acceptance of the work. O'Connell contended that interest was due 60 days after each item of work was completed. Its original interest claim of $50,693 had to increased to $87,636 by December 31, 2001.

Second, O'Connell appealed the Department's interpretation of the warranty period for Bridge lighting. The Contract required O'Connell to maintain lighting on the Bridge for five (5) years after construction. The Department originally contended that the five (5) year warranty ran until January 18, 2006, five years from the date of final acceptance of the work (January 18, 2001). O'Connell maintained that the 5 year warranty ran from the date the Bridge lighting "was placed in continuous operation." As all lighting had been installed by December 31, 1995, O'Connell contended that the warranty had expired before the Department sent O'Connell the final estimate on April 23, 2001. Thus, it argued, the $5,665.99 withheld by the Department for the warranty should be released. In May 9, 2002 the Department shifted its position, now advancing that the warranty ran from June 2, 1997 through June 2, 2002. It agreed that O'Connell was owed $5,665.00 as of June 2, 2002.

Finally, O'Connell appealed downward adjustments of $6,642.10 made by the final engineer to the final estimate. O'Connell had been paid $6,642.10 under the Contract by the Department to "take care of various minor extra work that needed to be done by paying under existing pay items." The contractor appealed the refusal of the final engineer to recognize the validity of payment for extra work done.

On August 20, 2003 a hearing was held on O'Connell's claims. On that day the Department mailed O'Connell a third revised final estimate, which was accepted on August 25, 2003. O'Connell was paid in full on October 17, 2003.

DISCUSSION

The Department took more than six years to determine how to calculate the correct statutory interest owed O'Connell for work completed in 1994 through 1997. During that time the amount of interest owed more than doubled, from $50,693 to $111,026. In 2001 $6,642 already paid by the Department for extra work was rejected in the final estimate. But in 2003, after further consideration, the Department restored $6,631 for the same extra work. Similarly, no resolution of the dispute over the operative 5 year period of the warranty applicable to Bridge lighting was possible until the warranty itself had expired in 2002. Only then did the Department determine that the $5,665.00 still withheld should be paid to O'Connell.

Although O'Connell plainly articulated the grounds in support of its contentions on January 7, 2001, it was not until August 20, 2003 that the Department was able to reach a final agreement with the contractor. Two matters in disagreement were essentially de minimus. While the dispute continued, interest continued to accrue. The Department and O'Connell agreed to the proper amount of the final payment on August 20, 2003, the day of the appeal was heard.

The cost of delay in resolving this dispute may be seen on the following chart.

Claim	Jan/2001	Jan/2002	Oct/2003 (payment)
Interest owed	$50,693	$87,636	$111,026
Extra work	6,642	6,642	6,631
Warranty	5,665	5,665	5,000

CONCLUSION AND RECOMMENDATION

The record shows that O'Connell was paid in full for all its work under the Contract on October 17, 2003, with interest. O'Connell released the Department from all claims through affidavits returned to the Department on August 25, 2003.

Because there is no longer any pending claim against the Department, O'Connell's appeal should be dismissed.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

To: Secretary Daniel A. Grabauskas, EOT

Through: Commissioner John Cogliano, MHD

From: Stephen H. Clark, Administrative Law Judge

Date: September 30, 2004

Re: Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

The pending administrative appeal of DeLucca Fence Company, Inc. (DeLucca) arising from MHD contract #32047 should be dismissed since DeLucca has filed an action in Superior Court to litigate the same claim and only the Attorney General may now conduct the litigation of DeLucca's claim.

STATEMENT OF THE APPEAL

DeLucca Fence Company, Inc. (Delucca) appealed from the decision of the claims committee of the Massachusetts Highway Department (Department) concerning Department contract #32047(Contract) entered into by Delucca and the Department on September 10, 2001. Under the Contract DeLucca was to "repair" certain areas of damaged guardrail along highways in District 4. DeLucca claims that the Department ordered it to "remove and replace" a one mile length of guardrail along Rt. 3 and contends that work was different from that described in the Contract.

In addition, DeLucca claims that the specifications for certain fittings on which it bid were not adequately described. Specifically, DeLucca contends that payment Item 603.21 "wood offset bracket (Thrie Beam)" (Wood Offset Bracket) was plainly ambiguous and did not refer to the material actually needed in the "remove and replace" work. DeLucca contends that the needed material is typically described by the Department as "Guardrail offset block for steel post-Thrie Beam" (Wood Offset Block For Steel). DeLucca claimed the value of the blocks used was $18.00 each. DeLucca used 1,618 Wood Offset Blocks For Steel in the work.

DeLucca's Statement of Claim, dated May 12, 2003, was filed in the Office of the Administrative Law Judge May 21, 2003. Acting Chief Administrative Law Judge John McDonnell conducted a hearing on the appeal on October 16, 2003, but not make a report.

On April 27, 2004 DeLucca filed a complaint in Superior Court, SUCV2004-01180, asserting claims identical to those raised in its administrative appeal.

DISCUSSION

The question presented is whether DeLucca's pending administrative appeal arising under Contract #32047 should be dismissed because DeLucca has filed an action in the Superior Court seeking relief on an identical claim. I conclude that DeLucca's administrative appeal arising under Contract #32047 should be dismissed. Any action taken by the Department in the hearing or deciding DeLucca's pending administrative appeal will necessarily conflict with the functions of the Attorney General. As a matter of policy, the Department should not hear and decide appeals that could even potentially interfere with the disposition of identical or related actions in court.

The Attorney General has exclusive jurisdiction to appear for the Department "in all suits … in which the commonwealth is a party or interested, or in which the official acts and doings of said [Department] … are called in question, in all the courts of the commonwealth …. All such suits and proceedings shall be prosecuted or defended by him or under his direction." G.L. c. 12, s.3. In the exercise of his statutory and Constitutional powers, the Attorney General assumes primary control over the conduct of litigation that involves the interests of the Commonwealth; under his powers in so doing he decides matters of legal policy normally reserved to a client in the ordinary attorney-client relationship. See Feeney v. Commonwealth, 373 Mass. 359 (1977). The Attorney General has the incidental power to compromise or settle matters in which the commonwealth is a party or interested. See 6 Op. Atty. Gen. 1921, p. 169. The Department, through proceedings before its Administrative Law Judge, should refrain from any action that could even potentially interfere with the Attorney General's conduct of identical or related litigation.

DeLucca filed suit in Superior Court against the Department on claims arising under Contract #32047 while its appeal on the same subject matter was pending in the Department. Because of the exclusive power of the Attorney General to conduct litigation filed against the Department, any hearing or disposition of DeLucca's related administrative appeal will necessarily conflict with the exclusive statutory and constitutional authority of the Attorney General.

Practitioners before the Office of the Administrative Law Judge understand that the filing of a court action results in the dismissal of a pending administrative appeals. With respect to the Department, the report of the "20th Annual Conference on Massachusetts Construction Law" states (at page III-5):

> It should be noted further that wherever a claim is asserted in a court action, the MHD Hearing Officer … will refuse to entertain such claim. Accordingly, no action can be brought in court on any claim which is pending before the MHD Hearing Officer or it will be immediately be dismissed by the MHD Hearing Officer.

Accordingly, DeLucca's appeal under Contract #32047 should be dismissed.

RECOMMENDATION

The Commissioner should dismiss DeLucca's pending appeal arising from Contract #32047.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: September 30, 2004

To:	Secretary John Cogliano, EOT
Through:	Commissioner Luisa Paiewonsky, MHD
From:	Stephen H. Clark, Administrative Law Judge
Date:	May 25, 2006
Re:	Report and Recommendation

I am pleased to submit for your consideration and approval the attached report and recommendation.

The pending administrative appeals of Modern Continental Construction, Inc. (MCC) arising from MHD contract #31157 should be dismissed because MCC has filed an action against the Massachusetts Highway Department in Superior Court, SUCV No. 04-4837F. The subject matter of the claims pending in this office and the subject matter of the claims asserted by MCC in court are virtually identical. The Attorney General has the exclusive constitutional and statutory authority to conduct the defense of suits brought against the Department.

Accordingly, all MCC's pending appeals in this office should be dismissed.

INTRODUCTION

Modern Continental Construction, Inc. (MCC) filed one or more statements of claim in the office of the Administrative Law Judge (ALJ) in 2002, 2003 and 2004 to appeal denials of claims brought before the Department's claims committee arising from MHD contract #31157 (Contract). The appeals all related to the construction of the Brightman Street Bridge (Bridge) in Fall River. Because MCC has filed a civil action against the Department in the superior court, I recommend that, in accordance with its standard practice, the Department forthwith dismiss all MCC's identical appeals here.

MCC's appeals all stem from claims it filed in the form of MCC "change proposals" (C. P.'s) seeking equitable adjustments in the Contract price pursuant to G.L. c.30, s. 39N due to changed conditions MCC claims it encountered in the work. Specifically, MCC's changed conditions claims related to (a) boring work on the East pier (C.P. #16), (b) work affected by the change in stability of shaft 17W on the West pier (C.P. #8), and (c) altered soil conditions on shaft W1 on the East Pier (C. P. #5). Other MCC claims were denied by the claims committee and were duly appealed to this office. The additional appeals, which also arose from the Brightman Street Bridge project, were set forth by MCC in C. P.'s #6, #10 and #11.

MCC filed its civil action on November 3, 2004. See SUCV No. 04-4837F. MCC's complaint alleged, inter alia, damages "in excess of $16,127,669.00" for failure of the Department to allow equitable adjustments under G..L. c.30, s. 39N due to the changed condition MCC had specified in its appeal to this office (C. P. #16). On June 15, 2005 the Department, through the office of the Attorney General, filed an answer and counterclaim in that action. In March 2006 MCC amended its complaint to add certain

claims that were originally denied by the claims committee and appealed to this office. The subject matters of the claims made by MCC's amended complaint in superior court and of its appeals filed in this office are essentially identical with MCC's claims originally brought by MCC in C. P.'s #5, #8, #10, #11, #25 and #27.

DISCUSSION

Because MCC's amended action in SUCV No. 04-4837F is in all material aspects duplicative of the appeals pending in this office,[1] I recommend that all MCC's appeals in this office be dismissed to avoid any possible interference with the Attorney General's management of the underlying litigation. Actions of the Department in defending MCC's six administrative appeal will conflict, or have the potential to conflict, with the constitutional or statutory functions of the Attorney General. As a matter of policy, this office should not hear, consider or decide appeals that may affect the defense of identical or related actions defended by the Attorney General in court.

The Department of the Attorney General represents the departments of the Commonwealth—including the Massachusetts Highway Department—when an action is filed in court. The Attorney General has exclusive jurisdiction to appear for the Department "in all suits … in which the commonwealth is a party or interested, or in which the official acts and doings of said [Department] … are called in question, in all the courts of the commonwealth …. All such suits and proceedings shall be prosecuted or defended by him or under his direction." G.L. c. 12, s. 3. This obligation has been construed to mean that, once a lawsuit has been filed against the Commonwealth, the Attorney General has exclusive control over the matter in litigation. See Attorney

[1] In its lawsuit MCC has apparently abandoned its claim relating to C. P. #6 and added claims related to C. P.'s #25 and #27, which were not appealed to this office.

General v. Depart. of Public Utilities, 342 Mass. 662 (1961). In addition, only the Attorney General has the power to compromise or settle civil proceedings in which a department of the Commonwealth was a party or interested. See 6 Op. Atty. Gen. 1921, p.169. See also Feeney v. Commonwealth, 373 Mass. 359 (1977) (in the exercise of his statutory and Constitutional powers, the Attorney General assumes primary control over the conduct of litigation that involves the interests of the Commonwealth, and in so doing he decides matters of legal policy normally reserved to a client in the ordinary attorney-client relationship).

The full exercise of the Attorney General's powers means that the Department, through proceedings before its Administrative Law Judge, should refrain from any action that could even potentially interfere with the Attorney General's conduct of identical or closely related litigation. A hearing or disposition of any of MCC's administrative appeals pending in this office has the potential of conflicting with the exclusive statutory and constitutional authority of the Attorney General to conduct MCC's claims asserted in SUCV2004-4837F.

Practitioners before the office of the administrative law judge understand that the filing of a court action results in the immediate dismissal of related administrative appeals pending in this office. The report of the "20th Annual Conference on Massachusetts Construction Law" states (at page III-5):

> It should be noted further that wherever a claim is asserted in a court action, the MHD Hearing Officer … will refuse to entertain such claim. Accordingly, no action can be brought in court on any claim which is pending before the MHD Hearing Officer or it will be immediately be dismissed by the MHD Hearing Officer.

MCC, by filing suit against the Department concerning Contract #31157, elected to pursue all its claims in court and forego any possible administrative remedy under the Contract. See Subsection 7.16. Because the Attorney General has exclusive control over the MCC litigation arising from Contract #31157, all MCC administrative appeals pending in this office should be dismissed forthwith.

RECOMMENDATION

The Commissioner should dismiss all pending appeals in this office arising under Contract #31157.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: May 25, 2006

To: Secretary Daniel A. Grabauskas, EOT

Through: Commissioner John Cogliano, MHD

From: Stephen H. Clark, Administrative Law Judge

Date: September 30, 2004

Re: Report and Recommendation

I am please to submit for your consideration and approval the attached report and recommendation.

All pending administrative claims of Renz Painting, Inc. (Renz) arising from MHD contract #97421 should be dismissed since Renz has filed an action in Superior Court on two closely related claims arising from the same contract and any action taken by the Department on the related administrative appeals could conflict with the powers and functions of the Attorney General in the conduct of the underlying litigation.

STATEMENT OF THE APPEAL

Renz Painting, Inc. (Renz) appealed decisions of the claims committee arising from cleaning, painting and related work on certain bridges in Woburn and Arlington under Massachusetts Highway Department (Department) contract #97421 (Contract). As revealed in Statements of Claim filed by Renz, its appeals under the Contract relate to the following claims:

(1) Repair of stress crack (Mishawam Road)	$24,694.00
(2) Clean/paint pigeon screens (Dow Street)	$3,229.69
(3) Lane closure (Mishawam Road)	$37,516.88
(4) Delead/ paint bridge rail (Mishawam Road)	$43,665.10

A hearing was held before Administrative Law Judge Peter Milano on these appeals on October 16, 2001, as continued to November 29, 2001. Judge Milano resigned his office before he made a report and recommendation to the Board of Contract Appeals. On March 25, 2004 the undersigned held a status conference on the record.

On June 28, 2004 Renz filed three additional claims arising from the administration of the Contract. Specifically, Renz asserts accounting errors concerning police detail payments, interest on late payments and omission of payment for certain items. The additional administrative appeals are closely related to the four administrative appeals previously filed.

On September 4, 2004 Renz filed a complaint in Superior Court, SUCV2004-3919 to litigate claims also asserted on two of the above-referenced items, to wit (1) repair of stress crack (Mishawam Road) and (2) clean/paint pigeon screens (Dow Street). Renz's court action did not specifically reference the remaining administrative appeals for (1) lane closures ordered by the Department at Mishawam Road bridge site, (2) the

deleading and painting of the bridge rails of the Mishawam Road bridge or (3) the related June 28, 2004 claims arising from the administration of the Contract.

DISCUSSION

The question presented is whether all administrative appeals of Renz under Contract #97421 should be dismissed because Renz has filed related actions in Superior Court. I conclude that all Renz's administrative appeals should be dismissed. All claims under the Contract are closely related and any action taken by the Department on Renz's remaining administrative appeals arising under the same Contract could adversely affect the power of the Attorney General to conduct the litigation in SUCV2004-3919. As a matter of policy, the Department should not hear and decide appeals that could potentially interfere with the disposition of related claims in court. This is particularly the case where the bifurcation of Renz's claims could be perceived as a litigation strategy to defeat the strong legal principle favoring the consolidation of claims.

The Attorney General has exclusive jurisdiction to appear for the Department "in all suits … in which the commonwealth is a party or interested, or in which the official acts and doings of said [Department] … are called in question, in all the courts of the commonwealth …. All such suits and proceedings shall be prosecuted or defended by him or under his direction." G.L. c. 12, s.3. In the exercise of his statutory and Constitutional powers, the Attorney General assumes primary control over the conduct of litigation that involves the interests of the Commonwealth; under his powers in so doing he decides matters of legal policy normally reserved to a client in the ordinary attorney-client relationship. See Feeney v. Commonwealth, 373 Mass. 359 (1977). The Attorney General has the incidental power to compromise or settle matters in which the

commonwealth is a party or interested. See 6 Op. Atty. Gen. 1921, p. 169. The Department, through proceedings before its Administrative Law Judge, should refrain from any action that could potentially interfere with the Attorney General's conduct of related litigation.

Renz filed suit in Superior Court against the Department for two claims on which identical appeals are currently pending in the office of the administrative law judge. At the same time Renz left pending five related administrative law appeals arising from the same Contract. The remaining five administrative appeals are of the character that could and should be joined with SUCV2004-3919. See Mass. R. Civ. Pro. 19 and 20. Because of the power of the Attorney General to conduct all litigation filed against the Department, any hearing or disposition of Renz's closely related administrative appeals has the potential to conflict with the Attorney General's statutory and constitutional functions. Accordingly, all Renz's administrative appeals arising from the performance of Contract #97421 should be dismissed.

Practitioners before the office of the administrative law judge understand that the filing of a court action results in the dismissal of pending administrative appeals. With respect to the Department, the report of the "20th Annual Conference on Massachusetts Construction Law" states (at page III-5):

> It should be noted further that wherever a claim is asserted in a court action, the MHD Hearing Officer … will refuse to entertain such claim. Accordingly, no action can be brought in court on any claim which is pending before the MHD Hearing Officer or it will be immediately be dismissed by the MHD Hearing Officer.

The above statement applies with equal force to all closely related administrative claims. That is so because the Department's prosecution or disposition of related

administrative appeals could adversely impact the pending litigation—for example, by an admission made in an administrative hearing or by the piecemeal settlement of related claim.

RECOMMENDATION

The Commissioner should dismiss all pending administrative appeals arising from Contract #97421.

Respectfully submitted,

Stephen H. Clark
Administrative Law Judge

Dated: September 30, 2004

MEMORANDUM

To: Frank Tramontozzi, Chief Engineer
MassHighway

cc: Thomas Waruzila, District Highway Director, District 3
David Spicer, Claims Manager
Monica Conyngham, Chief Counsel, MassHighway
Jeffery Mullan, Undersecretary and General Counsel, EOT

From: Stephen H. Clark, Administrative Law Judge, EOT

Date: September 9, 2008

RE: Remand of Claim of Roads Corporation in MassHighway contract #99042 (Charlton) from Office of Administrative Law Judge to Chief Engineer's Claims Committee

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I have ordered the remand of the claim of the Roads Corporation in MHD #99042 from this office to the Engineer's claims committee (Claims Committee). The reason for the remand is that the Claims Committee did not make a final written determination on the merits of Road's claim. Because this office only hears appeals of final written decisions of the Claims Committee, the claim must be remanded for a final written decision on the merits. See Subsection 7.16 of the Standard Specifications.

The appeal of Roads in this office is dismissed. Roads may file a new appeal from the final written determination of the Claims Committee on the merits of Roads' claim should that be necessary.

Background

On March 6, 2006 the Engineer sent the Roads Corporation (Roads) notice that its pending claim for $1,663,705.31 "for delay" had been denied by the Claims Committee. See Letter of John Blundo, attached. The reason for Mr. Blundo's denial was that Roads failed to provide "sufficient documentation," specifically a schedule analysis that identified a "critical path" that correlated the as-built schedule with the baseline schedule that established the impact of "MHD-caused delays." "Until this is provided, the Department cannot assess the additional costs your company incurred and the claim will remain denied." I understand Mr. Blundo's letter to mean (1) the department did not address the merits of Roads' claim but (2) would address the merits when Roads provided a "sufficient" schedule analysis.

On March 28, 2006 Roads wrote Chief Blundo that it "cannot accept the denial and the MHD reasoning for the denial" and that it would file a notice of appeal at the office of the Administrative Law Judge.

On March 31, 2006 this office notified Roads that it must file a Statement of Claim within 30 days. On April 28, 2006 Roads filed a Statement of Claim for $2,877,325.45, noting that "documentation and analysis has been re-submitted" to the department. There was no explanation by Roads how its claim for $1,663,705.31 before the claims committee became an appeal for $2,877,325.45 here.

On March 15, 2007 MassHighway notified Roads and its surety United States Fidelity and Guaranty (USF&G) that Roads was in default on MHD contract #99042 because it had abandoned the work and had been terminated as general contractor under Subsection 8.12 of the contract's Standard Specifications (default termination).

MassHighway demanded that USF&G "immediately undertake and complete Roads' work." See letter of Thomas J. Waruzila, attached.

The first status conference on the appeal was held July 30, 2008. At the conference I pointed out to the attorney for USF&G, Mr. Brasco, and the attorney for MassHighway, Mr. Dettman, that I believed a remand of this matter to the Claims Committee was required. A more detailed explanation of the matter is set forth in the attached Memorandum and Order.

Office of the Administrative Law Judge

To: Christopher J. Brasco, Esq.
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.
8405 Greensboro Drive, Suite 100
McLean, Virginia 22102-5104

Kurt Dettman, Esq.
Assistant General Counsel
Executive Office of Transportation
10 Park Plaza, Rm. 3300
Boston, MA 02116

CONTRACTOR:	Roads Corporation
SURETY:	USF& G
CONTRACT:	99042
DISTRICT:	MHD District 3
TOWN/CITY:	Charlton
CLAIM:	Denial of "Insufficient Documentation"

MEMORANDUM AND ORDER

I hereby dismiss the appeal of Roads Corporation pending in this office and remand the claim of the Roads Corporation in MassHighway contract #99042 to the Engineer's claims committee (Claims Committee) for investigation and final determination in writing on the merits, as required under Subsection 7.16 of the Standard Specifications.

Background

On March 6, 2006 the Engineer, Mr. Blundo, sent the Roads Corporation (Roads) notice that its pending claim for $1,663,705.31 "for delay" had been denied by the Claims Committee. The reason for the denial was that Roads failed to provide "sufficient documentation," specifically a schedule analysis that identified a "critical path" that correlated the as-built schedule with the baseline schedule that established the impact of

"MHD-caused delays." "Until this is provided, the Department cannot assess the additional costs your company incurred and the claim will remain denied." I understand Mr. Blundo's letter to mean (1) the department did not address the merits of Roads' claim but (2) would address the merits when Roads provided a "sufficient" schedule analysis.

On March 28, 2006 Roads wrote Chief Blundo that it "cannot accept the denial and the MHD reasoning for the denial" and stated that it would file a notice of appeal at the office of the Administrative Law Judge.

On March 31, 2006 this office notified Roads that it must file a Statement of Claim within 30 days. On April 28, 2006 Roads filed a Statement of Claim for $2,877,325.45 that stated, among other things, that the requested "documentation and analysis has been re-submitted" to the department.

On March 15, 2007 MassHighway notified Roads and its surety United States Fidelity and Guaranty (USF&G) that Roads was in default on MHD contract #99042 because it had abandoned the work and had been terminated as general contractor under Subsection 8.12 of the contract's Standard Specifications (default termination). MassHighway demanded that USF&G "immediately undertake and complete Roads' work."

The first status conference on the appeal was held July 30, 2008. During the conference I informed counsel that, given the circumstances pertaining, I was considering a remand of Roads' claim to the Claims Committee. I expressed the view that a remand of the claim would preserve the rights of the parties and assure that the Claims Committee made a final written determination on the merits as required by Subsection 7.16 of the Standard Specifications.

Subsection 7.16

Subsection 7.16 provides that the administrative law judge (Judge) hears appeals from final written determination on the merits of the Engineer's Claims Committee. [1] The contract provides that a contractor may appeal final decisions of the Engineer's Claims Committee to the Judge. An appeal can not be taken under the contract unless the Claims Committee has addressed on a contractor's claim on the merits. The contractor's appeal must be from matters address and decided by the Claims Committee.

Grounds for Remand

The pending appeal in this office of Roads in MHD contract #99042 should be dismissed and the underlying claim returned to the Claims Committee for a final written determination by the Engineer on the merits for these reasons:

(1) The Engineer's determination of March 6, 2006 addressed only a procedural matter—viz. the "insufficiency" of documentation;

(2) The Engineer's determination stated in effect that the Claims Committee would address the merits of Roads' claim once Roads submitted a critical path analysis;

(3) Roads asserted on its Statement of Claim filed here on April 28, 2006 that it had already "re-submitted" sufficient documentation to MassHighway;

[1] "The Engineer shall determine all questions as the amount and value of such work, and the fact and extent of such damage and shall so notify the Contractor in writing of his determination. Such determination of the Engineer may be appealed to [the office of the administrative law judge]…. The appeal shall set forth the contract number, city or town [the] project is in, the name and address of the Contractor, the amount of the claims (and breakdown of how amount was computed), a clear concise statement of the specific determination from which appeal is taken, including the reasons for appeal the determination and shall be signed by the Contractor."

(4) It is uncertain whether Roads' appeal for $2,877,325.45 here is from the same decision and subject matter as its claim for $1,663,705.31 before the Claims Committee;

(5) Where the Claims Committee has not ruled on the merits and Roads had already "re-submitted" the lacking documentation that the Claims Committee requested before any appeal was taken to this office, Roads did not file a proper appeal in this office under Subsection 7.16.

Conclusion

I conclude that the contract requires Roads' claim to be heard on the merits by the Claims Committee before this office has jurisdiction to hear an appeal.

The appeal of Roads filed in this office is hereby dismissed. The claim is remanded to the Claims Committee for a decision on the merits. The contractor may appeal to this office from the final written determination of the chief engineer through the Claims Committee after a decision on the merits under Subsection 7.16 of the Standard Specifications should that be necessary.

Stephen H. Clark
Administrative Law Judge

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Dated: _____________