OFFICE
OF
THE ADMINISTRATIVE LAW JUDGE

PRE-2015
SELECTED DECISIONS/RULINGS

Volume 2
Direct Payment Demands
(M.G.L. c. 30, §39F)

APPENDIX OF DECISIONS/RULINGS

Direct Payment Demands (M.G.L. c. 30, §39F)

APPENDIX A-1

DECISIONS/RULINGS

Form of Demand / Compliance with Statutory Requirements

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: August 25, 2006

Subject: REQUEST FOR DIRECT PAYMENT

Demand File No:	MHD Contract #99165 [C17AA]	Federal Aid #:	NFA
Demand Amount:	$254,231.74		
Subcontractor:	Stronghold Masonry, Inc. (Stronghold)		
Demand Filed:	08/09/06	Demand Dated:	08/07/06
General Contractor:	McCourt/Obayashi (Mct/O)		
Reply Filed:	08/15/06	Reply Dated:	08/14/06
City/Town: Boston		Project:	CA/T [C17AA "Tunnel Finishes"]
Report Request (Dist #)	CA/T	Report Received:	NA

Subcontractor Stronghold filed a two page direct payment demand (Demand) on august 7, 2006 (received August 9th) to which general contractor Mct/O made a sworn reply on august 15, 2006 (Reply). After consideration of both, I find that the Demand has been filed without a sworn statement of the status of the subcontract work. Neither the Demand nor Reply provides the date of substantial completion. Accordingly, I reject the Demand without prejudice.

Since the Demand contains other flaws that would cause rejection if re-filed in the same form, I discuss those matters below. Any re-filed demand needs to be restated. The general contractor should then file a new reply

Mailing: Section 39F requires that the Demand be "sent by certified mail" to the general contractor at the time it is mailed to the awarding authority. The mailing requirement was met.

Sworn Statement: Section 39F requires that a "demand shall be by sworn statement." A statement in the text such as "The undersigned swears under the pains and penalties of perjury that the statements made in this direct payment demand are true, complete and correct" meets that requirement. Here, Stronghold recites that it "made an oath that the above statements are true." As the jurat makes no reference to the scheduled or other documents attached, the Demand was not properly made by sworn statement. The Reply is properly sworn.

Status of Subcontract Work: Section 39F(1)(d) requires that the Demand contain under oath "a statement of the status of completion of the subcontract work." Such a statement is material and should contain the date of substantial completion because a subcontractor under a general contract awarded under Chapter 30 has no statutory right to

direct payment until at least sixty-five (65) days after substantial completion. See Section 39F(1)(d). There is no statement in the Demand that give the date of substantial completion and thus the Department has no way to know whether the requirements of Section 39F(1)(d) were met.

To the contrary, included within the Demand's voluminous filing are nine letter dated July 19, 2006 that indicate that less than 65 days ago Stronghold purported to make price adjustments to the subcontract, which indicates no payment was yet due for work that was done. (For example, one letter asks Mct/O to "Please issue a change order for this work so that payment can be made promptly"; another says, "Please process this change order and send to us for signature." Other letters state that no price has yet been agreed on.) There are thus numerous indications that the subcontract work was not substantially completed 65 days ago.

Detailed Breakdown: Section 39F requires that a "demand shall contain a detailed breakdown of the balance due under the subcontract." The detailed breakdown must be of sufficient detail to inform both the awarding authority and the general contractor what payment was not made that should have been made. This is typically done by submitting a statement under oath relating the key economic facts of the subcontract.[1]

Here, Stronghold gives a figure for "work billed thru July, 2005 Requisition"; the total of "approved changes orders"; the total of Change Orders pending"; the "total subcontract (approved change orders and extra work)"; and the amount of payments received to date. There is no schedule that correlates the subcontract work, the amounts billed or amounts paid and received. As Section 39F is a statute that provides a remedy for a subcontractor that was due payments not received, the Demand appears inadequate on its face, as it is not possible to determine what payments were due and not paid.

Stronghold attaches two unsworn schedules to its Demand. The first is a one page "Schedule of Approved Change Orders," which purports to show that Mct/O owes $50,673.78 for 11 specified items, each purporting to represent an "approved" change order of a specified amount. The Reply "agrees with the Change Orders written to date of $50,673.78." This part of the Demand may be colorable if presented in accordance with the requirements of Section 39F.

Stronghold's second schedule lists various items totaling $220, 911.38. It is titled "Extra Work (Change Order Pending)." That schedule lists 26 "Invoice/Proposals" by number, together with a short "Description" and "Amount." A note explains, "The following will list Stronghold Masonry, Inc.'s Extra Work Invoices/Proposals that have

[1] In the event Stronghold files a renewed demand at a later date that demand should contain a "detailed breakdown of the balance due under the subcontract" that clearly sets forth the original value of the subcontract, all additions to the subcontract through Department-approved amendments, all pending but Department-unapproved amendments, all payments made by the general contractor for work done, any retainage held, all credits, back charges and financial information needed to demonstrate what Department approved work was done but not paid by the general contractor.

not been incorporated into an approved McCourt/Obayashi Change Order as of this date. All of this work has been completed in the field by [Stronghold] at the request of the owner, engineer, and McCourt/Obayashi." The descriptions that relate to each of the 26 items contain such notations as "premium time," "remobilization," "loss time," "cut precast lintel in order to accommodate electrical conduit," "CMU piers," "downtime due to night shift work," "downtime due to power failure," "unit price adjustment due to deleted tunnel walls [sic]," and the like. The language appears to assert claims, not payments under the subcontract that were never made.

The Reply states that "the majority of the value of the claim is in Pending Change Orders which have not been paid to Mct/O and therefore are not due to Stronghold Masonry" and that $171,121.26 of the $220,911.38 "has been denied by Mct/O based on clear contract language." A conforming Reply should specify what is included within the $171,121.26 and what is contained within "pending change orders."

Section 39F permits direct payment in certain circumstances for items of work in the general contract (and in government-approved amendments thereto) for which work has been sublet to a subcontractor. A re-filed demand and rely should both state under pains and penalties of perjury the items of the government-approved general contract that have been sublet and the items in government-approved amendments to the general contract that have likewise been sublet, together with other relevant information. The demand should separately state amounts that are mere claims or included within change order requests yet unapproved by the government.

Attached to the Demand is a ream of supporting documents separated into 25 separate stapled attachments, each consisting of between 10 and 25 pages. No explanation accompanies this pile of subcontract change orders, correspondence, price breakdowns, invoices and spreadsheets, some of which contain handwritten notations that purport to modify the very writings they may be intended to verify. Stronghold implicitly invites this officer to sort through the voluminous materials and ferret out what might support its Demand. Cf. John A. Dziamba v. Warner & Stackpole LLP, 56 Mass. App. Ct. 397, 400-402 (2002) (scope of appropriate discretion to exercise where parties "throw mass of undifferentiated materials" at judge). Should Stronghold choose to re-file a demand it should be certain that supporting materials are keyed to the demand and are explained. Section 39F does not contemplate that the awarding authority must sort through voluminous materials to determine what the subcontractor intends them to mean.

I am compelled to reject the Demand. It is not properly sworn; no date of substantial completion is given; there is ambiguity on the face of the demand as to what is owed under the government-approved general contract and amendments thereto. The Demand is not concisely stated to differentiate between what must have been paid under the subcontract (but was not) and what might yet be paid under the subcontract after matters claimed are heard and decided.

Stronghold's Demand is rejected without prejudice. It may file a Demand that conforms with Section 39F at another time. Stronghold is referred to the following website for additional information: http://www.mass.gov/eot/ALJ

Take no further action on this Demand.

cc:

Stronghold Masonry, Inc.
801 Water Street Attn: Paul Buco
Framingham, MA 01701

McCourt/Obayashi
51 Melcher Street, 3rd Floor
Boston, MA 02210

Chris Strang, Esq.
Corwin & Corwin
One Washington Mall
Boston, MA 02118

Joseph J. Allegro, CA/T

Kimberly Brooks, Esq., CA/T

Commissioner, MHD

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: February 16, 2008

Subject: REQUEST FOR DIRECT PAYMENT

Demand File No:	MHD Contract # 34053		Fed Aid #: N.F.A.
Demand Amount:	$416,245.79		
Subcontractor:	Certified Coatings Company (Coatings)		
General Contractor:	Walsh Construction Company (Walsh)		
Surety:	Travelers Casualty and Surety Company of America		
Demand Filed:	01/29/08	Demand Dated:	01/23/08
Reply Filed:	NA	Reply Dated:	NA
City/Town:	Boston	Project:	CA/T
Report Request (CA/T)	NA	Report Received:	NA
ALJ Ruling Request	02/01/08	ALJ Ruling	02/16/08

I have reviewed the direct payment demand (Demand) by Coatings dated January 23, 2008 and received on January 29, 2008. For the reasons stated I reject the Demand without prejudice.

Mailing: Section 39F requires that the Demand be "sent by certified mail" to the general contractor at the time it is mailed to the awarding authority. The Demand does not state that it was copied certified mail to Walsh and there is no documentary evidence that Coatings complied with the mailing requirement of the statute.

Sworn Statement: Section 39F requires that a "demand shall be by sworn statement." A statement in the text such as "The undersigned swears under the pains and penalties of perjury that the statements made in this direct payment demand are true, complete and correct" meets that requirement. Coatings states that "the foregoing [Demand] is made under the under pains and penalties of perjury." I find that the sworn statement requirement is met.

Status of Subcontract Work: Section 39F(1)(d) also requires that the Demand contain under oath "a statement of the status of completion of the subcontract work." Such a statement is material since a demand for direct payment does not lie for subcontracts to general contracts awarded under Chapter 30 of the General Laws until at least sixty-five (65) days after substantial completion of the subcontract work. See Section 39F(1)(d). Coatings admits that its subcontract work is not complete. ("Work is

100% complete on work performed to date. Base Contract is approximately 72% complete.") Coatings made its Demand prematurely because its Demand was filed before 65 days had elapsed after substantial completion of the subcontract work.

Detailed Statement: Section 39F requires that a "demand shall contain a detailed breakdown of the balance due under the subcontract." The detailed breakdown must be of sufficient detail to inform both the awarding authority and the general contractor what payment was not made that should have been made. That is typically done by submitting a statement under oath relating the key economic facts of the subcontract that derive what payment is due from the general contractor that was not paid.

Coatings' Demand does not provide a detailed breakdown of the balance due within the meaning of Section 39F. Because it may submit another, conforming demand in the future I now address this requirement.

A detailed breakdown should detail the subcontract work completed by pay item and show payments already made therefor. That is true for lump sum work as well. A direct payment demand is not a claim—it is demand for a payment from the awarding authority that is presently due and owing from the general contractor but not made.

Coatings' detailed breakdown is comprised of three parts. First, it seeks $242,408.13 for "lump sum work complete." A conforming accounting would show the value of the lump sum item, the payments made to date and the payments still due after substantial completion. Periodic payments are not cognizable for the purpose of making a direct payment demand under Section 39F with respect to subcontracts to Chapter 30 general contracts.

Second, Coatings seeks $58,106.12 "time & material work complete." Coatings fails to specify the work it demands payment for or the provision of the subcontract work that permits time and materials payments.

Third, Coatings seeks $115,731.54 for unnamed "fire damage time & material [work] complete." A conforming detailed breakdown would specify the provision of the subcontract that permits time and material work for "fire damage." As well, the breakdown would show that the subcontract work was complete and all the payments made to date.

Coatings should be aware of the fact that under Section 39F a "claim" is not the same as a "direct payment demand." Coatings refers to itself as "claimant." Section 39F is not a substitute for a general writ of attachment or trustee process. See Cardi Corporation v. Sutton Corporation et als., Superior Court, C.A. No. 95-6027-D (Lauriat , J.). Nor is the process set forth under Section 39F a method for a subcontractor to obtain payment for work for which the awarding authority has not paid to the general contractor. Id. Finally, the direct payment statute does not permit the government to directly pay a subcontractor for "extra work" never approved by the awarding authority to the general contractor; nor does the statute permit a "demand" that is in fact a mere claim that the

subcontractor is attempting to assert against the general contractor. Id. Efforts to assert claims by characterizing them as demands may become false claims.

Coatings' Demand fails to meet the requirements of Section 39F because (1) the mailing requirement was not met; (2) there is no statement of the date of substantial completion, as the subcontract work is on-going; and (3) Coatings failed to provide a conforming detailed breakdown of the balance due under the subcontract for any of the payments it demands.

Notwithstanding the failure apparent in its Demand, it may be that Coatings could assert a conforming direct payment under Section 39F at a future time. Accordingly, Coatings' Demand is rejected without prejudice; it may re-file a conforming Demand at another time.

Coatings should refer to the following website for additional information: http://www.mass.gov/eot/ALJ

Take no further action on this Demand.

cc: Certified Coatings Company
1045 Detroit Avenue
Concord, CA 94518

Walsh Construction Company
383 Dorchester Avenue
South Boston, MA 02127

William J. Thompson
Travelers
215 Shuman Blvd.
Naperville, IL 60563

Kimberly Brooks Poirier, Esq.
Massachusetts Turnpike Authority
10 Park Plaza
Boston, MA 02116

Travelers Casualty and Surety Company of America
One Tower Square
Hartford, CT 06183

Chief Engineer
Commissioner, MHD
Undersecretary, EOT

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: July 6, 2012

Subject: REQUEST FOR DIRECT PAYMENT

Demand File No:	MassDOT Contract #63232 Fed. Aid: B-16-009-C-01-002		
Amount:	$19,296.46		
Filed By:	Chesapeake Specialty Products, Inc. (Chesapeake)		
General Contractor:	SPS New England, Inc. (SPS)		
Surety:	Hartford Fire Insurance Company (Bond No. 08BCSFS4190)		
Subcontractor:	All-Set, Inc.		
Subcontractor:	Mimosa, Inc.		
Date Filed:	06/19/12	Dated: 06/15/12	
Reply Filed:	NA	Reply Dated:	NA
City/Town:	Boston	Project:	Longfellow Bridge (Cambridge St.)
Report Request (Dist 6)	NA	Report Received:	NA
ALJ Ruling Request	06/25/12	ALJ Ruling	07/06/12

I have reviewed the direct payment demand (Demand) by Chesapeake dated June 15, 2012 and filed June 25, 2012. The Demand is made under the provisions of G.L. c.30, s.39F (Section 39F).

The Demand states that Chesapeake "would like to request a direct payment through MassDOT under G.L. c. 30, s. 39F." Chesapeake appears to be a materialman supplier of specialty products.

I am constrained to reject the Demand. Chesapeake does not show that it is a subcontractor to a general contractor as defined by Section 39F(3). There are other defects. Chesapeake made no showing that the Demand was mailed by certified mail to general contractor SPS at the time the Demand was mailed to MassDOT. No Subcontractor as defined by Section 39F(3) made a statement that shows when the subcontract work was completed. The Demand contains no detailed breakdown of the balance due under the subcontract that shows what payment SPS should have made to Chesapeake for sublet general contract work that it failed to make. Finally, Chesapeake appears to assert that it should be paid interest on its Demand, although interest is not payable on direct payments made under Section 39F.

Mailing: Section 39F requires that the Demand be "sent by certified mail" to the awarding authority and the general contractor at the same time. Chesapeake does not

show that it mailed a copy of its Demand certified mail to SPS. It did not testify by sworn statement that it did so and it did not supply a copy of a certified mail receipt. The requirement was not met.

Sworn Statement: Section 39F requires that a demand and reply shall be by a "sworn statement." A statement in the text of a demand or reply such as "The undersigned swears under the pains and penalties of perjury that the statements made in this direct payment demand are true, complete and correct" meets that requirement. Here, Chesapeake supplies a statement that "The above information is correct 'under pains and penalties of perjury.' " Lacking is the statement of a natural person "undersigned" that the statements made in the Demand were made under the pains and penalties of perjury. The requirement was not met.

Status of Subcontract Work: Section 39F(1)(d) requires that a demand contain under oath "a statement of the status of completion of the subcontract work." Such a statement is material since a demand for direct payment does not lie until at least sixty-five (65) days after substantial completion of the subcontract work. See Section 39F(1)(d). Chesapeake does not explicate its relationship with SPS in MassDOT #63232, so it is not possible to determine if Chesapeake is a "subcontractor" within the definition of Section 39F(3). However, from the context of the Demand it would appear that Chesapeake might be a materialman supplier to All-Set Corp, not to SPS. [1]

A letter by Chesapeake dated May 17, 2012 addressed to this officer is included in the file. That letter states, "We are requesting a payment of $19,011.29 for balance due from All-Set Corp. for this project." Since the Demand does not state under oath the relationship among SPS, All-Set Corp., Mimosa, Inc. and Chesapeake it is not possible to find that Chesapeake is subcontractor/materialman to SPS.[2] I note that Chesapeake's invoice for $17,386.60 for the materials at issue is addressed to All-Set Corp., not to SPS. In the event Chesapeake elects to refile a demand it must demonstrate by statements made under oath and supporting documents that it is a materialman/subcontractor to the

[1] Section 39F(3) defines a subcontractor as "a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor." A subcontractor to a subcontractor is thus not within the definition of the word "subcontractor" as defined by Section 39F and as such in not entitled to the remedy of direct payment.

[2] Chesapeake filed with MassDOT on February 21, 2012 a copy of its claim against the bond to The Hartford, the general contractor's surety. In that filing Chesapeake stated, "This is to serve as our notice of claim against SPS New England, Inc. [] general contractor, All-Set, Inc. … and Mimosa, Inc. … subcontractors in [MassDOT project 604421] for the amount of $17,912.14… which represents the balance due on our invoices #21183." The Hartford, by letter dated March 22, 2012, denied Chesapeake relief because Chesapeake filed its claim on the bond after the time permitted by law had expired. The Hartford's March 22, 2012 letter, which was apparently based on prior correspondence with Chesapeake, said in part, "The documentation seems to indicate that your company, Chesapeake Specialty Products, Inc., provided materials to All-Set Corp., who was a subcontractor to Mimosa Construction Inc. [,] who was a subcontractor to SPS New England, Inc., the general contractor on the Longfellow Bridge project." If The Hartford's statement is correct, Chesapeake is not a subcontractor to a general contractor, as defined by Section 39F(3).

general contractor SPS and in doing so should explain the relationship among SPS, All-Set, Mimosa, Inc. and Chesapeake. As no properly sworn facts exist here, it is not possible to find when a subcontractor entitled to relief under Section 39F completed its subcontract work. Chesapeake did not show that it was a subcontractor as defined by Section 39F(3) and did not state when its "subcontract work" to the general contractor was completed. The requirement was not met.

Detailed Breakdown: Section 39F requires that a "demand shall contain a detailed breakdown of the balance due under the subcontract." The detailed breakdown must be of sufficient detail to inform both the awarding authority and the general contractor what payment was not made that should have been made for sublet general contract work. As extra work not approved by the awarding authority in the general contract may not be sublet and as claims may not be asserted in a direct payment demand, it is also required that the detailed breakdown clearly demonstrate that the Demand does not contain mere claims of the subcontractor against the general contractor or seek payment for extra work not within the general contract.

There is no coherent detailed breakdown of a balance due under a subcontract with the general contractor here. Chesapeake encloses the following documentation: (1) claim on bond notice from [this] office dated February 29, 2012; (2) denial of bond claims from The Hartford dated March 22, 2012; (3) invoice #21183 for a shipment to All-Set (Subcontractor) of 41,451 pounds of METGRIT 40 abrasives in 24 drums for the Longfellow Bridge project #63232; (4) a current customer statement [of Chesapeake] showing a balance due of $19,296.46 (including interest charges not payable under Section 39F); and (5) proof of delivery. Chesapeake "request[s] a lien to be placed on this project until payment is satisfied in full."[3]

I conclude that Chesapeake's Demand does not conform to Section 39F. None of the procedural requirements of the statute were met. Chesapeake has not shown that it is a materialman supplier subcontractor to a general contractor within the meaning of Section 39F(3). Chesapeake did not file a detailed breakdown of the balance due under the subcontract. Chesapeake did not submit in writing a narrative of facts which, if true, would entitle it to direct payment.

Chesapeake's Demand is rejected without prejudice.

cc: Chesapeake Specialty Products, Inc.
5055 North Point Blvd.
Baltimore, MD 21219

Bond Claims Department
Hartford Fire Insurance Company
16 South Main Street
P.O. Box 457
Topsfield, MA 01983

[3] Section 39F does not authorize the awarding authority to place liens.

Peter F. Sennott, Attorney in Fact
Sennott Insurance Company
16 South Main Street
Topsfield, MA 01983

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

All-Set, Inc.
One Maureen Lane
Georgetown, MA 01833-1113

Mimosa, Inc.
One Maureen Lane
Georgetown, MA 01833-1113

Chief Engineer, MassDOT
Administrator, Highway Division, MassDOT
General Counsel, MassDOT
District Highway Director, District 6

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: June 15, 2012

Subject: REQUEST FOR DIRECT PAYMENT

Demand File No:	MHD Contract #51675	Fed. Aid No.	STP-001S (609)X
Demand Amount:	$21,113.88		
Subcontractor:	DeLucca Fence Company, Inc. (DeLucca)		
General Contractor:	Paolini Corporation (Paolini)		
Surety:	Western Surety Company (Bond No. 929434227)		
Demand Filed:	06/04/12	Demand Dated:	05/30/12
Reply Filed:	NA	Reply Dated:	NA
City/Town:	Taunton	Project:	(Rte. 138, Somerset Avenue)
Report Request (Dist #5)	06/15/12	Report Received:	NA
ALJ Ruling Request	06/06/12	ALJ Ruling	06/15/12

I have reviewed the direct payment demand (Demand) by DeLucca dated May 30, 2012 and received by MassDOT on June 4, 2012. The Demand is made under the provisions of G.L. c.30, s.39F (Section 39F).

The Demand states that DeLucca is a subcontractor for "guard rail and fence" work to general contractor Paolini.

I am constrained to reject the Demand. There is no sworn statement in the body of the Demand that it was made "under pains and penalties of perjury." The detailed breakdown of the balance due under the subcontract as submitted does not conform with the requirements of Section 39F because it does not derive a balance due under the subcontract that shows what payment was not made that should have been made for sublet general contract work.

Mailing: Section 39F requires that the Demand be "sent by certified mail" to the awarding authority and the general contractor at the time. DeLucca shows that it has mailed a copy of its Demand certified mail to Paolini and supplied the certified mail number. The requirement appears to have been met.

Sworn Statement: Section 39F requires that a demand and reply shall be by a "sworn statement." A statement in the text of a demand or reply such as "The undersigned swears under the pains and penalties of perjury that the statements made in this direct payment demand are true, complete and correct" meets that requirement. Here, DeLucca supplied the statement of a notary, not the statement of a principal of DeLucca. The notary states that Barbara J. DeLucca-Rea, President of DeLucca, "made oath" that the statements in the Demand and Exhibit A (itemized breakdown) "are true and accurate." That is not sufficient. DeLucca's principal must state in the body of the

Demand that the statements made are made "under the pains and penalties of perjury." The requirement was not met.

Status of Subcontract Work: Section 39F(1)(d) requires that a demand contain under oath "a statement of the status of completion of the subcontract work." Such a statement is material since a demand for direct payment does not lie until at least sixty-five (65) days after substantial completion of the subcontract work. See Section 39F(1)(d). DeLucca states the subcontract work was completed on March 16, 2012, more than 65 days before the date the Demand was filed on June 4, 2012. The requirement was met.

Detailed Breakdown: Section 39F requires that a "demand shall contain a detailed breakdown of the balance due under the subcontract." The detailed breakdown must be of sufficient detail to inform both the awarding authority and the general contractor what payment was not made that should have been made for sublet general contract work. As extra work not approved by the awarding authority in the general contract may not be sublet and as claims may not be asserted in a direct payment demand, it is also required that the detailed breakdown clearly demonstrate that the Demand does not contain mere claims of the subcontractor against the general contractor or seek payment for extra work not within the general contract.

DeLucca's detailed breakdown appears on a single page. There is no backup attached. In substance, the detailed breakdown consists of six columns: (1) Pay Item; (2) Item Description; (3) Unit; (4) Unit price; (5) Quantity completed "to date"; and (6) amount [dollar value of work completed]. There are 16 line items that identify the work for which an amount is stated. The first eleven [11] line items are clearly associated with sublet pay items from the general contract. The last five [5] line items, that is, lines 12 through 16, are not clearly associated with sublet pay items.

On line 8 DeLucca references work associated with pay item 670.000:

Item	Description	Unit	Unit Price	Quantity	Amount
670.000	[fence][1]	lf	20.71	805.50	$16,681.91

On lines 14, 15 and 16 DeLucca also purports to associate work with pay item 670.000 by use of the words "New Fence Materials Supplied under Item 670":

Item	Description	Unit	Unit Price	Quantity	Amount
[blank]	[fence][2]	ls	1.00	122.83	122.83
[ditto]	[ditto]	ls	1.00	4361.96	4,361.96
[ditto]	[ditto]	ls	1.00	19200.58	19,200.58

[1] "Fence Removed & Reset (new material excluded)"

[2] "New Fence Materials Supplied under Item 670"

On line 8 of the detailed breakdown the unit price for "Fence Removed & Reset (new material excluded)" is stated as $20.71/lf while on lines 14, 15 and 16 the unit price for "new fence materials supplied under Item 670" is stated as "ls" [lump sum] $1.00.

I find the unit prices for work done under contract pay item 670.000 is stated twice in the detailed breakdown and are manifestly self-contradictory. Whether the quantities of "new fence materials supplied under Item 670" stated on lines 14, 15 and 16 is for extra work or claimed extra work is impossible to determine. It is only possible to be certain that the sublet unit price of $20.71 "lf" otherwise applied in line 8 for Item 670 sublet work is not applied to "new fence materials." DeLucca provides no narrative explanation under the pains and penalties of perjury and no backup.[3]

The detailed breakdown contains no breakdown whatsoever of the $84,094.69 in payments received from Paolini. The amounts received are not associated with particular sublet pay items.

I find that the detailed breakdown of the balance due is defective. With respect to the amounts stated to be due under its Demand, DeLucca failed to specify for each of the 16 lines in the detailed breakdown the pay item in the general contract under which the sublet work was performed. With respect to the amount of payments received, it did not specify by pay item the amounts paid, which makes it impossible to determine what payments for sublet work were not made that should have been made. The failure of DeLucca to specify the work performed by sublet pay item on lines 12, 13, 14, 15 and 16 (or specify whether any payment was made for any work described on those lines) makes it impossible to determine whether such work is extra, a mere claim or, indeed, general contract sublet work at all.

The requirement of supplying a detailed breakdown under pains and penalties of perjury under Section 39F has not been met. I am constrained to reject this Demand.

DeLucca is referred to http://www.massdot.state.ma.us/ALJ for additional information.

DeLucca may file a conforming demand at another time.

cc:

DeLucca Fence Company, Inc.
Five Old Ferry Road
Methuen, MA 01844

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[3] In addition, line 12 ["Guard Rail Removed and Disposed" ($506.25)] and 13 ["Hand Dig for Guard Rail Posts" ($476.00)] are not associated with any pay item even purportedly sublet from the general contract. It is therefore not possible to know whether lines 12 and 13 refer to extra work or a mere claim. There is no narrative statement made under pains and penalties of perjury that explains.

Paolini Corporation
103R Adams Street
Newton, MA 02158

Western Surety Company
c/o Danielle M. Bechard
TD North Insurance Agency, Inc.
100 Great Meadow Road
Wethersfield, CT 06109

Chief Engineer, MassDOT,
Administrator, Highway Division, MassDOT
General Counsel, MassDOT
District Highway Director, District 5

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: January 9, 2014

Subject: REQUEST FOR DIRECT PAYMENT

Demand File No:	MassDOT Contract #68165		Fed. Aid: N.F.A.
Demand Amount:	$186,565.13		
Subcontractor:	EDM Construction, Inc. (EDM)		
General Contractor:	PIHL, INC. (PIHL)		
Surety:	The Insurance Company of the State of Pennsylvania No. 29-53-76		
Demand Filed:	12/19/13	Demand Dated:	12/13/13
Reply Filed:	NA	Reply Dated:	NA
City/Town:	Lynn	Project:	General Edwards Drawbridge
Report Request:	Dist. 4	Report Received:	NA
ALJ Ruling Request:	12/30/13	ALJ Ruling:	01/09/14

I have reviewed the direct payment demand (Demand) by EDM dated December 13, 2013 and received by MassDOT on December 19, 2013. The Demand is made under the provisions of G.L. c. 30, s. 39F (Section 39F). This is the second demand by EDM under this contract. On October 18, 2013 I rejected EDM's demand for $191,936.13 seeking payment for the same change orders, and approximately the same amount, on the ground that EDM did not supply a conforming detailed breakdown of the balance due required under Section 39F. This re-filed Demand must be rejected for the same reason.

Summary

EDM's Demand consists, in essence, of the total amount of its invoices sent PIHL less the total amounts PIHL paid it. EDM does provide an accounting based on the general contract pay items sublet to it. The Demand seeks whatever it chose to bill PIHL in its invoices, irrespective of whether those amounts were related to the sublet pay items of the subcontract. Its accounting method does not show what general contract pay items were sublet by PIHL, the scheduled value of those items, the sublet work EDM in fact performed and the amounts PIHL paid EDM for the sublet work. As a result the Demand provides no way to determine what sublet pay item work EDM performed that PIHL failed to pay. The amount of the Demand, $186,565.13, is merely the difference between what EDM billed and PIHL paid. It contains no means to verify (or tie out) the gross amounts billed or paid under the subcontract. As a result the total of the Demand could include—and this instance certainly did include—claimed extra work and naked claims that are not subject to payment by direct payment under Section 39F.

Should EDM file a third demand in this matter it should take care to only seek amounts that it can clearly show are due and owing for completed sublet general contract work performed by EDM but unpaid by PIHL. Claims or billing for "extra work" must be separately stated. A proper detailed breakdown should show—by specific sublet pay item—all sublet work performed, billed and paid. The balance due should be derived by an accounting of the sublet work EDM performed but for which it was not paid by PIHL. EDM should take care not to demand amounts that are mere claims, or claimed extra work, or amounts it may possibly recover in a suit against PIHL, such as EDM's costs of delay since they may not be paid under Section 39F. See Cardi Corporation v. Sutton Corporation et al., SUCV No. 95-6027D, October 3, 1996 (Lauriat, J) (Cardi). Gross totals of invoice billings and amounts paid in response to such billings cannot properly support a direct payment demand under Section 39F since they contain billing for extra work and naked claims.[1]

The Demand

The Demand consists of a two page letter, which contains a six line accounting of the amount demanded. The Demand states an original subcontract amount of $708,456.00,[2] plus two additions by change order [Change Order 1 ($29,716.29); Change Order 2 ($65,055.82)] less one deletion [Change Order 3 (-$6,000.00)]. The total is further reduced by the amount PIHL has paid EDM to date ($610,662.80). Combining the six lines yields (according to EDM) a "Balance Due" under the subcontract of $186,565.13. The three change order amounts, and the amounts paid to date, are purportedly supported by additional materials attached to the Demand, in Tabs B, C, F, G, H & I.

The subcontract between EDM and PIHL is not attached. The Demand does not contain a narrative statement that explains the subcontract work or make any reference to

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[1] On September 27, 2013 I wrote in a ruling involving EDM's demand of $33,467.05 as subcontractor to PIHL in MassDOT general contract #68202:

> EDM did not submit a conforming detailed breakdown. The purpose of the detailed breakdown is to derive a "balance due"—that is, the amount of a payment (or payments) that the general contractor was obligated to pay the subcontractor but did not. A conforming breakdown must contain sufficient detailed financial information to demonstrate what payment is due and owing. In a typical MassDOT subcontract the balance due is shown by stating the amount of sublet general contract work by sublet pay item, and then, once the subcontract work has been completed, showing the amount of sublet work performed by the scheduled value of sublet pay item, the work performed by pay item and the payments made by the general contractor by pay item. Claims may not be made under Section 39F. Hence, claimed extra work may not be paid by direct payment unless extra work has been authorized for the general contract and has been sublet to the subcontractor and approved by the awarding authority.

[2] Nowhere in the Demand is the original contract amount of $708,456 broken down by sublet pay item. The Demand does disclose which pay items in the original subcontract were completed and paid for by PIHL's payments of $610,662.80. Because no reference to sublet pay items exist, it is impossible to know what work was contained within the subcontract.

the pay items approved by MassDOT for sublet. Also not disclosed is whether the sublet pay items were to be paid as a lump sum or a unit price. There is no statement under oath that identifies what the subcontract work was. EDM's invoices do not reference specific general contract pay items under which payment is sought. EDM's detailed breakdown is not set forth in a comprehensive spreadsheet designed to reveal by pay item the scheduled value, work performed, work completed in full, amount paid by PIHL or amounts that should have been paid but were not paid.

The copies of EDM's invoices sent to PIHL do not reference specific sublet pay items. The checks PIHL sent to EDM as payment for work performed likewise do not reference the sublet pay items (although they do reference EDM's invoices by invoice number). The result is that it is not possible to know what sublet pay item work was performed, billed and paid. It is likewise not possible to know what pay item work was performed but not paid. These flaws result from EDM's flawed accounting method, which wholly fails to provide the required specificity.[3]

Mailing: Section 39F requires that the Demand be "sent by certified mail" to the general contractor at the same time it is mailed certified to the awarding authority. EDM's Demand infers by a "CC" that it sent a copy of its Demand to PIHL. However, it does not so state under oath and it does not supply a copy of the certified mail receipt. The mailing requirement therefore was not met.

Sworn Statement: Section 39F requires that a demand and reply shall be by a "sworn statement." A statement in the text of a demand or reply such as "The undersigned swears under the pains and penalties of perjury that the statements made in this direct payment demand are true, complete and correct" meets that requirement. Here, EDM appears to have met the requirement.

Status of Subcontract Work: Section 39F(1)(d) requires that a demand contain, under oath, "a statement of the status of completion of the subcontract work." Such a statement is material since a demand for direct payment does not lie until at least sixty-five (65) days after substantial completion of the subcontract work. See Section

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[3] A proper accounting requires that EDM do more than attach an AIA summary or copies of invoices sent and checks received. Standing alone, that data—because it is not tied expressly to sublet pay item work—cannot constitute a conforming detailed breakdown of the balance due under the subcontract required by Section 39F. If necessary, a subcontractor must create and submit a spreadsheet that shows, by pay item, the scheduled value of sublet work, the value of work performed and payments received on account of each sublet pay item. The method should derive a balance that reveals, by pay item, what was left unpaid. Claims for extra work, clearly labeled as such, must be stated separately from the sublet general contract work in the spread sheet, since mere claims are not payable by direct payment under Section 39F. See Cardi. A subcontractor is free to state under oath the meaning of the documents it submits and it may also submit a narrative that explains its detailed breakdown and supporting documentation. It is also free to argue why the format it chooses to submit is appropriate to derive an accurate detailed breakdown of the balance due under the contract. But, without more, the gross difference between the total of invoices submitted (without reference to sublet pay items) and the total of amounts paid (without reference to sublet pay item work) cannot, in the ordinary case, constitute a conforming detailed breakdown of the balance due under the subcontract within the meaning of Section 39F.

39F(1)(d). EDM's Demand states that it "completed its contract obligations on June 20, 2013." The requirement was met.

Detailed Breakdown: Section 39F requires that a "demand shall contain a detailed breakdown of the balance due under the subcontract." The detailed breakdown must be of sufficient detail to inform both the awarding authority and the general contractor what payments were not made that should have been made. See Manuel F. Spencer & Son, Inc. v. Commonwealth, 16 Mass. App. Ct. 290, 295 (1983) ("We are not to be taken as derogating from the importance of proper detail in demand and response under Section 39F; indeed, the smooth conduct of the direct payment procedure may depend on it.").

The purpose of the detailed breakdown is to derive a "balance due"—that is, the amount of a payment (or payments) that the general contractor was obligated to pay the subcontractor but did not pay. A conforming breakdown must contain sufficient detailed financial information to demonstrate what payment is due and owing. In a typical MassDOT subcontract the balance due is shown by sublet pay item, scheduled value, the value of the work performed and the payments made by the general contractor by pay item.

Here, EDM supplies a notarized AIA document (G702) that purports to summarize the subcontract work of "bridge repair and misc install rack repair" dated 12/09/13. The AIA document includes a "Change Order Summary" of "additions" of $94,772 and "deletions" of $6,000. The summary states: "Change orders approved in previous months by Pihl." EDM does not state in the summary that the change orders were made to the general contract and then sublet to EDM. EDM does not state that MassDOT approved the change order work and added that work to the general contract or that PIHL then sublet that work to EDM with MassDOT approval. Page two of the AIA summary breaks out the work by lines 1 through 16, which include this description of change orders 1, 2 and 3 shown on lines 14, 15 and 16, to wit:

Line	Description	Amount
14	change order 1 rack repairs[4]	$29,716.29
15	change order 2 see breakdown[5]	$65,055.82
16	change order 3 Painting	($6,000)

If the sums on lines 14, 15 and 16 are combined, the total is $88,772.11.

[4] No document in the Demand shows that MassDOT increased the value of the general contract by $29,716.29 by a change order during the performance of the contract. No document is provided that shows that MassDOT approved an additional $29,716.29 in pay item work sublet from PIHL to EDM. EDM points to "Tab C (page 11) paid" as support. The document appearing on page 11 is a "contract invoice" made by EDM that references pay item 924.003 (LS $29,716.29).

[5] A breakdown of the $65,055.82 is included in Tab G. As explained at note 9, the $65,055.82 is not a change order to the general contract—rather, it is plainly a list of 30 separate claims EDM made to PIHL.

EDM's invoices sent to PIHL are summarized on a computer generated "Customer Quick Report" that shows between 04/20/12 and 07/16/13 EDM sent PIHL 12 invoices. The total amount invoiced is $787,334.96, to which is added retainage of $21,263.97 and from which is subtracted two back charges ($6,000 and $5,370.82) yielding "total amount owed EDM of $797,228.11." From that figure, the Quick Report subtracts $610,662.80 ("amount paid") yielding an "amount now due" of "$186,565." Nothing in the schedule of invoices is accounted for by sublet pay item.

EDM's payment summary shows the dates and the amounts of the checks PIHL sent to EDM, which in the aggregate total $610,662.80. PIHL's payments were made by 10 separate checks, in various amounts, that total $610,662.80. Nothing in EDM's payment summary is accounted for by sublet pay item.

EDM supplies "back up" in the form of copies of PIHL checks received together with copies of the invoices it sent PIHL. The backup is divided into these headings, each with a separate Tab containing various documents.

Tab C	"Back up of invoices and payments received"[6]
Tab D	Invoice 1109-10 short payment[7]
Tab E	Invoice for complete contract[8]
Tab F	EDM Change Order 2 for $70,426.63[9]

[6] Neither invoices nor checks specify sublet work by pay item.

[7] Invoice 1109-10 is for $153,977.00 "steel repair work" and is notated: "only paid $82,278.15 check 008612." [Ck#008612 references two invoices: 1109-009 = $124,369.25 and 1109-1010 = $146,278.15. Ck #008612 allocates payment by invoice: invoice 1109-009 paid $124,369.25; Invoice 1109-1010 paid $82,278.15. The references show that EDM and PIHL dispute the amount invoiced—EDM says $153,997, PIHL says $146,278.15. EDM's copy of invoice 1109-1010 is dated 6/20/13; PIHL's invoice references the date of invoice 1109-1010 as 07/04/13. EDM's 6/20/13 invoice is for $153,977; PIHL's 7/4/13 invoice indicates an amount of $146,278.15. EDM supplies an undated "lump sum breakdown" of $673,456.00 to show the source, by joint number, the elements of the $153,977 it apparently billed on 6/20/13: Joint 3 =00.76; Joint 4 = $00.75; Joint 7 = $00.76; Joint 8 = $2,243.76; Joint 9 = $37,243.76; Joint 10 = $57,243.76; Joint 11 = $57,243.76. The sum of these figures is apparently $153,977, the amount billed PIHL on 6/20/13. There is no explanation in words about what constituted PIHL's "short" payment or why PIHL had reason to believe that invoice 1109-1010 was $146,278.15, not $153,977.00. The discrepancy is $7,698.85. EDM does not specify what sublet general contract work, by pay item, was included within the unpaid invoice of $153,997.00. The Demand does not note or address the discrepancy. Characterizing a general contractor's payment as "short" does not make the full amount invoiced payable by direct payment under Section 39F.

[8] EDM's invoice 1109-011 dated 7/16/13 [printed 7/24/13] is the only document in the voluminous Demand that describes the work billed by general contract pay item: 924.01 LS $7,000; 924.02 LS $28,000; 960 LS $673,456; and 924.003 LS $29,716.29. It appears that of the $36,908.56 billed PIHL on 7/1/13, $28,000 was billed for item 924.02 ("install 200 Kip unidirectional sliding disc bearing 56 each"). It is not possible to determine what other pay item sublet work was billed but not paid.

[9] "Change Order 2" is a claim for additional compensation from PIHL. The $70,426.63 is broken out in invoice 1109-12 dated 6/21/13. EDM Change Order 2 consists of approximately 38 separate, dated requests by EDM to PIHL for additional compensation. For example, "08/30/12J 1 & 12 Brg holes not

Tab G	PIHL Change Order 2 Agreement for $65,055.82[10]
Tab H	EDM credit memo for change order 2 $5,370.82[11]
Tab I	EDM credit memo for painting $6,000

It is not possible to determine from the voluminous invoices EDM supplies or the payment summary it attaches what sublet general contract work was performed and paid by pay item.

The Demand contains no separate accounting of retainage due EDM. It may be possible to calculate the correct amount from the documents supplied, but I decline to attempt that task because it involves speculation. Should EDM seek retainage via direct payment at another time it has the burden to show the unpaid retainage held by PIHL for sublet general contract work performed that is due and owing.

The billing and payment summaries EDM supplies do not constitute a conforming detailed breakdown of the balance due under the subcontract. EDM conflates subcontract work it presumably has performed (though yet to be set forth by sublet pay item) with claims not payable at all under Section 39F. The amounts set forth on change orders 1 and 2 are not substantiated as amounts added to the general contract as approved extra work then sublet to EDM. Rather, change orders 1 and 2 appear to be claims of EDM against PIHL for which it seeks direct payment.

In order to be paid by direct payment, change order work must be shown to be work that is sublet from the general contract. EDM does not state under oath that change orders 1 and 2 were work added to the general contract and approved for sublet by MassDOT. The Demand itself shows that PIHL did not in fact approve all of EDM's claimed extra work; but even if it had, such PIHL-approved extra work is not payable

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lined up (Down Time) $933.93"; and "04/20/13 Rack column repairs (take out prm. Time) $10,846.61." In each line item it appears that "extra work" is claimed by EDM. EDM attaches 30 sheets to substantiate the charges appearing on invoice 1109-12. For example, "8/30/12 On site to install bearings at span 1 & 12 gauge of holes on support beam were different than those on bearings—Down time 11:30 to 3:30." Of the 30 back up sheets at least 28 appear to be EDM's documentation but are apparently signed by PIHL personnel [Caleb Thayer] and may be intended, at least in part, to support EDM's claims for extra or claimed work. The backup in every instance is an EDM form titled "Work Authorization Slip." See post, note 10. Nothing in Change Order 2 appears to be work MassDOT added to the general contract.

[10] The "agreement" consists of an email from PIHL employee Caleb Thayer to "Jacquie" at EDM. "I am looking to closeout EDM's contract for this job. From what I remember and understand with my office we still owe EDM [plus or minus] $60k + retainage ([plus or minus] $38k). Also I have about [plus or minus] $65k in slips that I have verified (please review the attached spreadsheet)." The spreadsheet referenced in the "agreement," which consists of three pages, is attached. At the bottom of the final page of the spreadsheet is a notation: "Total EDM to be paid $65,055.82; pihl to be paid by MassDOT/MCIW $42,036.90; [diff] $23,018.91." The $23,052.80 is referenced in a separate document: "EDM Electronic Slip Summary (MassDOT EWO #6- Issue #1) apparently showing "slip value" and date of the amounts MassDOT might pay PIHL under EWO #6. The email and summary apparently show that $23,018.91 claimed by EDM is not included in EWO #6 to PIHL's general contract and thus not payable to EDM by direct payment because it was not added to the general contract.

[11] EDM's "credit memo" is dated 10/16/13.

under Section 39F unless the general contract has been amended to include that extra work. See EWO #6.

Because neither the invoices EDM sent to PIHL nor the copies of the checks sent by PIHL to EDM reference approved sublet pay items, it is not possible to determine what part of the $186,565.13 demanded is payable under Section 39F. It is not possible to distinguish what are in fact mere claims from the amounts that might be payable on direct payment because no accounting has been provided by sublet pay item. Certainly some amounts included in the Demand are claims that EDM may pursue against PIHL. I conclude that, because I find that it is not possible to determine from EDM's Demand what sublet work PIHL has in fact paid for and what work remains unpaid, I must reject the Demand. The Demand is also rejected because the mailing requirement was not met.

In the event EDM files another demand on this subject matter, it must provide a detailed breakdown of the amount it demands by sublet pay item and must support its demand by showing—by sublet pay item—the work performed by EDM and paid by PIHL for sublet general contract work. The demand should clearly identify amounts merely claimed since those amounts may not be paid by direct payment. Seeking money not payable by direct payment may constitute a false claim.

EDM's Demand is rejected. Take no further action on this Demand.

EDM may refer to www.mass.gov/eot/alj for more information.

cc:

EDM Construction, Inc.
125 East Main Street
Merrimac, MA 01860

PIHL, Inc.
8 Essex Center Drive, Suite 5
Peabody, MA 01960-2911

The Insurance Company of the State of Pennsylvania
175 Water Street
New York, NY10038

Chief Engineer, MassDOT
Administrator, Highway Division, MassDOT
Prequalification Committee, MassDOT
General Counsel, MassDOT
District Highway Director, District 4

TO:	Lina Swan, Director of Fiscal Operations
FROM:	Stephen H. Clark, Administrative Law Judge
DATE:	October 5, 2005
RE:	**Request for Direct Payment**

Claimant:	P.J. Keating Company (Keating)
Contractor:	Roads Corporation (Roads)
Contract #	Contract #33134
City/Town:	Auburn (Bridge Rehab I-290)
Amount:	$300,281.12

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1. I have reviewed the direct payment demand (Demand) by Keating dated September 27, 2005 and filed with the Department on September 28, 2005. Although the Demand complies with G.L. c.30, s.39F (Section 39F) in some respects, the Demand must be rejected since it fails to comply with all the formal requirements of Section 39F.

2. Section 38F requires that the Demand be "sent by certified mail" to the general contractor at the time it is mailed to the awarding authority. The Demand demonstrates this requirement was complied with.

2. Section 39F requires that a "demand shall be by sworn statement." Keating met that requirement by stating in the body of its Demand "Signed under the pains and penalties of perjury [etc.]."

3. Section 30F requires that the Demand contain "a statement of the status of completion of the subcontract work." See Section 39F(1)(d). Keating meets this requirement by the sworn assertion that "the work under this subcontract is complete."

4. Section 39F requires that a "demand shall contain a detailed breakdown of the balance due under the subcontract." The Demand says, "The original contract value was $530,570.19. There have been change orders, approved in writing and signed by both parties with the total adjusted contract of $679,980.33." Keating recites that it has "received total payments of $379,699.21, leaving a balance due of $300,281."

5. Keating's "detailed breakdown" supplies conclusory figures, but does not breakdown the economic facts of the subcontract in a detailed manner appropriate for a $679,980.33 subcontract. For example, the breakdown does not state how many change orders there were to the subcontract, the amounts of such change orders and whether the Department (as well as Keating and Roads) approved each such change order. Further, the breakdown does not show what work was both performed and paid for and what work performed but remains unpaid. This defect is a critical one since Roads is required to make a sworn reply to the Demand within 10 days. See Section 39F(1)(d). Keating's Demand is so general that a meaningful response by Roads sufficient to allow a disputed amount to be identified so that it may be deposited in a joint bank account is simply not possible. Keating's Demand fails to meet the requirement of providing a "detailed breakdown of the balance due under the subcontract."

6. Keating provides attachments to its demand that contain considerable financial detail. It may be that the attachments read carefully might provide the raw material for a detailed breakdown of the balance due under the subcontract. Keating must submit a demand that presents the required financial detail in understandable form, however. The Department is not required to do that task.

7. Keating's Demand is rejected without prejudice; it may refile a new Demand at another time. A re-filed demand should clearly summarize the critical financial facts of the subcontract to show the balance due Keating. The Demand should be presented in a manner that permits Roads to make an intelligent reply.[1] See Section 39F(1)(d).

8. Take no further action on this Demand.

cc:

P.J. Keating Company
P.O. Box 367
Fitchburg, MA 01420

The Roads Corporation
241 Treble Cove Road
North Billerica, MA 01852

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[1] A "detailed breakdown of the balance due under the subcontract" typically sets forth the original value of the subcontract, all additions to the subcontract through Department approved amendments, all pending but unapproved amendments, all payments made by the general contractor to the subcontractor for work done, any retainage held, all credits, back charges and the like, and any other critical financial information that specifically demonstrates what Department approved work was done by the subcontractor but remains unpaid by the general contractor. Attachments to the Demand to support the "detailed breakdown" given under oath—such as detail submitted on AIA forms—may be helpful to confirm what work (by payment item number) was done and paid for—or, conversely, what work was done but remained unpaid at substantial completion. In sum, the Demand on its face should recite all critical financial facts needed to derive a "balance due" under the subcontract.

District Highway Director, District 3

Chief Engineer

Commissioner

APPENDIX B-1

DECISIONS/RULINGS

Definition of “Subcontractor”

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: August 28, 2012

Subject: REQUEST FOR DIRECT PAYMENT

Demand File No:	MassDOT Contract #63232 Fed. Aid: B-16-009-C-01-002		
Amount:	$19,296.46		
Filed By:	Chesapeake Specialty Products, Inc. (Chesapeake)		
General Contractor:	SPS New England, Inc. (SPS)		
Surety:	Hartford Fire Insurance Company (Bond No. 08BCSFS4190)		
Subcontractor:	All-Set, Inc.		
Subcontractor:	Mimosa, Inc.		
Date Filed:	06/19/12	Dated: 06/15/12	
Reply Filed:	NA	Reply Dated:	NA
City/Town:	Boston	Project:	Longfellow Bridge (Cambridge St.)
Report Request (Dist 6)	NA	Report Received:	NA
ALJ Ruling Request	08/02/12	ALJ Ruling	08/27/12

This is a re-filed demand following the rejection on July 6, 2012 of Chesapeake's demand on the same subject matter. To avoid repeating facts already stated in the July 6, 2012 ruling, I incorporate that ruling herein by reference. This re-filed Demand was received by MassDOT on July 31, 2012; the papers are dated July 26, 2012. The Demand is made under the provisions of G.L. c.30, s.39F (Section 39F).

Chesapeake has satisfied the formal requirements of Section 39F.

The Demand states that MassDOT "awarded to Chesapeake" a "Claim on Bond" on February 29, 2012 and that Chesapeake was denied payment by Hartford "due to time limitation in the bond."

Chesapeake here seeks "further relief" by direct payment for $17,386.63 "due to non-payment from SPS New England, Inc. General Contractor, All-Set Corporation, Sub-Contractor and Mimosa, Inc. Sub-Contractor to Chesapeake Specialty Product, Inc. a material suppler on the Longfellow Bridge Project #63232."

I am constrained to reject the Demand.

Chesapeake is a materialman/supplier. The Demand states that Chesapeake is a subcontractor to a subcontractor of the general contractor. In the words of Chesapeake,

"Chesapeake …furnished, sold and delivered METgrit Abrasives at the request of All-Set Corporation, Subcontractor, between the dates of September 6, 2011 and September 7, 2011 for the above referenced project through the purchase made by All-Set Corporation." "Although Chesapeake … has made repeated requests for payment to All-Set Corporation, payment has not been made and the balance of $17,386.63 is still due and owing."

It is apparent from the Demand that All-Set is a subcontractor to general contractor SPS and that Chesapeake is a material supplier to subcontractor All-Set.

Section 39F(3) provides:

> "Subcontractor" as used in this section … (ii) for contractors awarded as provided in paragraph (a) of section thirty-nine M of Chapter thirty shall mean a person approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor, and (iii) for contracts with the commonwealth not awarded as provided in forty-for A to forty-four H, inclusive, of chapter one hundred forty-nine shall also mean a person contracting with the general contractor to supply materials used or employed in a public works project for a price in excess of five thousand dollars.

Thus, for general contracts awarded under Chapter 30 "subcontractor" "shall mean a person approved by the awarding authority in writing as a person …furnishing materials pursuant to a contract with the general contractor" and shall also mean, in certain circumstances, "a person contracting with the general contractor to supply materials used or employed in a public works project for a price in excess of five thousand dollars."

Chesapeake did not furnish materials for the project "pursuant to a contract with the general contractor"; Chesapeake is not "a person contracting with the general contractor to supply materials…."

I conclude that Chesapeake is not a subcontractor within the meaning of Section 39f(3). Accordingly, it may not avail itself of the remedies afforded by Section 39F.

The Demand is rejected with prejudice. Take no further action on this Demand.

cc: Chesapeake Specialty Products, Inc.
5055 North Point Blvd.
Baltimore, MD 21219

Bond Claims Department
Hartford Fire Insurance Company
16 South Main Street

P.O. Box 457
Topsfield, MA 01983

Peter F. Sennott, Attorney in Fact
Sennott Insurance Company
16 South Main Street
Topsfield, MA 01983

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

All-Set, Inc.
One Maureen Lane
Georgetown, MA 01833-1113

Mimosa, Inc.
One Maureen Lane
Georgetown, MA 01833-1113

Chief Engineer, MassDOT
Administrator, Highway Division, MassDOT
General Counsel, MassDOT
District Highway Director, District 6

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: February 29, 2012

Subject: REQUEST FOR DIRECT PAYMENT

Demand File No:	MHD Contract #57758	Fed. Aid No.	N.F.A.
Demand Amount:	$20,650.00		
Subcontractor:	ECS North America, LLC (ECS)		
General Contractor:	RDA Construction Corp. (RDA)		
Surety:	Great American Insurance Company (Bond No. 8118554)		
Demand Filed:	1/4/12	Demand Dated:	12/30/11
Reply Filed:	NA	Reply Dated:	NA
City/Town:	Milton	Project:	Bridge (M-25-028) Ponkapoag Trail/ I-93
Report Request (Dist #4)	01/24/12	Report Received:	02/22/12
ALJ Ruling Request	02/22/12	ALJ Ruling	02/29/12

On January 24, 2012 I found the direct payment demand (Demand) by ECS dated December 30, 2011 and received by MassDOT on January 4, 2012 colorable and asked District 4 for report on the status of the subcontract work. The Demand is made under the provisions of G.L. c.30, s.39F (Section 39F).

The Demand stated that ECS is a subcontractor that rented equipment to RDA as general contractor to MassDOT for rehabilitation of the bridge over Ponkapoag Trail at I-93 in Milton for the MassDOT accelerated bridge program.

On February 22, 2012 I received the February 8, 2012 report of District 4, which stated (1) ECS was not an approved subcontractor; instead "they apparently supplied rental equipment to the contractor"; (2) "the equipment was used for structural steel painting which was normal [general] contract work"; (3) the work for which the equipment was rented is complete; (4) the work was substantially completed on 7/21/11 and was inspected on that date; and (5) the District does not intend to file a claim for defective or incomplete work.

It appears from the report of the District that ECS is not a subcontractor within the meaning of Section 39F as it did not perform sublet general contract work. The District did not approve the sublet of any general contract work to ECS—for example, any bid pay item work contained in the general contract. ECS is not a materialman supplier, as it did not supply material that was incorporated in the general contract work.

Section 39F is not a statute that authorizes the awarding authority to pay by direct payment every unpaid bill sent to a general contractor. The statute does not provide a remedy to every vendor of the general contractor in circumstances where the subcontractor has not been approved in writing. I find that the remedy of Section 39F does not authorize direct payment to ECS in these circumstances.

It is for MassDOT to determine whether, notwithstanding the conclusion reached with respect to Section 39F, RDA has breached its general contract with MassDOT because it failed to pay ECS.

The Demand of ECS is rejected with prejudice. Take no further action on this Demand.

cc:

ECS North America, LLC
148 Mill Rock Road East
P.O. Box 612
Old Saybrook, CT 06475

RDA Construction Corporation
35 North Street
Canton, MA 02021

Great American Insurance Company
c/o Sandra C. Lopes
Ten Lincoln Place, Suite 116
Foxborough, MA 02035

Chief Engineer, MassDOT,
Administrator, Highway Division, MassDOT
General Counsel, MassDOT
Administrator, Accelerated Bridge Program
District Highway Director, District 4

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: March 11, 2014

Subject: REQUEST FOR DIRECT PAYMENT

Demand File No:	MassDOT Contract #70562		Fed. Aid: BR-002S (256)
Demand Amount:	$34,419.10		
Subcontractor:	GV Engineering, LLC (GV)		
General Contractor:	Middlesex Corporation (Middlesex)		
Surety:	Travelers Casualty and Surety Company of America No. 105714312		
Demand Filed:	02/6/14	Demand Dated:	02/03/14
Reply Filed:	02/10/14	Reply Dated:	02/06/14
City/Town:	Bourne	Project:	Bridge Replacement
Report Request:	Dist 5	Report Received:	NA
ALJ Ruling Request:	02/18/14	ALJ Ruling:	03/11/14

I have reviewed the direct payment demand (Demand) by GV, dated February 3, 2014 and received by MassDOT on February 6, 2014. Middlesex made a reply to the Demand on February 10, 2014. The Demand and Reply are made under the provisions of G.L. c. 30, s. 39F (Section 39F).

The Demand consists of a one page letter stating that GV is owed $34, 419.10 for "professional engineering services' provided in 2012 to "MassDOT/Middlesex subcontractor Testa Corporation, which went out of business." GV also states: "What remains troubling is the fact that our plans continue to be utilized during the construction phases of the project without payment being received for our services."

The Reply consists of a two page letter stating that GV "was a second tier subcontractor to Testa Corporation (Testa)." The Reply states that Middlesex paid Testa all monies due "including GV's payment…." The Reply states that it was not notified of non-payment by Testa to GV until September 24, 2013, at which time they notified Testa of its obligation to pay GV. The Reply states that "Testa was still a viable company at the time of the work and for approximately 1 ½ years after GV's work was completed."

Mailing: Section 39F requires that the Demand be "sent by certified mail" to the general contractor at the same time it is mailed certified to the awarding authority. GV did not meet the mailing requirement; Middlesex did not meet the mailing requirement.

Sworn Statement: Section 39F requires that a demand and reply shall be by a "sworn statement." A statement in the text of a demand or reply such as "The undersigned swears under the pains and penalties of perjury that the statements made in this direct payment demand are true, complete and correct" meets the requirement. GV did not submit a conforming sworn statement; Middlesex did not submit a conforming sworn statement.

Status of Subcontract Work: Section 39F(1)(d) requires that a demand contain, under oath, "a statement of the status of completion of the subcontract work." Such a statement is material since a demand for direct payment does not lie until at least sixty-five (65) days after substantial completion of the subcontract work. See Section 39F(1)(d). GV states (but not under oath) that its design work was completed on April 9, 2012. The Reply does not contradict that statement. The requirement appears to have been met but for the fact that the statement was not made under oath.

Detailed Breakdown: Section 39F requires that a "demand shall contain a detailed breakdown of the balance due under the subcontract." The detailed breakdown must be of sufficient detail to inform both the awarding authority and the general contractor what payments were not made that should have been made. See Manuel F. Spencer & Son, Inc. v. Commonwealth, 16 Mass. App. Ct. 290, 295 (1983) ("We are not to be taken as derogating from the importance of proper detail in demand and response under Section 39F; indeed, the smooth conduct of the direct payment procedure may depend on it.").

The purpose of the detailed breakdown is to derive a "balance due"—that is, the amount of a payment (or payments) that the general contractor was obligated to pay the subcontractor but did not. A conforming breakdown must contain sufficient detailed financial information to demonstrate what payment is due and owing. In a typical MassDOT subcontract the balance due is shown by sublet pay item, scheduled value, the value of the work performed and the payments made by item by the general contractor.

GV's Demand is based on the fact that it was paid nothing for its design work (and that the fruits of it labors were incorporated into Contract No. 70562). Nonetheless, GV Demand must be rejected.

GV admits that it is not a subcontractor to Middlesex but is, instead, a subcontractor to Middlesex's subcontractor Testa. ("Services were performed through Middlesex subcontractor Testa Corporation….") Middlesex's Reply characterizes GV's status as "a second tier subcontractor to [Testa]."

The direct payment remedy afforded by Section 39F does not extend to a "second tier subcontractor." Section 39F(3) provides that a "subcontractor" in a general contract awarded under Chapter 30

> …shall mean a person approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor … in a public works project for a price in excess of five thousand dollars.

GV is not an entity that performed labor "pursuant to a contract with the general contractor." GV is not a "subcontractor" within the definition of G.L. c. 30, s.39F. Accordingly, GV may not avail itself of the direct payment remedy provided by Section 39F.

Take no further action on this Demand.

cc:

GV Engineering, LLC
372 West Street, Suite 100
Keene, NH 03431

Middlesex Corporation
One Spectacle Pond Road
Littleton, MA 01460

Travelers Casualty and Surety Company of America
Aon Risk Services
One Federal Street, 20th Floor
Boston, MA 02110

Chief Engineer, MassDOT
Administrator, Highway Division, MassDOT
Prequalification Committee, MassDOT
General Counsel, MassDOT
District Highway Director, District 5

APPENDIX C-1

DECISIONS/RULINGS

Substantial Completion of Subcontract Work

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: July 21, 2014

Subject: REQUEST FOR DIRECT PAYMENT

Demand File No:	MassDOT Contract #75715		Fed. Aid: IM-95-2(118)
Demand Amount:	$95,587.02		
Subcontractor:	Osburn Associates, Inc. (Osburn)		
General Contractor:	Liddell Brothers, Inc. (Liddell)		
Surety:	Liberty Mutual Insurance Company No. 012019863		
Demand Filed:	06/24/14	Demand Dated:	06/19/14
Reply Filed:	NA	Reply Dated:	NA
City/Town:	Peabody-Georgetown Project: I-95 signage		
Report Request:	Dist. 4	Report Received:	NA
ALJ Ruling Request:	07/14/14	ALJ Ruling:	07/18/14

I have reviewed the direct payment demand (Demand) by Osburn dated June 19, 2014 and received by MassDOT on June 24, 2014. The Demand is made under the provisions of Section 39F.

Osburn is a manufacturing company based in Logan, Ohio. Osburn's Demand states it furnished "materials" for use in the project, which is to fabricate and install overhead and ground mounted guide signs along a section of Interstate 95 in municipalities from Peabody to Georgetown.

The Demand states under oath that Osburn provided materials, including "roadway signage" to Liddell "through a direct agreement with Liddell."

The facts stated in the Demand support a finding that Osburn is a materialman supplier that has supplied materials to a general contractor to MassDOT in an amount exceeding $5,000.00 thus falls within the definition of "subcontractor under Section 39F(3)(ii).

Liddell purported to file a "Reply" to the Demand on June 20, 2014 (received by MassDOT on June 25, 2014). The "Reply" was unsworn. The "Reply" contained the following statements that Liddell apparently intends that MassDOT accept as fact: that (1) payment was delayed due to numerous [unspecified] issues with . . . Osburn regarding fabrication of the signs not meeting MassDOT specifications; (2) multiple [unspecified] attempts to correct the product; (3) "credits due Liddell [unspecified] and backcharges to

Osburn [unspecified] for the [unspecified] errors in fabrication"; (4) Liddell "issued a payment today" to Osburn of $44,970.63"; (5) Liddell "had a difficult time confirming the [unspecified] material provided by Osburn met the [unspecified] MassDOT specifications; (6) Liddell is "processing the [unspecified] paperwork to reflect the correct dates and amounts due."

The Demand

The Demand consists of a three page letter dated June 19, 2014. The second page of the letter states an amount due of $95,587.02 and is signed by Michael Grove, Osburn Associates, Inc. The third page of the letter contains a statement that it is copied to Liddell via certified mail and a jurat. The third page has two signature blocks, one for Michael Grove and one for OSBURN ASSOCIATES, INC. signed by "Michael Grove Its: Office Manager."

Attached to the letter is (1) a nine page invoice dated January 31, 2014 for numerous items shipped to Liddell for a total of $44,970.63; (2) a nine page invoice dated February 7, 2014 for numerous items for a total of $54,122.83; (3) a one page credit memo dated 3/25/14 for $372.50; (4) a 6 page credit memo dated 3/26/14 for $15,808.90; (5) a 6 page invoice dated March 28, 2014 for numerous items for a total of $15,808.90; (6) a one page credit memo dated April 4, 2014 for $3,133.94; (7) a letter from Liddell dated April 4, 2014 to Osburn for "pricing of" Liddell's force account work performed for $3,133.94 for "removal of labeling from the signs supplied for this project"; (8) a certified mail receipt (lacking signature on delivery and checked box showing service type); and (9) a xerox of the mailing to MassDOT dated June 19, 2014 showing certified mail sticker.

The substance of the Demand appears in the text of the June 19, 2013 letter on pages two and three. The Demand states that $95,587.02 is "currently outstanding and is now due and owing…." The letter supplies 11 reasons for the basis of its Demand:

1. "substantial completion of Phase I" one 3/28/14 "over seventy days ago";

2. "upon information and belief" all materials supplied by Osburn "have been accepted by MassDOT;

3. As of June 19, 2014 Osburn has "not received any payments from Liddell … for the completion of Phase I of the Project";

4. Osburn has not "received the balance of $95,587.02 for the completion of Phase I" as of June 19, 2014;

5. under Osburn's agreement with Liddell, Liddell agreed to pay Osburn "within 30 days of its receipt of payment from MassDOT";

6. "Upon information and belief" MassDOT has paid Liddell "for materials provided to the Project by Osburn Associates";

7. An accounting showing invoiced and credit memo amounts that derive a balance due of $95,587.02;

8. an incorporation by reference of the invoices and credit memos attached to the Demand;

9. "A detailed breakdown of the balance due under Osburn Associates' contract with Liddell Brothers, for the Phase I is as follows … $95,587.02";

10. Osburn's agreement to the April 4, 2014 credit memo for time and materials work;

11. "Osburn Associates' agreement with Liddell Brothers for materials related to Phase 2 of the Project totals $121,725.00."

Mailing: Section 39F requires that the Demand be "sent by certified mail" to the general contractor at the same time it is mailed certified to the awarding authority. It appears that Osburn met the mailing requirement.

Sworn Statement: Section 39F requires that a demand and reply shall be by a "sworn statement." A statement in the text of a demand or reply such as "The undersigned swears under the pains and penalties of perjury that the statements made in this direct payment demand are true, complete and correct" meets that requirement. Here, Osburn's office manager Michael Grove "swears under the pains and penalties of perjury that the statements made in the Demand for Direct Payment are true, complete and correct." Osburn appears to have met the requirement.

Status of Subcontract Work: Section 39F(1)(d) requires that a demand contain, under oath, "a statement of the status of completion of the subcontract work." Such a statement is material since a demand for direct payment does not lie until at least sixty-five (65) days after substantial completion of the subcontract work. See Section 39F(1)(d). Osburn states that it completed Phase I of the contract with Liddell on March 28, 2014. Osburn also states in effect that Phase II of the contract with Liddell is not complete but that its "agreement with Liddell Brothers for materials related to Phase 2 of the Project totals $121,725."

The general contract to Liddell was awarded pursuant to G.L. c. 30, s. 39M. As such, subcontractors to such general contracts are not entitled to the remedy afforded by Section 39F until the subcontract work is substantially completed. Here, Phase II of Osburn's subcontract is not complete and thus the entire subcontract work is not substantially complete. Accordingly, Osburn is not entitled to direct payment of the $95, 587.02 under Section 39F. See Section 39F(1).

Detailed Breakdown: Section 39F requires that a "demand shall contain a detailed breakdown of the balance due under the subcontract." The detailed breakdown must be of sufficient detail to inform both the awarding authority and the general contractor what payments were not made that should have been made. See Manuel F. Spencer & Son, Inc. v. Commonwealth, 16 Mass. App. Ct. 290, 295 (1983) ("We are not to be taken as derogating from the importance of proper detail in demand and response under Section 39F; indeed, the smooth conduct of the direct payment procedure may depend on it."). The breakdown supplied by Osburn is sufficient under Section 39F for a materialman supplier.

The "Reply"

Liddell's "Reply" fails to meet the requirements of Section 39F. It is not made under oath; it does not contain a detailed breakdown of the balance due under the subcontract.

Conclusion

Osburn's Demand must be rejected. Section 39F does not afford a remedy to a subcontractor until the subcontract work has been substantially completed. Here, Osburn admits that Phase II of the subcontract work had not been completed.

Take no further action on this Demand.

I have this date asked District 4 to report on circumstances pertaining to Liddell's non-payment of money due and owing to Osburn and a report on the issues "regarding fabrication of the signs not meeting MassDOT specifications."

cc:

Osburn Associates, Inc.
P.O. Box 912
Logan, OH 43138

Liddell Brothers
600 Industrial Drive
Halifax, MA 02338

Liberty Mutual Insurance Company
c/o Jean Correia
Aon Risk Services Northeast, Inc.
One Federal Street, 20th Floor
Boston, MA 02110

Chief Engineer, MassDOT
Administrator, Highway Division, MassDOT
Prequalification Committee, MassDOT
General Counsel, MassDOT
District Highway Director, District 4

TO: Lina Swan, Director of Fiscal Operations
FROM: Stephen H. Clark, Administrative Law Judge
DATE: August 17, 2005
RE: **Request for Direct Payment Under G.L. c.30, S.39F**

Claimant:	PT Corporation (PT)
Contractor:	Modern Continental Construction Co. Inc. (MCC)
Contract #	Contract #32153 [CO9C2]
City/Town:	Boston (CA/T)
Amount:	$72,227.99

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1. PT filed this direct payment demand (Demand) pursuant to G.L. c.30, s. 39F (Section 39F) on August 2, 2005. With respect to the formal requirements of Section 39F, PT's Demand was properly sworn under "pains and penalties of perjury," was delivered in hand to the Department by a messenger service and was apparently delivered to MCC at the time by the same method.

2. The sworn Demand included "a statement of the status of completion of the subcontract work" as required by Section 39F(1)(d). PT stated, "The work on this section of the contract has been substantially completed as of April 30, 2005." (Emphasis supplied.) PT attached a copy of the subcontract with MCC to support its Demand. The scope of work of the subcontract shows 20 different "sections," each with an estimated price. The particular work for which PT alleges that MCC failed to pay is section 722.876. Section 722.876 is described as "Remove Asbestos Coated Retaining Wall—Partial."

3. Section 39F requires that a demand "contain a detailed breakdown of the balance due under the subcontract." See Section 39F(1)(d). PT purports to meet this requirement in paragraph 5 of its Demand, which states

> The original subcontract value was $5,198,875.00. The total subcontract value is $5,317,874.95[.] Total due to PT for the above mentioned work at this time is $72,227.99 for partially paid item #722.876. (Emphasis supplied.)

4. In support of its "detailed breakdown" PT also attached two standard American Institute of Architects (AIA) forms [Document G702] titled "Application And Certification For Payment." The two PT applications, numbers 36 and 37 dated May 6, 2005 and May 13, 2005 respectively, do not show the amounts billed and paid for section 722.876 work and do not derive the unpaid balance of $72,227.99 that is specified in the Demand. Handwritten notations on both forms do not appear to relate to section 722.876 work.

5. After review of the Demand and attachments, I conclude that the Department may not pay this Demand for two reasons. First, the subcontract work is not substantially complete and second the Demand does not contained a proper "detailed breakdown" of the balance due under the subcontract.

6. First, Section 39F distinguishes between subcontractor demands made with respect to general contracts awarded under G.L. c. 30 and those awarded under G.L. c. 149. With respect to a general contract awarded under G. L. c. 149, a subcontractor is authorized to make a direct payment demand after substantial completion of subcontract work and after a general contractor receives payment for subcontract work in a periodic estimate but fails to pay the subcontractor. See Section 39F(1)(1st para) in combination with Section 39F(1)(i) and Section 39F(1)(a). By contrast, with respect to a general contract awarded under G.L. c.30, a subcontractor is only authorized to make a direct payment demand upon "substantial completion of the subcontract work." See Section 39F(1)(1st para) in combination with Section 39F(1)(i) and Section 39F(1)(d). Here, PT only makes demand for partially completed subcontract work, namely work completed under section 722.786 of the subcontract. PT does not allege that it has substantially completed all its subcontract work. Section 39F does not permit PT's Demand.

7. Second, even if PT's Demand were permitted under Section 39F, the "detailed breakdown of the balance due under the subcontract" PT has submitted is not of sufficient detail or clarity to permit MCC to reply intelligently within 10 days under oath. See Section 39F(1)(d). The Demand does not contain a "detailed breakdown of the balance due."

8. I conclude that Section 39F does not permit direct payment to PT in the circumstances presented here. However, that conclusion does not alter PT's right to pursue remedies it may have under its subcontract or the payment bond.

9. PT Demand is rejected. Take no further action on this Demand.

cc:

PT Corporation
480 Broadway
Lynnfield, MA 01940

Modern Continental Construction Company, Inc.
600 Memorial Drive
Cambridge, MA 02139

District Highway Director, District 4
Deputy Chief Engineer, Construction
Marie T. Breen, Esq.
Commissioner

APPENDIX D-1

DECISIONS/RULINGS

Subcontract Balance Due / Improper Assertion of Claims

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: December 29, 2006

Subject: REQUEST FOR DIRECT PAYMENT

Demand File No: MHD Contract #30140 Federal Aid #: AC-STO-134(001)
Demand Amount: $499,351.00
Subcontractor: Aetna Bridge Company (Aetna)
Demand Filed: 12/07/06 Demand Dated: 11/27/06
General Contractor: P.A. Landers, Inc. (Landers)
Reply Filed: NA Reply Dated: NA
City/Town: Carver, Kingston, Plympton Project: Rte. 44 including 5 Bridges

Report Request (Dist #5) NA Report Received: NA

I have reviewed the direct payment demand (Demand) by Aetna dated November 27, 2006 and received by the Department on December 7, 2006. For the reasons stated I reject the Demand with prejudice.

Mailing: Section 39F requires that the Demand be "sent by certified mail" to the general contractor at the time it is mailed to the awarding authority. The Demand by sworn statement says a copy was sent to Landers. The mailing requirement was met.

Sworn Statement: Section 39F requires that a "demand shall be by sworn statement." Aetna met that requirement here.

Status of Subcontract Work: Section 39F(1)(d) requires that the Demand contain under oath "a statement of the status of completion of the subcontract work." Aetna's Demand states under oath that it "has completed its work under the Subcontract."

Detailed Breakdown: Section 39F requires that a "demand shall contain a detailed breakdown of the balance due under the subcontract." Aetna purports to meet that requirement by alleging in writing that its costs of performance exceed the "base" subcontract price of $5,242,551.00. In particular, the Demand recites the circumstances by which Aetna "experienced a series of delays that dramatically increased the time and cost of performance of its work under the Subcontract."[1]

[1] For example, on the Spring Street bridge work was scheduled to begin on June 25, 2001 but "due to delays that Landers caused" Aetna could not be begin work until March 18, 2002. Additional delays were experienced when Landers allegedly failed to provide sufficiently detailed drawings causing additional

Aetna's Demand is plainly a claim for damages due to delay. In its own words

> These delays required Aetna to perform its work on the Project in a dramatically different economic environment, because of increased labor, material and equipment costs, than the environment that existed at the time of Aetna's bid. [] Due to these delays, Aetna experienced escalated direct labor costs and prolongation costs in the total amount of $449,351.00. [2]

Section 39F is a remedial statute by which payments due a subcontractor that a general contractor fails to make in a timely manner shall be paid directly to the subcontractor by the awarding authority. It is not a statute under which subcontractor claims may be asserted or paid.

Aetna's Demand must be rejected with prejudice because it is wholly beyond the scope of Section 39f. Aetna is referred to the following website for additional information: http://www.mass.gov/eot/ALJ

Take no further action on this Demand.

cc:

Aetna Bridge Company
30 Lockbridge Street
Pawtucket, RI 02860

P.A. Landers, Inc.
24 Factory Pond Road
Hanover, MA 02339

District Highway director, District 5
Chief Engineer
Commissioner, MHD

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delays that then necessitated a shut down for the winter, which meant that Aetna could not complete the bridge until the spring of 2003. Aetna also details delays it experienced in the construction of the Brook Street Bridge (487 calendar days), the Route 58 Bridge (680 calendar days), the Route 58 Bridge (an additional 316 calendar days) and the Winnetuxet River Bridge (84 calendar days).

[2] The attachments to the Demand make clear that Aetna first claimed delays damages on May 20, 2002. See Ex. #1. Among other statements that make plain that Aetna is asserting a claim and not a demand for untimely payment is the following: "When delays are caused by the actions of others, Aetna is entitled to claim for damages [sic] caused by the delays." Whatever the truth of that assertion may be under its contract with Landers or under other applicable law, it is not correct that Aetna "is entitled to claim for [delay] damages" under Section 39F.

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: February __, 2009

Subject: REQUEST FOR DIRECT PAYMENT

Demand File No:	MHD Contract # 32030 (C17A6)
Demand Amount:	$2,607,237.80
Subcontractor:	Architectural Paving & Stone, Inc. (APS)
General Contractor:	Modern Continental Construction Co., Inc. (MCC)

Surety: Payment Bond No. SK 3886 3S013199

Lumbermens Mutual Casualty Company, and
American Motorists Insurance Company, and
United States Fidelity and Guaranty Company, and
St. Paul Fire and Marine Insurance Company

Demand Filed:	10/31/08	Demand Dated:	10/29/08
Reply Filed:	None	Reply Dated:	NA
City/Town:	Boston	Project:	CA/T
Report Request	NA	Report Received:	NA
ALJ Ruling Request	11/04/08	ALJ Ruling	01/30/09

Architectural Paving & Stone, Inc. (APS) on October 31, 2008 filed this demand (Demand) dated October 29, 2008 for $2,607,237.80 seeking direct payment under G.L. c.30, s.39F (Section 39F). The Demand arises from an APS subcontract with Modern Continental Construction Co., Inc. (MCC)[1] to supply and install brick, precast pavers, granite paving, site walls and the like at various locations within the Central Artery Tunnel project (CA/T). The subcontract provided that payment would be made for quantities of materials actually "used/installed"; the estimated value of the subcontract was $9,593,802.10. APS states that MCC has paid it $9,877,773.81 to date.

APS's Demand is framed in two parts: Part One seeks $1,166,866.63 for "change order" work; Part Two seeks $1,440,371.17 for delay "claims," for a total of $2,607,237.80 [$1,166,866.63 + $1,440,371.17].

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[1] On June 23, 2008 MCC filed a voluntary petition for Chapter 11 bankruptcy in the United States Bankruptcy Court, District of Massachusetts (Court). See Chapter 11 of Title 11 of the United States Code, 11 U.S.C. ss. 101 et seq. No trustee has been appointed. MCC is the debtor and debtor in possession. MCC has notified the Court that there are 629 creditors holding unsecured claims. The second largest unsecured claim is that of APS, which is listed as holding an unliquidated "claim" of $3,154,554.75. The Demand makes no reference to the bankruptcy filing.

I reject the Demand in its entirety. Part One, seeking payment for "change order" work, is not supported by a detailed breakdown of the balance due under the subcontract. The financial information within Part One is (1) unsupported, (2) involves unidentified extra work not shown approved by the awarding authority or (3) seeks payment additional quantities "pending" future measurement by the awarding authority. Payments made "to date" by MCC to APS are given as a lump sum, without any breakdown. Retainage of $101,765.84 sought by direct payment is nowhere detailed. Part Two, seeking direct payment for "delay claims," is not cognizable under Section 39F.

Mailing: Section 39F requires that the Demand be "sent by certified mail" to the general contractor at the time it is mailed to the awarding authority. APS swears under pains and penalties of perjury that it mailed a copy of its Demand by certified mail to MCC on October 29, 2008. The mailing requirement appears to have been met.

Sworn Statement: Section 39F requires that a "demand shall be by sworn statement." The APS Demand contains a sworn statement.

Status of Subcontract Work: Section 39F(1)(d) requires that the Demand contain under oath "a statement of the status of completion of the subcontract work." APS states that its subcontract work was completed on January 20, 2008, which is more than 65 days prior to the submission of its Demand. APS provided a statement of the status of the completion of the subcontract work.

Detailed Breakdown: Section 39F requires that a "demand shall contain a detailed breakdown of the balance due under the subcontract." The detailed breakdown must be of sufficient detail to inform both the awarding authority and the general contractor what payment was not made that should have been made. Section 39F does not authorize an awarding authority to adjudicate or pay mere claims.

The APS Demand states it is for "payment of final sums due and owing … as set forth in G.L. c. 30, s.39F(1)(d), or otherwise."[2] Its breakdown consists of two parts: Part One, for a total of $1,166,866.63, "set forth" on a requisition made to MCC on July 31, 2007;[3] and, Part Two, "a claim for schedule impacts/delay in the total amount of $1,440,371.17."

Part One

APS submitted a financial breakdown less than one half page in length in support of its Demand for payment of $1,166,866.63, to which its attaches three exhibits of voluminous documents. The text of the Demand does not discuss the exhibits. APS derives the total demanded in Part One by adding together three subtotals: (1) the "sub

[2] APS does not explain what "otherwise" refers to. Direct payment is only authorized by Section 39F.

[3] APS identifies the "requisition" as number "87Rev." "87 Rev" is not attached to the Demand. See Demand PP 4.

balance due on contract" ($370,932.66); (2) "change orders, AWA & FCN, pending" ($397,001.00); and (3) "change order, actual quantities, pending" ($398,932.97) [$370,932.66 + $397,001.00 + $398,932.97 = $1,166,866.63].

I find that APS failed to provide a detailed breakdown of the balance due under the subcontract with respect to Part One because, among other things, none of the three subtotals it uses to derive its final number is supported by detailed a breakdown of a balance due.

The first subtotal, $370,932.66 ("sub balance due on contract"), APS calculates by adding to the "estimated" total subcontract value of $9,593,802.10 the figure of $654,904.37 ("change orders – issued") to find a "subtotal" of $10,248,706.47, from which it then subtracts $9,877,773.81 as "paid [to APS] to date" by MCC, yielding a "sub balance due on contract" of $370,932.66.

The calculation deriving $370,932.66 is insufficient because its principal components are unsupported by any financial detail. Specifically, the "sub balanced due on contract" of $370,932.66 is unexplained in detail because (a) the sum $9,877,773.81 "paid to date" is not specified by pay item or other detail; and (b) the sum of $654,904.37 ("change orders –issued--") is unsupported by the documents attached in Exhibit 1 of the Demand.

APS asserts that MCC has "paid to date" $9,877,773.81 and uses that number to calculate the subtotal $370,932.66. The sum "paid to date" by MCC is given as a lump sum with no back up or breakdown that identifies the subcontract work for which MCC paid APS. Because there is no breakdown of the payments the awarding authority can not determine what work approved by it has been paid or not paid. Nor may it investigate whether payment of any of the $1,166,866.63 demanded in Part One might result in double payment, payment of disputed work, or payment of mere claimed extra work.

APS asserts that $654,904.37 should be added to the estimated subcontract value of $9,593,802.10 to derive a total subcontract value of $10,248,706.47. APS seeks to derive the figure $654,904.37 by two methods. First, APS points to two MCC documents to calculate the figure $654,904.37: (1) "[MCC] Requisition dated 12/31/07 (see Section 7)" and (2) "[MCC] Requisition #10105-084 dated 12/31/07 (see Section 7)". Neither MCC document is attached to the Demand. See "Reconciliation of Change Orders Issued" ("Reconciliation"), Exhibit 1. Second, APS seeks to derive the figure $654,904.37 by using figures derived from 22 supplemental agreements made between APS and MCC. Specifically, APS adds together the face value of the 22 supplemental agreements copied in Exhibit 1 to yield $749,799.37, from which it deducts $94,895.00 ("CO Deducts") to find $654,904.37 [$749,799.37 - $94,895.00 = $654, 904.37]. I find that this second method of deriving $654,904.37 also unsupported.[4] I conclude that APS

[4] APS's method of using the 22 supplemental agreements does not show that $654,904.37 in change orders approved by the awarding authority was issued by MCC to APS. Some of the 22 supplemental agreements signed by those parties are mere authorizations—for example, Supp. #7 for $250,000 for premium time merely authorizes an amount not to exceed but reserves payment "for work as directed and

failed to supply a detailed breakdown showing it had performed $654,904.37 of extra work through a detailed breakdown of any balance due.[5]

The second subtotal, $397,001.00, ("change orders, AWA & FCN, pending"), APS asserts is "evidenced by additional work authorizations and field change notices executed by Modern and/or the awarding authority" in Exhibit 2. Direct payment to subcontractors with respect to additional work must demonstrate that such extra work was authorized by the awarding authority in writing for inclusion in the general contract. APS does not disclose anywhere in Exhibit 2 what extra work was authorized by MCC, what extra work was authorized by the awarding authority and what extra work was authorized by both. For that reason Exhibit 2 does not support APS's assertion that $397,001.00 is due and payable for extra work approved by the awarding authority. Because APS gives no detailed breakdown of the $9,877,773.81 "paid to date," as explained above, it is not possible to verify whether any of the $397,001.00 demanded has already been paid. I find that APS has not provided a detailed breakdown of the balance due under the subcontract with respect to the subtotal $397,001.00 because APS does not show what extra work approved by the awarding authority was added to the general contract, sublet to APS, fully performed by APS in a satisfactory manner but never paid by MCC. APS's statement that extra work was authorized by MCC "and/or" the awarding authority is not sufficient.[6]

The third subtotal, $398,932.97, ("change order, actual quantities, pending"), seeks direct payment for "actual installed quantities over/beyond estimated quantities awaiting final measurement to determine final quantities …." as shown in Exhibit 3. I

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approved" by MCC. Other supplemental agreements create budgeted lump sum items, which by their very terms are "interim [amounts] not-to-exceed," not sums due and owing—e.g. Supp. #9 for $75,000, Supp. #10 for $30,000 and Supp. #13r1 for $88,000. Since APS's Demand provides no detailed breakdown of payments made by pay item or otherwise, budget authorizations or amounts "not to exceed" do not show that any of the extra work authorized was paid by the awarding authority to MCC for work actually completed by APS. The method APS employed relies on unverifiable quantities and the assumption that all MCC authorized extra work was in fact performed. See e.g. Supp. #11 for $43,470. I find that more than $200,000 of the $370,932.66 claimed extra work purportedly shown in Exhibit 1 is unsupported. I find that the net figure of $654,904.37 derived in the Reconciliation by use of the 22 supplemental agreements has no detailed support.

[5] The figure of $101,765.84, which APS asserts is retainage held by MCC, is not backed by any detail and is wholly unsupported. See Exhibit 1, Reconciliation.

[6] Exhibit 2 consists of a one page document titled "Pending Change Order Log" and one hundred and sixty-five (165) pages of APS generated materials, including proposals for extra work, invoices to APS from third parties, drawings, time and materials summaries, purported extra work authorizations (some without dollar figures), notations of partial payment, emails, unexplained demands by APS for sums due and so on. The 165 pages are not indexed and not arranged in chronological sequence. Many documents do not reveal on their face what relevance they have to the one page "Pending Change Order Log" or to the subtotal caption in the Demand labeled "change orders, AWA & FCN, pending." Some of the attached APS "additional work authorization" forms do not include any dollar amount; some are illegible; some are not signed by the Resident Engineer. The 165 pages are not cross referenced by the numbering system employed by APS in its one page "Pending Change Order Log." APS's Demand offers no explanation under oath of this potpourri.

find that $398,932.97 is not due and owing and can not be paid by direct payment because the "pending" change orders included within Exhibit 3 are presently "awaiting final measurement to determine final quantities." APS admits that final payment is not now due since the basis for payment is "awaiting final measurement." The documents comprising Exhibit 3 do not show that $398,932.97 ("change orders, actual quantities, pending") is presently due and payable to APS in any event. (1) The August 22, 2008 letter by APS to MCC stating that an enclosed AIA G702 Contractor's Application For Payment dated 8/22/08 for $649,601.25, which purportedly "reflects the difference between our actual measured quantities and Modern's revisions," is devoid of any substantive back up; (2) the AIA Contractor's Application For Payment for $649,533.67 is also without back up; (3) an attached computer printout showing on Line 46 ("pending cos-quantities") the figure $649,533.67 is entirely unsupported—indeed, Line 46 is flagged by an asterisk pointing to a handwritten notation at the bottom of the page, saying "should be $398,932.97." That hand-written number appears to be the sole basis for the asserted subtotal of $398,932.97 ("change orders, actual quantities, pending"), although it is unsupported by detail and is entirely unexplained. I find the subtotal $398,932.97 without basis and not supported by a detailed breakdown of any balance due under the subcontract.

I conclude that none of the three subtotals comprising the total demanded in Part One is supported by a detailed breakdown of the balance due under the subcontract.

Part Two

In Part Two of the Demand APS seeks payment of $1,440,371.17. It derives this total by combining a "delay claim through 12/31/06," $1,251,422.00, with $76,684.00, explained as "reverse SA #1rl," and then subtracting $223,082,.83 for a "2006 delay claim settlement," to which a second delay claim for $335,348 is added, all yielding a "sub balance due for schedule impact/delay of $1,440,371.17 [$1,251,422 + $76,684 - $223,082,83 + $335,348 = $1,440,371.17].

Nothing in Part Two of the Demand supports direct payment of $1,440,371.17. To the contrary, as submitted by APS here, Part Two of its Demand on its face precludes direct payment.

Part Two is for a "sub balance due for schedule impact/delay." A claim for delay damages may not be paid by a demand for direct payment under Section 39F. A Section 39F "demand" is an administrative remedy for non-payment; it does not authorize the awarding authority to adjudicate or pay mere "claims." A "delay claim," no matter how characterized, can not be the basis of a "direct payment demand" under Section 39F because a naked claim is not a sum due and owing. See Cardi Corporation v. Sutton Corporation et als., Superior Court Department, C.A. No. 95-6027-D (Lauriat, J) (subcontractor claims for extra work not payable under Section 39F where awarding authority had not paid the general contractor for such extra work). I find that Part Two of APS's Demand is nothing more than a mere claim for delay damages. I reject Part Two of APS's Demand for $1,440,371.17.

Conclusion

In Part One APS does not in substance provide a "detailed breakdown of the balance due under the subcontract" that shows $1,166,866.63 is due and owing. In Part Two APS asserts mere claims beyond the jurisdiction Section 39F to address or pay by direct payment.

Accordingly, take no further action on this Demand.

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Chief Counsel, MHD
Commissioner, MHD

INTEROFFICE MEMORANDUM

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: August 10, 2005
Subject: Request for Direct Payment

Claimant:	Rusco Steel Company; Regis Steel Corporation (Rusco/Regis)
Contractor:	Slattery/Interbeton/White/Perini (SIWP)
Contract #:	97298 (CO9A4)
City/Town:	Boston, CA/T
Amount:	$1,841,180.00

Background

The attached demand for direct payment (Demand) is the fourth submitted by Rusco/Regis seeking direct payment for an alleged balance due it under a subcontract entered into with SIWP, the general contractor in MHD#97298 [CO9A4].[1] Rusco Regis, as SIWP's subcontractor, furnished and installed reinforcing steel on the project. It has been paid $45,525,080.00 to date. This Demand seeks by direct payment an additional $1,841,180.00 from the Massachusetts Highway Department (MHD or the Department).

The instant Demand, dated January 20, 2005, sworn and mailed to SIWP on January 31, 2005, was filed at the Department on February 11, 2005. The Demand states that the subcontract work is complete; it is signed under pains and penalties of perjury; it attests that a copy was sent to SIWP certified mail on January 31, 2005.

SIWP filed a reply to the Demand dated January 20, 2005 [mailed January 31, 2005] on February 10, 2005 (Reply). The Reply was properly sworn and recites that a copy was sent to Rusco/Regis by certified mail. SIWP incorporates by reference its sworn "September 28, 2004 [sic September 29, 2004] objection to Rusco/Regis' demand [of September 20, 2004]." I refer to SIWP's February 10, 2005 response incorporating the prior September 29, 2004 response collectively as the Reply.

On February 16, 2005 I found both the Demand and Reply colorable under Section 39F and asked the central artery/tunnel (CA/T) project to report on the status of the subcontract work (Report). The CA/T project submitted a Report on March 11, 2005.

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[1] On three occasions this office rejected direct payment demands filed by Rusco-Regis: (1) August 4, 2004 (demand not signed under pains and penalties of perjury; no detailed breakdown of the balance due under the subcontract); (2) October 7, 2004 (fourteen page computer printout entitled "accounts aging receivable" not a sworn demand); and (3) October 20, 2004 (unsworn statement referring to documents not provided not detailed statement of the balance due under the subcontract). Each of the above rulings are attached to this ruling for the sake of completeness.

On April 20, 2005 the parties participated in a settlement conference. At the settlement conference the parties provided additional materials in support of their positions, but such materials were not sworn and were not intended to supplant the statutory Demand or Reply. Although the materials were appropriate for use during the settlement conference, I do not here consider any materials other than the sworn Demand, Reply and Report.

Analysis

Rusco/Regis's "detailed breakdown of the balance due under the subcontract" in its Demand is

Subcontract Price	$43,211,109.00
Agreed upon change orders	4,079,011.00
Pending change orders	76,140.00
Retainage	0.00
Work to completed	0.00
Payments	($45,525,080.00)
Amount due	$1,841,180.00

Rusco/Regis's Demand notes that its prior demands had been rejected by this officer because they did not "contain" a suitable detailed breakdown due under the subcontract. The Demand points out that I suggested that Rusco/Regis supply change order documentation to support its assertions of the amount of change order work referenced. The instant Demand asserts $4,079,011.00 are "agreed upon change orders." The Demand suggests those documents are in the hands of the Department. It asserts that, notwithstanding the public records requests of its attorney, the Department has yet to supply those documents. Rusco/Regis seems to contend that the unsupplied documents would identity with specificity the four million dollars in "agreed upon change orders" set forth in its Demand.[2]

SIWP's Reply includes a "detailed breakdown of the balance due," which summarized in relevant part, is

Total installation [steel]	$18,991.653
Total materials [steel]	$27,832,030
Agreed SIWP Approved Modifications	(870,383) [3]
Subcontractor Proposed Credit	(750,000)
SIWP Back Charges	(47,814)[4]

[2] Rusco/Regis concludes: "The statue is clear, in the event the general contractor disputes all or a portion of our demand, the MHD must place the disputed amount in a joint escrow account." "[W]e demand those obligations be fulfilled [by MHD] in response to this demand."

[3] Contract modifications 1 thru 44, as set forth in detail by SIWP in Ex. B of Reply.

[4] 12 back charges are specified by amount in the Reply.

Total Revised Subcontract Amount	$45,155,485
Total Payments To Date	($45,525,080)
Overpayments by SIWP	$369,594

SIWP's Reply asserts that Rusco/Regis "appears to be demanding direct payment for unapproved change order work and extra work it alleged it performed on the project." "The vast majority of this allegedly outstanding amount is made up of requests for payments that the CA/T project has not determined Rusco/Regis to be entitled to at this time," including "unapproved extra work claims." In addition, the Reply asserts that the Demand is stale since it fails to account for the settlement reached on September 7, 2004 between Rusco/Regis and Barker Steel Company, Inc. for $26,533,426.00. The Reply asserts that Rusco/Regis's Demand did not provide any "back-up documentation for its version of the subcontract accounting," specifically "copies of fully executed contract modifications which constitute … 'agreed upon change orders.' "[5] Finally, the Reply attaches the decision of the Superior Court in Cardi Corporation v. Sutton Corporation et als, C.A. No. 95-6027-D (October 3, 1996) (Cardi), in support of its contention that mere unapproved claims for extra work are not cognizable under Section 39F.

On March 14, 2005 I received a Report from the CA/T informing me (1) Rusco-Regis was an approved subcontractor and a writing was on file to that effect; (2) the subcontract work was substantially complete as of 7/13/03; (3) the subcontract work was satisfactory; (4) CA/T does not intend to file a claim for defective or incomplete subcontract work; and (5) Rusco-Regis has now pending two undecided claims filed through SIWP ("pass-through" claims, so-called) totaling $4,264,296.00, namely:

Claim CP-639 (Thrust Pit Base Slab Design)	$2,894,631
Claim CP –999 (Loss of Productivity …[etc.])	$1,369,665[6]

The CA/T project further reports that $254,591 is being held by the Project as retainage for the value of completed subcontract work.

Replying on the Demand, Reply and Report I determine that the Demand should be rejected. The fact that the Demand seeks $4,079,011.00 for "agreed upon change orders" without a breakdown of that lump sum specifying the change order work, the identity of the change order and amount is, in the circumstances of this multi-million dollar Demand, insufficient to meet Section 39F's requirement that a Demand "contain" a "detailed breakdown of the balance due under the subcontract."

While it is true, as the Demand points out, that Section 39F does not define "detailed breakdown," it is also true that a Demand must include sufficient detail so that a

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[5] The Reply "makes [] demand" that such back up documentation be produced. If such documentation can not be produced, SIWP questions how such Rusco/Regis demand for direct payment can be signed under the pains and penalties of perjury."

[6] SIWP claims $1,111,777 from the Department for Pyramid Steel used by SIWP "in order to mitigate unanticipated delays and impacts."

general contractor may intelligently reply to it under oath within 10 days. See Section 39F(1)(d). A lump sum figure of $4,079,011.00 referring to plural change "orders" is not detailed and is not a sufficient breakdown of the lump sum to identify which amounts supposedly "due" were unpaid by the general contractor or in dispute.

Rusco/Regis's legal contention that the Department "must place" in a joint account any amount it contends is in dispute between a subcontractor and a general contractor finds no support in the statutory scheme. As in the Cardi case, the subcontractor work here forming the basis for Rusco/Regis's direct payment demand is "work for which the Department has neither paid [the general contractor] nor approved for payment to [the general contractor]." As Judge Lauriat pointed out in Cardi

> This work is related to extra costs and change orders allegedly incurred by [the subcontractor] during the performance of its subcontract. Since the amounts due for this "extra work" have not yet been approved by the Department, they do not qualify or fall within the scope of the direct payment provisions of G.L. c. 30, s.39F. (Slip opinion p. 6.)

The amount of Rusco/Regis's Demand is simply not "due" within the meaning of Section 39F. If mere claims of a subcontractor, such as Rusco/Regis's undecided pass-through claims of $4,264,296.00 here, were "due" under Section 39F and triggered the legal obligation of the awarding authority to deposit into a joint account established pursuant to Section 39F(1)(f), cash otherwise encumbered for public works contracts could be routinely placed beyond the control of the awarding authority upon the assertion of a mere subcontractor claim. Section 39F provides a remedy for subcontractors due payments from general contractors. It is not a general lien statute authorizing the set aside of funds pending a later resolution of claims.

Rusco-Regis's Demand makes no distinction in its detailed breakdown between contested and uncontested amounts, which make the identification of "disputed" sum difficult if not impossible to ascertain. In contrast to the Reply, which breaks out separate amounts for (a) furnishing and (b) installing steel, the Demand fails to provide any meaningful breakdown of the "subcontract price" of $43,211,109.00. The Demand does not specify in words or figures what it means by "agreed upon change orders." (Does "agreed" refer to SIWP or to CA/T? Both?) The line item for $76,140.00 for "pending change orders" is similarly defective. (Pending before whom?) Finally, the Demand fails to refer in any way to the "backcharges" SIWP has specified as $47,814.37.

Rusco/Regis's Demand is rejected with prejudice. Take no further action on this Demand.

cc:

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Chief Engineer

Commissioner

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: January 29, 2010

Subject: REQUEST FOR DIRECT PAYMENT

Demand File No:	MHD Contract # 33055		
Demand Amount:	$14,624.05		
Subcontractor:	Vigil Electric Company (Vigil)		
General Contractor:	Todesca Equipment Co., Inc. (Todesca)		
Surety:	United States Fire Insurance Company		
Demand Filed:	01/20/10	Demand Dated:	01/16/10
Reply Filed:	NA	Reply Dated:	NA
City/Town:	Milton	Project:	Rte. 28
Report Request (Dist #4)	NA	Report Received:	NA
ALJ Ruling Request	01/22/10	ALJ Ruling	01/29/10

I have reviewed the direct payment demand (Demand) by Vigil dated January 16, 2010 and received by the Department on January 20, 2010. For the reasons stated I reject the Demand.

Mailing: Section 39F requires that the Demand be "sent by certified mail" to the general contractor at the time it is mailed certified to the awarding authority. The mailing requirement appears to have been met.

Sworn Statement: Section 39F requires that a "demand shall be by sworn statement." A statement in the text such as "The undersigned swears under the pains and penalties of perjury that the statements made in this direct payment demand are true, complete and correct" meets that requirement. The Demand merely states that "the above statements are true." The requirement of a proper sworn statement has not been met.

Status of Subcontract Work: Section 39F(1)(d) also requires that the Demand contain under oath "a statement of the status of completion of the subcontract work." Such a statement is material since a demand for direct payment upon completion does not lie until at least sixty-five (65) days after substantial completion of the subcontract work. See Section 39F(1)(d). The Demand does not state on its face when the subcontract work was complete; but it does state its "Final Invoice was dated July 15, 2008." Although it appears that the work was completed before July 15, 2008, the ambiguity created by the lack of an affirmative statement by Vigil as to the date of completion prevents a finding when the subcontract work was substantially complete.

Detailed Breakdown: Section 39F requires that a "demand shall contain a detailed breakdown of the balance due under the subcontract." The detailed breakdown must be of sufficient detail to inform both the awarding authority and the general contractor what payment was not made that should have been made. A conforming demand typically states the key economic facts of the subcontract under oath.

Vigil recites the original subcontract value ($427,500.00) and attaches a copy of the Subcontract dated 12/24/05 in support. It then attaches its Final Bill dated July 15, 2008 purporting to show extra work in the amount of $4,893.26, which in turn is supported by a one page document dated 3/4/08 purporting to show certain hours and equipment costs for a "cost breakdown" to "remove damages 10' Post, Vehicle Signal" etc. in the same amount.[1] Vigil does not supply any document that purports to authorize Vigil to incur such extra work; nor does Vigil show that MassHighway amended the generals contract to incur extra work in that amount.

Section 39F is not a statute that permits an awarding authority to pay a subcontractor by direct payment for a claim or purported extra work it performed outside the scope of the work sublet to the subcontractor by the general contractor with the approval of the awarding authority. See Cardi Corporation v. Sutton Corporation et als, SUCV 95-6027-D. Because Vigil supplies a detailed breakdown that purports to show it should be paid for extra work and because it failed to attach documentation showing that MassHighway approved such extra work to the general contract, Vigil did not supply a conforming detailed breakdown of the balance due within the meaning of Section 39F.

Vigil is referred to the following website for additional information: http://www.mass.gov/eot/ALJ

Section 39F is not a remedy that may be employed unless the subcontractor strictly complies with the terms of the statute. I am constrained to reject this Demand.

Take no further action on this Demand.

cc: Vigil Electric Company
72 Providence Street
Hyde Park, MA 02136

Todesca Equipment Co., Inc.
8 Wolcott Court
Readville, MA 02137

Joseph F. McDonald

[1] Vigil also seeks $2,230.79 for "interest on unpaid balance." Section 39F does not authorize payment of interest.

J.F. McDonald Insurance Agency, Inc.
P.O. Box 890229
E. Weymouth, MA 02189

Chief Engineer, MassDOT, Highway Division
Commissioner, MassDOT, Highway Division
General Counsel, MassDOT

APPENDIX E-1

DECISIONS/RULINGS

Claims by General Contractor

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: October 4, 2007

Subject: REQUEST FOR DIRECT PAYMENT

Demand File No:	MHD Contract # 30140		
Demand Amount:	$117,877.11		
Subcontractor: Aetna Bridge Company (Aetna)			
General Contractor: P.A. Landers, Inc. (Landers)			
Demand Filed:	02/15/07	Demand Dated:	02/13/07
Reply Filed:	None	Reply Dated:	NA
City/Town: Rte. 44		Project:	Five Bridges
Report Request (Dist #5)	03/02/07	Report Received:	09/10/07
ALJ Ruling Request	02/21/07	ALJ Ruling	10/04/07

Aetna's Demand was filed in the Department on February 15, 2007. Landers filed a Reply on February 26, 2007 by certified mail. On August 10, 2007 I ruled that Aetna's Demand was colorable and asked District 5 to report on the status of the subcontract work.

On September 10, 2007 the District report was forwarded to me and stated in substance that (1) the subcontractor was approved in writing by the Department on August 1, 2002; (2) the subcontract work was substantially completed on November 25, 2005; (3) "All work performed by Aetna Bridge Co. was inspected by MassHighway personnel from March 2, 2002 until November 25, 2005"; (4) the District does not intend to file a claim for defective or incomplete subcontract work; and (5) the retainage held "with respect to Aetna" is $117,877.11.

The Positions of Aetna and Landers

In its Reply dated February 26, 2007 Landers, the general contractor, admits that the Demand correctly sets forth the amount of retainage held by the Department but states that the Department "has yet to pay Landers with regard to the above-referenced project, and as result [sic], said amount is not presently due to Aetna from Landers." It points out that "the subcontract, between Landers and Aetna, dated March 19, 2001, specifically references that retainage will be withheld with regard to the above-referenced project." Landers did not supply the subcontract in support of its Reply.

Aetna, through counsel, wrote on March 1, 2007 in response. It pointed out that Landers did not dispute that $177,877.11 was withheld from Aetna in retainage and not paid; nor did Landers contend that Aetna's work was "incomplete or unsatisfactory in any fashion." It argued that Lander's legal argument was wrong as a matter of law, citing Bayer & Mingolla Indus. v. Orlando Contracting Co., 6 Mass. App. Ct. 1 (1978) (Mingolla) .

Landers, through counsel, responded to the Aetna letter by its own letter dated March 2, 2007. There, Landers (1) argues that this office should disregard Aetna's counsel's letter because Section39F does not authorize "rebuttal"; and (2) recites that Landers "disputes that Aetna … is entitled to" any direct payment.

Aetna thereafter replied to Landers, on March 5, 2007. Aetna argued that a ruling of this office in the matter of Algar Construction Corp. v. Roads (June 15, 2006) should control the outcome here. It stated that the Algar ruling "specifically rejected the very (and only) defense Landers proffers here," citing two rulings of this office in support, Hub Foundations Co., Inc. v. Roads (September 26, 2005) and Rev-Lyn Contracting v. Roads Corp. (May 19, 2005).

On August 22, 2007 Landers again wrote the Department stating that it "agrees with the amount of $177,877.11 for retainages [sic] withheld and owed to" Aetna. However, it repeated its contention that no payment should be made on Aetna's Demand "since Landers has not received a reduction in retainage on this project, P.A. Landers respectfully withhold the amount of retained due Aetna until such time as a reduction in retainage is afforded to P.A. Landers, Inc."

On September 21, 2007 Aetna through counsel again reasserted that Lander's position was incorrect as a matter of law. It argued that Landers contention that direct payment is contingent on Landers' first receiving "final inspection" from MassHighway and release of retainage held to Aetna is not related to a general contractor claim of unsatisfactory work. Aetna again cites Mingolla as directly on point. [1]

The Merits

It is a common misconception of both subcontractors and general contractors that a general contractor may withhold payment of retainage to a subcontractor long after all subcontract work has been substantially completed as long as the Department is

[1] Aetna quoted the following language in Mingolla: "Moreover, if the defendant's contention that release of retainage is contingent upon final payment from the Commonwealth were correct, the retainage provision would be contrary to G.L. c.30, s. 39F, and therefore void. Section 39F … which is "binding between the general contractor and each subcontractor," requires that sixty-five days after the subcontractor has completed its work, the entire balance (less the costs of completing incomplete and unsatisfactory items of work) is due to the subcontractor. The defendant's argument that the section applies only to the amount defined as due by the contract is incorrect, as the statute makes the entire balance (less the costs of incomplete and unsatisfactory items) due. It is thus clear that the entire balance of the retainage was due the plaintiff, as more than sixty-five days have past since substantial completion and there is no dispute as to the quality for the work." 6 Mass. App. Ct. 1, 3 (1978).

withholding retainage from the general contractor under the general contract. The Appeals Court has expressly held to the contrary. See Bayer & Mingolla Indus. v. Orlando Contracting Co., 6 Mass. App. Ct. 1, 3 (1978) (Mingolla).

Generally, Section 39F provides that the "entire amount" of the balance due to the subcontractor should be paid sixty-five days after substantial completion of the subcontract work unless the awarding authority claims defective work; "and the awarding authority shall pay that amount to the general contractor." Section 39F(1)(b). The Appeals Court in Mingolla construed the statutory language and specifically held that payment of retainage to a subcontractor is not dependent on prior payment by the awarding authority of retainage to the general contractor. "If [a general contractor's] contention that release of retainage is contingent upon final payment from the Commonwealth were correct, the retainage provision [in the subcontract] would be contrary to G.L. c. 30, s. 39F, and therefore void." Id. I thus conclude that any provision in the Aetna-Landers subcontract purporting to regulate when retainage is paid is of no effect here.

The retainage withheld by the Department from Landers on account of Aetna's work was due and payable to Aetna by Landers 65 days after satisfactory completion of the subcontract work, unless the Department asserts a claim for defective or unsatisfactory work. Section 39F. The Mingolla court made clear that under Section 39F the "entire balance due," including retainage due the subcontractor, is payable sixty-five days after substantial completion of the subcontract work. Here, sixty-five days after completion of the subcontract work (November 25, 2005) has long since elapsed.

The District reported that the Aetna subcontract work is complete and that it does not intend to file a claim with respect thereto. Consequently, as a matter of law Aetna is entitled to direct payment from the Department since Landers has plainly failed to pay the retainage it admits is due.

Based on the District's report and the sworn Demand on file, I find that $117,877.11 should be paid by the Department on this Demand.

Kindly pay claimant $117,877.11 out of the next periodic, semi-final or final estimate on the project if funds are available and deduct from payments due the general contractor in accordance with Section 39F(1)(g) and (f).

cc:

Aetna Bridge Company
30 Lockbridge Street
Pawtucket, RI 02860

P.A. Landers, Inc.
24 Factory Pond
Hanover, MA 02339

Chip Mainelli
Greg Maurer
Aetna Bridge Company
30 Lockbridge Street
Pawtucket, RI 02860

Paul J. Murphy, Esq.
Greenberg Traurig LLP
One International Place
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Robert Philip Hilson, Esq.
175 Derby Street, Suite 12
Hingham, MA 02043

Stephen Legare, Vice President
P.A. Landers
351 Winter Street
Hanover, MA 02339

Alyssa A. Bergman
Travelers Bond Claim
One Tower Square
Hartford, CT 06183

Commissioner, MHD
Acting Chief Engineer
Director of Construction
District Highway Director, District 5

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: February 28, 2013

Subject: RECONSIDERATION OF FEBRUARY 8, 2013
RULING ON DIRECT PAYMENT

Demand File No:	Contract #62861 Fed. Aid	BR-001S (992)-NH-001S (992)	
Demand Amount:	$81,352.84		
Subcontractor:	Lorusso Corp. (Lorusso)		
General Contractor:	McCourt Construction Company, Inc. (McCourt)		
Surety:	Continental Casualty Company (Bond No.929501039)		
Demand Filed:	01/02/13	Demand Dated: 12/26/12	
Reply Filed:	NA	Reply Dated: NA	
City/Town:	Dedham/Needham/Westwood Project: (Rte. 128/replace 7 bridges)		
Report Request (Dist #6)	NA	Report Received:	01/25/13
ALJ Ruling Request	02/13/13	ALJ Ruling	02/28/13

This is a response to your request of February 13, 2013 that I reconsider my ruling of February 8, 2013 on Lorusso's Demand.

You asked that I reconsider the disposition of the Demand on the basis of a letter received from counsel to McCourt dated February 12, 2013. In the letter McCourt points out that the statement made in the February 8, 2013 ruling that "The general contractor McCourt did not make a sworn reply to the Demand" is incorrect. McCourt correctly points out that on January 18, 2013 I found that McCourt had properly filed a sworn reply (Reply) within the time permitted by Section 39F. Accordingly, I now reconsider.

The Demand

Lorusso filed this Demand on January 2, 2013. Lorusso is a material supplier to McCourt, the general contractor. The Demand was filed following my rejection on December 7, 2012 of Lorusso's prior demand dated November 23, 2012 on the same subject matter.

On January 10, 2013 I found that Lorusso appeared to qualify as a materialman/subcontractor under Section 39F(3) and had met procedural requirements of Section 39F. The Demand, which incorporates by reference documents attached as Exhibits A through H, contains a proper detailed breakdown of the balance due under the subcontract. I found that the Demand appears to show that "the sum of $81,352.84 is due

and payable." Accordingly, on January 10, 2013 I requested a report on the status of the subcontract from District 6.

The Reply

On January 16, 2013 you received a reply from McCourt stating "Please accept this letter disputing Lorusso's direct payment claim." It was "signed and sworn under the pains and penalties of perjury" by Ryan McCourt. As said, on January 18, 2013 I found that McCourt Reply appeared to be a "valid statutory reply made under Section 39F."

Report From the District

On January 25, 2013 I received the District's report. The District reported (1) the subcontractor was approved and that MassDOT tested and approved for use the material samples provided by Lorusso; (2) the materials were delivered and incorporated in the work by August 31, 2012; (3) the District inspected the material on August 31, 2012; (4) the materials were satisfactorily; and (5) MassDOT does not intend to file a claim for defective or incomplete subcontract work. The District also reported that no part of the Demand is for MassDOT approved extra work.

Positions of Lorusso and McCourt

I find that Lorusso's Demand and McCourt's Reply both conform to the procedural requirements of Section 39F.

1. The Demand

The Demand shows by invoice the material delivered by quantity, price, amount paid and amount not paid. Lorusso's detailed breakdown divides the invoices sent to McCourt into three categories: (1) those for which the invoice was paid "in full"; (2) those for which McCourt paid the invoice "in part," and (3) those for material incorporated in the project for which no payment was received. The breakdown shows that McCourt paid Lorusso $331,115.28 "in full." It also shows that McCourt made payments "in part" of $117,739.30, leaving unpaid $3,033.04. Finally, the breakdown shows that McCourt made no payment to Lorusso whatsoever on invoices that total $78,319.80.

I conclude that the Demand shows on its face that McCourt failed to pay Lorusso $81,352.84 that is now due and owing ($3,033.04 + $78,319.80).

1. The Reply

The Reply argues the Demand can not be paid because (1) Lorusso did not provide its subcontract with McCourt that shows the items sublet to Lorusso, or provide "various quoted materials/labor per unit based pricing," or the "final contractual terms"; (2) Lorusso failed to state under oath the status of the work; (3) Lorusso "provided two

… unsuitable loads of Ordinary Borrow" containing stumps, loam, clay and grass that were rejected by McCourt and that Lorusso is attempting to invoice McCourt in its Demand for that rejected material, which is valued at $447.78; (4) McCourt disputes $3,033.04 of Lorusso invoices shown on Exhibit C to its Reply; and (5) "outstanding issues … need to be resolved before remaining payment can become due," namely

(a) an executed purchase order to show the contractual relationship,
(b) the resolution of a dispute between the parties about what language controls the general contractor-materialman relationship,
(c) the amount of the potential liability of Mobile Excavating Corp (Mobile), a subcontractor to Lorusso, due to an accident on the work site,
(d) the amount of any set off due McCourt because of Mobile's alleged liability.

Counsel to McCourt attaches "delivery tickets for [certain] rejected material."[1] Counsel represents that McCourt, through its own quality control process, intercepted the inferior material" before MassDOT could reject the same and argues that "Lorusso … still invoiced McCourt for the returned material." Counsel contends that, "while Lorusso should not be paid at all [for the above reasons], it cannot be paid twice for the same work."

Disposition

Lorusso's Demand presents substantial evidence to demonstrate that, if true, the sum of $81,352.84 is due and owing from McCourt for materials it delivered.

The District reports that MassDOT Lorusso is an approved supplier, that MassDOT tested and approved the material samples provided, that the materials were incorporated in the work, that Lorusso's materialman work was completed on August 31, 2012, that MassDOT inspected the material on August 31, 2012 and found them satisfactorily, and that MassDOT did not intend to file a claim for defective or incomplete work.

In these circumstances the Demand is payable unless the Reply contains sworn facts or persuasive legal reasons why the Demand should not be paid.

The Reply (and the letter of McCourt's counsel supporting the request for reconsideration) argues as a matter of fact that it "disputes $3,480.82 of [Lorusso's] invoices," consisting of five invoices that challenge a specific amount, which total $3,033.04, and three delivery tickets showing defective materials rejected at the job site and never incorporated in the work, which total $447.78.[2]

[1] The tickets purport to show that McCourt rejected $447.48 of materials as defective. Accordingly, McCourt's Reply challenges $3,480.82 of the $81,352.84 at issue in the Demand ($3,033.04 + $447.78).

[2] Two delivery tickets have a handwritten notation written on the face of the Lorusso tickets: "Do not pay for this load. Octavio."

I find $3,480.82 [$3,480.82 + $447.78] is an amount that Section 39F provides may be withheld from an otherwise valid demand as "the amount due for each claim made by the general contractor [McCourt] against the subcontractor [Lorusso]." See Section 39F(1)(d). Accordingly, I subtract $3,480.82 from the $81,352.84 demanded by that amount. The amount of the Demand, as so adjusted, is $77,872.02 ($81,352.84 - $3,480.82).

McCourt argues that as a matter of law four separate grounds exist that require the awarding authority not to pay any of the amount demanded. None has merit.

1. Lorusso failed to execute a subcontract. McCourt argues that there are no "final contractual terms" and that Lorusso is attempting to invoice McCourt in advance of a "final negotiation" of complete contract terms. Because Section 39F does not require a written subcontract for deliveries of a materialman and because Section 39F does not require a written subcontract, I reject McCourt's argument.[3] I note that McCourt paid Lorusso $331,115.28 "in full" before disputes between the parties arose. Those payments are ample proof that a contract existed.

2. Status of the subcontract work. McCourt argues that Lorusso failed to state under oath the status of the work. I reject this argument because I found on January 10, 2013 that Lorusso stated under oath that the "last date of delivery and completion in this relationship was August 31, 2012."

3. McCourt's "outstanding issues." McCourt states that five additional issues need to be resolved before the Demand can be paid. (a) Lorusso failed to accept the language on McCourt's purchase orders. I reject this argument for the reasons stated in (1) above. I note that Lorusso rejected the purchase orders because it did not agree that it should indemnify McCourt for an accident on the job site. (b) No language controls the general contractor-materialman relationship. I reject this argument for the reasons stated in (1) above and because both parties agree that the amount owed to Lorusso is contained in the detailed breakdowns of the balance due in the Demand and

[3] Section 39F(3)(iii) defines a "subcontractor" as "a person contracting with the general contractor to supply materials used or employed in a public works project for a price in excess of five thousand dollars." Section 39F nowhere requires that a subcontractor produce a written subcontract with a general contractor as precondition of availing itself of the statutory remedy. Nor is there any requirement in Section 39F that a subcontract be approved by an awarding authority. Rather, to qualify for the remedy under Section 39F a materialman/subcontractor must only demonstrate that it is a person "approved by the awarding authority in writing." That Lorusso is a materialman approved in writing is evidenced by the processing of payments to McCourt for materials delivered by Lorusso and by the written report of the District received on January 25, 2013. Lorusso in fact delivered invoiced materials that were incorporated into the public work (except those in three rejected loads valued at $447.78) to McCourt. The materials were tested, approved and accepted by MassDOT.

Reply. (c) Lorusso refusal to sign the McCourt purchase order. McCourt states that liability, if any, stems from actions of Lorusso's subsidiary, Mobile, not Lorusso. Section 39F does not compel a subcontractor to indemnify a general contractor before receiving payment for work done or materials delivered by another entity. (d) McCourt's set off. I find that McCourt can not set off the amounts owed under its subcontract with Lorusso as a "claim" under Section 39F(1)(d) any and all inchoate amounts that may eventually be paid to McCourt by Mobile, a Lorusso subsidiary. McCourt may not withhold payment from Lorusso for materials delivered and incorporated into a public work that have been paid for and accepted by the awarding authority any amount McCourt characterizes as "liability for [Mobile] … and … future claims under this contract [that] are assumed by Lorusso." The reason is that payment of a demand is proper under Section 39F once subcontract work has been completed in full in a satisfactory manner and 65 days have elapsed after substantial completion. See Bayer & Mingolla Indus. v. Orlando Contracting Co., 6 Mass. App. Ct. 1 (1978). Lorusso has met all these statutory conditions here.

The manifest purpose of Section 39F is to provide a payment remedy to subcontractors where general contractors fail to pay amounts due and owing. Here, it is plain that McCourt owes $77,872.02 to Lorusso for materials delivered and incorporated in the work.

Based Demand, Reply, the District's report and the documents on file, I find that $77,872.02 should be paid by MassDOT to Lorusso on this Demand.

Kindly pay claimant $77,872.02 out of the next periodic, semi-final or final estimate on the project if funds are available and deduct from payments due the general contractor in accordance with Section 39F(1)(g) and (f).

A copy of this ruling has been forwarded the MassDOT, Prequalification Committee.

cc:

Lorusso Corp.
3 Belcher Street
Plainville, MA 02762

McCourt Construction Company, Inc.
60 K Street 2nd Floor
South Boston, MA 02127

Continental Casualty Company
100 Newport Ave. Ext.
Quincy, MA 02171

Chief Engineer, MassDOT,
Administrator, Highway Division, MassDOT
Prequalification Committee, MassDOT
General Counsel, MassDOT
District Highway Director, District 6

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: June 15, 2007

Subject: REQUEST FOR DIRECT PAYMENT

Demand File No:	MHD Contract # 33134		
Demand Amount:	$7,959.29		
Subcontractor:	NES Traffic Safety, LP (NES)		
General Contractor:	Roads Corporation (Roads)		
Demand Filed:	05/04/07	Demand Dated:	04/30/07
Reply Filed:	None	Reply Dated:	NA
City/Town: Auburn		Project:	Bridge Rehabitilation/I-290
Report Request (Dist #3)	05/11/07	Report Received:	NA
ALJ Ruling Request	05/09/07	ALJ Ruling	NA

On May 11, 2007 I found the direct payment demand (Demand) by NES dated April 30, 2007 and received by the Department on May 4, 2007 to be colorable and requested District 3 to report on the status of the subcontract work.

On May 29, 2007 District 3reported (1) that NES was an approved subcontractor; (2) that the subcontract involved extra work; (3) that NES completed the subcontract "in the Fall of 2004"; (4) that the Department inspected the work "at the time of installation" and found its satisfactorily completed; and (5) the District does not intend to file a claim with respect to the subcontract work.

The Demand is for retainage of $7,959.29 held by Roads.

It is a common misconception of both subcontractors and general contractors that a general contractor may withhold retainage from a subcontractor long after all subcontract work has been substantially completed, as long as the Department is withholding retainage on the general contract. The Massachusetts Appeals Court has specifically held to the contrary.

Section 39F provides that the "entire amount" of the balance due to the subcontractor should be paid sixty-five days after substantial completion of the subcontract work unless the awarding authority claims defective work; "and the awarding authority shall pay that amount to the general contractor." Section 39F(1)(b). The Appeals Court construed Section 39F with respect to the payment of retainage in the case of Bayer & Mingolla Indus. v. Orlando Contracting Co., 6 Mass. App. Ct. 1 (1978). The Mingolla court

specifically held that payment of retainage to a subcontractor is not dependent on prior payment by the awarding authority of retainage to the general contractor. "If [a general contractor's] contention that release of retainage is contingent upon final payment from the Commonwealth were correct, the retainage provision [in the subcontract] would be contrary to G.L. c. 30, s. 39F, and therefore void." Id. The Mingolla court made clear that the "entire balance due" the subcontractor should be paid sixty-five days after substantial completion of the subcontract work. (My emphasis.)

The retainage withheld by Roads for NES was due after the sixty-five days after the subcontract work was completed "in the Fall of 2004," a day long since passed.

Kindly pay claimant $7,959.29 out of the next periodic, semi-final or final estimate on the project if funds are available and deduct from payments due the general contractor in accordance with Section 39F(1)(g) and (f).

cc:

NES Traffic Safety, LP
55 Bodwell Street
Avon, MA 02322

Roads Corporation
241 Treble Cove Road
North Billerica, MA 01862

Chief Engineer
District Highway Director, District 3
Commissioner, MHD

INTEROFFICE MEMORANDUM

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: May 19, 2005
Re: Demand For Direct Payment Under G.L. c.30, s.39F (Section 39F)

Claimant:	Rev-Lyn Contracting Company (Rev-Lyn)
Contractor:	Roads Corporation (Roads)
Contract:	MHD #32166 (CO1A7)
City/Town:	CA/T
Amount:	$71,463.65

1. Rev-Lyn filed this renewed direct payment demand (Demand) on April 5, 2005 through a sworn statement dated March 29, 2005. On April 6, 2005 I found the Demand colorable and asked the CA/T project for a report on the status of the subcontract work. The Demand included a breakdown of the balance due of $71,463.65. In substance, the Demand asserted that the total value of all work performed, including "approved changes of work to date," was $1,221,456.94 and that Roads had paid it "to date" $1,149,993.29. The total demanded is asserted to be the difference, or $71,463.65. Rev-Lyn stated that the last day it performed work was "January 24, 2005"; and, "our work is substantially complete."

2. On April 8, 2005 Roads responded with a sworn reply (Reply), which incorporated by reference its March 3, 2005 reply (and attachments) to an earlier Rev-Lyn demand filed February 28, 2005, which I rejected on March 9, 2005. I find Roads' Reply, received on April 11, 2005, to be properly filed under Section 39F(1)(d). The Reply asserts three grounds to "dismiss" Rev-Lyn's Demand:

   (1) Rev-Lyn's work "is not substantially complete";
   (2) Roads is permitted to "offset monies due to Roads" from another Roads-Rev-Lyn subcontract in Wellesley; and
   (3) Rev-Lyn's "accounting includes retainage which has yet to be approved and funded to Roads."

3. I requested a report from the CA/T project on April 6, 2005 on the status of the subcontract work. The CA/T project responded on May 10, 2005 that Rev-Lyn was an approved subcontractor; that Roads issued change orders of unknown value to Rev-Lyn for additional work; that the subcontract work was substantially completed on October 8, 2004 in a satisfactory manner and that CA/T did not intend to file a claim for defective or incomplete work. The CA/T project also attached documents to its report, including a letter from Roads dated April 19, 2005 requesting permission from CA/T "to terminate Rev-Lyn's subcontract in order to affect [sic] a viable means of prosecuting the [subcontract] work." Also

enclosed was a letter from Roads to CA/T dated April 8, 2005 stating: "[Roads] has terminated the subcontract of [Rev-Lyn] on the D Street project." Enclosed as well was a letter of Roads to Rev-Lyn dated April 8, 2005 terminating the subcontract and stating that "Roads is withholding further payment under this subcontract [in general contract #32166] pending resolution of significant additional costs incurred by Roads on MassHighway Contract No. 33205….."

4. Attached to Roads' Reply by reference is the spreadsheet it attached to its March 3, 2005 sworn reply to Rev-Lyn's earlier, rejected demand. The spreadsheet states that the "total [work] completed and stored to date" is $1,221,456.94 and that the total "previous payments" by Roads to Rev-Lyn is $1,149,993.29. The spreadsheet, which provides a detailed breakdown of the balance due in Roads' Reply, purports to subtract three sums from the "total [work] completed and stored": (1) $34,089.36 for "retainage"; (2) $7,000 for "backcharge for OSHA violation"; and (3) $70,237.00 "backcharge" for "damages incurred on MHD Contract #33205 Wellesley Project. Total Damages Not Known At This Time."

5. Because Roads and Rev-Lyn agree that $1,221,456.94 is the total value of work completed and that Roads has made payments of $1,149,993.29 to Rev-Lyn, the matters in dispute here are the three items Roads subtracted from the total Demand specified in paragraph 4 above. Those items total $71,463.65, the amount of Rev-Lyn's Demand.

6. Retainage: G.L. c.30, s. 39F(1)(b) provides that sixty-five days after the subcontractor has completed the work the "entire balance due under the subcontract," less certain amounts, is "due" to the subcontractor.[1] The amounts that may be subtracted from the "entire balance" are the amounts retained to complete undone or unsatisfactory subcontract work. The record here supports a finding that Rev-Lyn substantially completed the work not later than January 24, 2005. Although Roads states that the work is not substantially complete, the CA/T project reports that on October 8, 2004 substantial completion had been achieved. Because the sixty-sixth day following substantial completion as of January 24, 2005 was April 1, 2005, I find that retainage held of $34,089.36 is "due" and should be paid. See Bayer & Mingolla Indus. v. Orlando Contracting Co., 6 Mass. App. Ct. 1, 3 (1978).

7. OSHA Backcharge: Section 39F(1)(d) provides that a general contactor may assert in its reply "the amount due for each claim made by the general contractor against the subcontractor." The OSHA "crane violation," which Roads terms a

[1] The pertinent part of G.L. c.30, s.39F(1)(b) provides: "Not later than the sixty-fifth day after each subcontractor substantially completes his work in accordance with the plans and specifications, the entire balance due under the subcontract less amounts retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, shall be due the subcontractor; and the awarding authority shall pay that amount to the general contractor."

"backcharge" of $7,000, is effectively a claim of Roads against Rev-Lyn. See Section 39F(1)(d).

8. Backcharge For "Damages" MHD Contract #33205: Roads estimates that it suffered $70,237.00 as a result of certain acts of Rev-Lyn that damaged Roads during subcontract work being performed on MHD Contract #33205. I reject Roads' contention that it may deduct from a sum otherwise due under a Section 39F Demand an amount it characterizes as "damages" suffered from acts done in an entirely different subcontract. The mere assertion that Rev-Lyn owes Roads $70,237.00 does not create a "backcharge" to this Roads-Rev-Lyn subcontract. Nor can an inchoate claim relating to another subcontract be an amount "disputed" by the subcontractor and general contractor within the meaning of Section 39F(1)(e)(iii). By contrast, an amount "specified in any court proceedings barring such payment" would be deducted from the balance otherwise due. See Section 39F(1)(e)(ii).

9. In sum, I conclude that Rev-Lyn is owed $64,463.65 as a direct payment, summarized as

Total original and extra subcontract work	$1,221,456.94
Subtract disputed amount (OSHA)	7,000.00
Subtract payments made to Rev-Lyn	$1,149,993.29
Amount of direct payment by MHD	64,463.65

10. Kindly pay $64,463.65 to the claimant out of the next periodic, semi-final or final estimate on the project if funds are available and deduct from payments due to Roads in accordance with G.L. c. 30, s. 39F(1)(h). Take no further action on the balance of the Demand.

Rosemary Kelley, President
Rev-Lyn Contracting Company
1265 Saratoga Street
East Boston, MA 02128

Fernando A. Nunes, Vice President
Roads Corporation
241 Treble Cove Road
N. Billerica, MA 01862

Marie R. Breen, Esq.
Central Artery/Tunnel Project
185 Kneeland Street
Boston, MA 02111

Paul A. Goguen, Director of Construction
Deputy Chief Engineer, Construction

APPENDIX F-1

DECISIONS/RULINGS

Subordinate Rights of Surety

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: August 20, 2007

Subject: REQUEST FOR DIRECT PAYMENT

MHD Contract # :	34699	Fed Aid:	STP-001S (225)
Demand Amount:	$24,237.99		
Subcontractor:	GeoTek Engineering, Inc. (GeoTek)		
General Contractor:	Roads Corporation (Roads)		
Demand Filed:	05/09/07	Demand Dated:	05/07/07
Reply Filed:	NA	Reply Dated:	None
City/Town: Cambridge		Project:	(Mass. Ave. and Lafayette Sq.)
Report Request (Dist #4)	05/16/07	Report Received:	07/22/07
ALJ Ruling Request	06/22/07	ALJ Ruling	08/20/07

Background

On May 16, 2007 I found that the direct payment demand (Demand) by GeoTek pursuant to G.L. c.30, §39F (Section 39F) dated May 7, 2007 (received by MassHighway on May 9, 2007) was colorable. I asked District 4 of MassHighway for a report on the status of the subcontract work. GeoTek's Demand is a re-file of an earlier GeoTek demand for $24,237.99 that was rejected on April 9, 2007. Because certain facts stated in the April ruling provides context to the renewed Demand, I attach a copy of the April 9, 2007 ruling.

District 4 responded to my request with a report on June 20, 2007. The District reported (1) the subcontractor was approved in writing by MassHighway on February 2, 2005; (2) no part of the demand was for MassHighway-approved extra work; (3) the subcontract work was substantially completed on June 13, 2005; (4) MassHighway inspected the work on June 20, 2005; and (5) the subcontract work was satisfactorily done, and (6) MassHighway does not intend to file a claim for defective or incomplete subcontract work.

The Demand seeks payment of $24,237.99 for soil disposal and LSP subcontract work completed in 2005. The scheduled value of GeoTek's subcontract was $73,920.00, to which GeoTek seeks to include in its Demand $95.00 for purported extra work.

Neither Roads nor its surety XL Specialty Insurance Company (XL) filed a sworn reply (Reply) to the Demand under Section 39F(1)(d).

Based on the sworn Demand and the report of District 4, I find that GeoTek performed the subcontract in full by July 13, 2005; that MassHighway inspected and found the work satisfactory on June 20, 2005; that GeoTek billed Roads $30,274.60 for all subcontract work performed (including $95.00 for purported extra work); and that no

part of the demand was for MassHighway-approved extra work. MassHighway paid Roads $30,274.60 for the work done by GeoTek. Roads failed to pay GeoTek that amount in full. Instead, Roads paid GeoTek $6,036.61 and held $1,513.73 as retainage. GeoTek asserts in its Demand that the balance due it under its subcontract with Roads is $24,237.99 ($30,274.60 - $6,036.61), including the $95.00 for unpaid extra work. The $24,237.99 demanded consists of $22,724.26 paid by MassHighway to Roads plus $1,513.73 in retainage held. XL has refused to pay GeoTek any part of its Demand.

Additional Submissions

On July 3, 2007 MassHighway's office of general counsel forwarded to this office a letter dated June 20, 2007 it had received from Dennis C. Cavanaugh, Esq. Mr. Cavanaugh asserted XL's position that MassHighway should not pay GeoTek's Demand.[1] Mr. Cavanaugh's letter is not a Reply. It was not received within the time permitted by Section 39F, is not made under pains and penalties of perjury and does not challenge any facts sworn to in GeoTek's Demand. It was not copied to GeoTek.[2]

On July 13, 2007 Mr. Cavanaugh wrote this office, stating "To protect the Surety's superior rights to and interests in the remaining payments due under the Assignment from MHD to the Surety, we hereby request that the Surety be permitted to intervene and be heard in the adjudication of GeoTek's untimely and ineligible direct pay claim."

On July 20, 2007 GeoTek responded to Mr. Cavanaugh's letter.[3]

XL's Request to "Intervene"

I deny XL's request to intervene in "the adjudication" of GeoTek's Demand. Hearings are generally not held in deciding a subcontractor's direct payment demand under Section 39F because the statutory scheme contemplates that facts be adduced by sworn statement in a demand and reply. See Section 39F(1)(d). Although XL had notice of GeoTek's Demand, it made no Reply. MassHighway's written report is not ambiguous. GeoTek and XL have both been afforded ample opportunity to argue.

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[1] Mr. Cavanaugh's letter was addressed to Mr. Kurt Dettman, Esq., an attorney and consultant under contract to MassHighway. Mr. Cavanaugh's letter was made in response to Mr. Dettman's request that he "set forth the Surety's position that the obligations of [the Department under Section 39F] to satisfy demand for direct payment … are inapplicable to the contract arrangement in place between the Surety and MHD."

[2] On July 9, 2007 this office forwarded a copy of Mr. Cavanaugh's letter to GeoTek allowing it until July 24, 2007 to respond to XL's arguments.

[3] GeoTek's response re-iterated it was not untimely in submitting its Demand. "…[f]or the past two years we were fighting to be paid on this contract. The fact that we were late to submit our claim to the right authority was a result of misrepresentation and deceit…" See April 9, 2007 ruling for a summary of the facts on which GeoTek's assertions appear to rest. GeoTek did not copy its July 20, 2007 response to Mr. Cavanaugh. On July 30, 2007 this office forwarded a copy of GeoTek's letter to Mr. Cavanaugh allowing him until August 10, 2007 to respond to GeoTek's statements. No response was received.

Accordingly, because a hearing would serve no useful purpose, I find "intervention" not warranted. I decide the Demand under the procedure set forth in Section 39F.

The Merits

Section 39F authorizes a subcontractor, once at least 65 days have elapsed after completion of the subcontract work, to demand the payment of the balance due that should have been paid by a general contractor or surety directly from the awarding authority.[4] See Section 39F(1) and (2). If a subcontractor meets the formal requirements of Section 39F(1)(d), establishes that the balance due has not been paid by the general contractor and shows that the awarding authority has no claim for defective work, Section 39F provides that the awarding authority pay the balance due directly to a subcontractor and subtract the amount paid from available contract funds. See Section 39F(1)(e) & (h); Section 39F(2).

Section 39F embodies the policy of the Commonwealth that subcontractors be paid for completed, satisfactory work. It is a remedial statute designed to provide an administrative payment remedy to a subcontractor without resort to suit. Among other things, Section 39F requires that a general contractor "forthwith" pay a performing subcontractor after it receives payment by the awarding authority for subcontractor work. See Section 39F(1)(a). Sixty-five days after a subcontractor to a Chapter 30 general contractor completes its work, the "entire amount" of the balance due under the subcontract, including retainage, is due from the general contractor (or from the awarding authority by direct payment) absent a claim for defective work. Section 39F(1)(b). *See* Bayer & Mingolla Indus. v. Orlando Contracting Co., 6 Mass. App. Ct. 1 (1978). Failure of the general contractor or surety to pay a subcontractor within sixty-five days gives rise to a right to a demand for direct payment. Id; Section 39F(2). A demand for payment under Section 39F is not a claim; rather, it is a statutory remedy by which an unpaid subcontractor may receive the balance due under its subcontract. See Section 39F(1)(d) and Section 39F(2). A demand may be made sixty-five days following completion of the subcontract or at any time thereafter.

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[4] "When, on default of the contractor, [the surety] pays all the bills of the job to date and completes the job, it stands in the shoes of the contractor insofar as there are receivables due it; in the shoes of the laborers and material men who have been paid by the surety—who may have had liens; and, not least, in the shoes of the government, for whom the job was completed." National Shawmut Bank of Boston v. New Amsterdam Casualty Co., Inc., 411 F.2d 843, 845 (1st Cir. 1969) (Shawmut). A surety does not have a security interest in the contract funds remaining in possession of the government at the time of default. "[T]he real security … [is] the eventual right to be in the shoes of the [project owner] upon job completion. This is not 'created by contract' but rather by the status, resulting from a contract, inhering in a surety …" First International Bank v. Continental Casualty Company, Superior Court No. 03122, August 16, 2004, 17 Mass. L. Rptr, 575, 2004 WL 1049068, citing Shawmut at 846. As a matter of law a surety does not discharge its obligation to complete the work of its principal (the defaulting general contractor) until the principal's debts are paid. *See* Framingham Trust Company v. Gould-National Batteries, Inc., 427 F.2d 856, 859 (1st Cir. 1970) ("… we cannot escape the conclusion that in both a practical and legal sense, the payment of previously unpaid laborers and materialmen is a cost of completing the contract").

Section 39F regulates direct payment to a subcontractor when a surety has replaced a defaulting general contractor. Section 39F(2) provides that the assignment and subrogation rights of the surety are "subordinate" to the rights of "all subcontractors who are entitled to be paid" under Section 39F. In the words of Section 39F(2),

> Any assignment by a subcontractor of the rights under this section to a surety company furnishing a bond under the provisions of section twenty-nine of chapter one hundred and forty-nine shall be invalid. The assignment and subrogation rights of the surety to amounts included in a demand for direct payment which are in possession of the awarding authority or which are on deposit pursuant to subparagraph (f) of paragraph (1) shall be subordinate to the rights of all subcontractors who are entitled to be paid under this section and who have not been paid in full.

Here, GeoTek filed a Demand in the proper statutory form. Roads and XL failed and refused to pay the subcontract balance due of $24,237.99. XL does not contest that the Demand was properly filed; it does not contest the amount of the balance due. The report of District 4, however, puts at issue whether the $95.00 for extra work included in GeoTek's Demand is proper. District 4 reported that no part of the Demand involved "approved" extra work. As GeoTek did not show that MassHighway approved extra work for $95.00, that amount is a mere claim that can not be properly included within its Demand. *See* Cardi Corporation v. Sutton Corporation, Superior Court, C.A. 95-6027-D, October 3, 1996 (amounts demanded for claimed extra work "do not qualify or fall within the scope of the direct payment provisions of G.L. c. 30, §39F"). With the exception of its extra work claim I find that GeoTek is otherwise entitled to be paid under Section 39F. I therefore deduct $95.00 from GeoTek's Demand and treat the Demand as for $24,142.99 only.

Section 39F(2) controls GeoTek's Demand. That subsection of Section 39F makes plain that a subcontractor may make a direct payment demand after a surety has stepped into the shoes of a defaulting general contractor. Section 39F(2) provides that a surety's rights to "the amounts included in a demand" "in possession" of the awarding authority are "subordinate" to "all subcontractors who are entitled to be paid under this section and who have not been paid in full." Here, GeoTek has shown that both Roads and XL have failed and refused to pay the balance due under the subcontract. GeoTek has shown that it is a performing subcontractor entitled to direct payment under Section 39F. In these circumstances, because Section 39F(2) commands that any right XL may have to the amount demanded through assignment or subrogation is "subordinate" to GeoTek's right to be paid by direct payment, I conclude that MassHighway should pay GeoTek's Demand, less $95.00.

XL asserts that MassHighway should not make a direct payment to GeoTek since to do so would violate XL's rights to equitable subrogation under which XL says it has the right to all "earned" contract funds. It also argues that the Section 39F "process" is

"inapplicable" to XL's contractual "arrangement" with MassHighway to complete the project.

With respect to XL's assertion that it is entitled to the balance of remaining "earned" contract funds, I think no principle of equitable subrogation confers "superior" rights upon XL "to amounts included in a demand" that are in possession of MassHighway. Section 39F(2) provides that a surety's rights are "subordinate" to the rights of unpaid subcontractors, such as GeoTek. Section 39F(2) is consistent with equitable principles that protect third parties who have completed work prior to a general contractor's default but who have not been paid, since payment of bills for labor and materials "is part of finishing the job." *See* Framingham Trust Company v. Gould-National Batteries, Inc., 427 F.2d 856, 859 n.6 (1st Cir. 1970). No principle of equitable subrogation prevents payments for labor and materials used on the work either before or after a general contractor's default. A surety is certainly not entitled to all unpaid contract funds remaining upon default where, as here, a statute expressly provides specified circumstances when a surety's rights are subordinate. *Cf.* French Lumber Co., Inc. v. Commercial Realty & Fin. Co., Inc., 346 Mass. 716, 719 (1964) (equitable doctrine of subrogation not affected where no provision of the Uniform Commercial Code purported to alter it). XL is bound by the express terms of Section 39F(2), which affords GeoTek an administrative remedy of direct payment with rights superior to XL's on these facts. I conclude that, because GeoTek has never been paid for satisfactory work performed that has been incorporated into the work, MassHighway may pay GeoTek's Demand from available contract funds.

With respect to XL's contention that its takeover agreement with MassHighway renders Section 39F "inapplicable," I think nothing in the agreement's assignment of contract proceeds purports to oust GeoTek's rights to direct payment. Nor could XL's takeover agreement with the MassHighway do so. *See* Bayer & Mingolla Indus. v. Orlando Contracting Co., 6 Mass. App. Ct. 1 (1978) (contract provision purporting to affect operation of Section 39F void); *see also* Peabody Construction Co., Inc. v. City of Boston, 28 Mass. App. Ct. 100, 103 (1989). The takeover agreement simply does not affect GeoTek's statutory right to demand direct payment under Section 39F(2). Nor is direct payment by MassHighway the payment of a "claim" or an "offset" under the takeover agreement, which in fact contemplates that direct payments be made. I conclude that nothing in the takeover agreement makes Section 39F "inapplicable."[5]

[5] XL's other arguments are without merit. (1) Because XL incorrectly characterizes GeoTek's Section 39F demand as a "claim," it erroneously assumes the one year limitation to file a claim against the bond under G.L. c.149, §29 (Section 29) applies to a direct payment demand under Section 39F. Section 39F does not terminate a subcontractor's right to make a demand after one year, as XL implies. GeoTek's remedy to make a claim under Section 29 is wholly independent of its remedy to demand payment under Section 39F. *See* Floors, Inc. v. B.G. Danis of New England, Inc., 7 Mass. App. Ct. 356, 358 (1979) (claim on bond under Section 29 a non-exclusive remedy). (2) XL argues that MassHighway "is not authorized to deduct amounts [paid in direct payment] from payments due to the Surety to satisfy GeoTek's claim" since Section 39F(1)(h) only permits a deduction "from payments to a general contractor" and not from payments to a surety. But Section 39F(2) expressly authorizes direct payment from contract funds "in possession" of the awarding authority while subordinating a surety's rights "to the amounts included in a demand." Direct payments made under Section 39F(2) are made from contract funds in possession of the government; they are not deducted in the manner set forth in Section 39F(1)(h).

In sum, all XL's contentions fail in light of the fact that Section 39F(2) expressly provides that the assignment and subrogation rights of the surety "to amounts included in a demand" by a qualifying subcontractor are "subordinate" to subcontractors "entitled to be paid." *See* Section 39F(2).

Conclusion

In light of the plain language contained in Section 39F(2), I find that the Department should pay GeoTek $24,142.99 ($24,237.99 - $95.00). MassHighway should pay GeoTek from available contract funds in its possession. Kindly pay claimant $24,142.99 out of the next periodic, semi-final or final estimate on the project if funds are available.

cc: GeoTek Engineering, Inc.
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Acting Chief Engineer
District Highway Director, District 4
Acting Chief Counsel, MHD
Commissioner, MHD

Secretary, EOT
Under Secretary and General Counsel, EOT

To: Lina Swan, Director of Fiscal Operations
From: Stephen H. Clark, Administrative Law Judge
Date: February 9, 2009

Subject: REQUEST FOR DIRECT PAYMENT

Demand File No:	MHD Contract #38898		
Demand Amount:	$24,586.83		
Subcontractor:	New England Bridge Products (NE Bridge)		
General Contractor:	XL Specialty Insurance (XL)		
Demand Filed:	07/15/08	Demand Dated:	07/11/08
Reply Filed:	None	Reply Dated:	NA
City/Town: Palmer		Project:	Rte. 146
Report Request (Dist #3)	10/15/08	Report Received:	10/31/08
ALJ Ruling Request	10/31/08	ALJ Ruling	02/10/09

NE Bridge filed a direct payment demand (Demand) on July 11, 2008, which was received by MassHighway July 15, 2008. On October 15, 2008 I found the Demand colorable and requested a report on the status of the subcontract work from District 3. District 3 responded with a written report dated October 23, 2008. The file contains memoranda copied to Fiscal Operations concerning the status of the work, a request for an Interim Time Extension (unexecuted), a recommendation for liquated damages of $1,050.00 dated April 22, 2008 and a letter dated November 5, 2008 by Dennis C. Cavanaugh, Esq., attorney for XL. I find that MassHighway should pay the Demand in full.

MHD contract #38898 was awarded to Roads Corporation (Roads), which defaulted. Thereupon, Roads' surety, XL Specialty Insurance (XL), was obligated to complete the work. The District's report indicates that XL then contracted with Bridges LLC (Bridges) as its agent to discharge its obligations under the payments and performance bonds it executed under MHD #38898. NE Bridge was a supplier to Bridges of material—namely, a protective screen and handrail—for the east and west sides of the bridge. The file shows that EDM Construction (EDM) was a subcontractor to Bridges that was responsible for the installation of the steel NE Bridge supplied. The steel was delivered and accepted by Bridges on March 7, 2008.

The report of District 3 shows that NE Bridge was obligated to supply Bridges with the material for its use by its subcontractor EDM and in fact did so.

XL wrote a letter to me on November 5, 2008 contending that NE Bridge should not be paid via direct payment because (1) it failed to meet the notice requirement as it did not notify XL directly of its Demand; and (2) NE Bridge "apparently" entered into a

subcontract with EDM and procured the steel needed by XL's agent Bridges to complete the work. The arguments misapprehend the duties of a surety under payment and performance bonds to MassHighway.

With respect to the notice requirement, I find that NE Bridge met the requirement of Section 39F given the circumstances here. NE Bridge served its Demand by certified mail to XL's agent, Bridges, Inc. Moreover, XL had actual notice and in fact had the opportunity to raise factual and legal argument, and did so.

XL's response unaccountably fails to address the requirements of Section 39F(2), which controls the rights of sureties and is dispositive of the rights of NE Bridge here.[1] That subsection reads:

> Any assignment by a subcontractor of the rights under this section to a surety company furnishing a bond under the provisions of section twenty-nine of chapter one hundred forty-nine shall be invalid. The assignment and subrogation rights of the surety to amounts included in a demand for direct payment which are in the possession of the awarding authority or which are on deposit pursuant to subparagraph (f) of paragraph (1) shall be subordinate to the rights of all subcontractors who are entitled to be paid under this section and who have not been paid in full.

XL's rights under Section 39F(2) are plainly "subordinate to the rights of all subcontractors who are entitled to be paid … and have not been paid in full." In that respect Section 39F is entirely consistent with the law of the Commonwealth, which requires that subcontractors and materialmen performing work on projects where sureties have been substituted for defaulting general contractors be paid in full. In Massachusetts a surety does not discharge its obligation to complete the work of its principal (the defaulting general contractor) until the principal's debts are paid. *See* Framingham Trust Company v. Gould-National Batteries, Inc., 427 F.2d 856, 859 (1st Cir. 1970) ("… we cannot escape the conclusion that in both a practical and legal sense, the payment of previously unpaid laborers and materialmen is a cost of completing the contract").

XL argues through counsel that the critical fact is that NE Bridge had a contract with EDM Construction, a subcontractor to Bridges, Inc., XL's agent. But the documents on file show that the purchase order for materials was within the lump sum item for completion of the bridge and the material supplied was accepted by Bridges, XL's agent. XL's argument that under general principles of equitable subrogation it has superior rights to NE Bridge on these facts is without merit. XL's agent accepted the material supplied by NE Bridge to complete performance of MassHighway contract #38898, which XL was bound to do. XL was also bound to pay the costs of completing the work. The doctrine of equitable subrogation does not permit XL to accept material and incorporate it into work it is bound to complete but fail to pay the materialman of its

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[1] XL makes no reference to the ruling of this office in the demand of GeoTek Engineering, Inc.(GeoTek) of August 20, 2007, holding that under Section 39F(2) GeoTek, a subcontractor, had a right of direct payment superior to XL, the surety of the defaulting general contractor.

agents. XL's right to eventually receive contract funds held by the awarding authority is not superior to the rights of unpaid materialmen, as XL is bound to complete the work before it may receive unexpended contract funds of its principal. See Section 39F(2); Framingham Trust Company v. Gould-National Batteries, Inc., 427 F.2d 856, 859 (1st Cir. 1970).

I find that (1) NE Bridge, qua materialman, is a subcontractor as defined by Section 39F(3); (2) the work of NE Bridge was completed by delivery on March 7, 2008; (3) payment of $24,586.83 is due and owing under NE Bridge by the surety XL.

XL is responsible for the payment of materialmen under MassHighway contract #38898 and has failed to pay NE Bridge. See Section 39F(2).

Based on the District's report and the sworn Demand on file, I find that $24,586.83 should be paid by the Department on this Demand.

Kindly pay claimant $24,586.83 out of the next periodic, semi-final or final estimate on the project if funds are available and deduct from payments due the general contractor in accordance with Section 39F(1)(g) and (f).

cc:

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District Highway Director, District 3

Chief Engineer
Commissioner, MHD