COMMONWEALTH OF PENNSYLVANIA

DEAN INSTITUTE OF TECHNOLOGY, INC.	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF LABOR & INDUSTRY,	:	
BUREAU OF WORKFORCE DEVELOPMENT	:	
PARTNERSHIP	:	DOCKET NO. 3972

FINDINGS OF FACT

Parties and Procedural History

1. The Plaintiff is Dean Institute of Technology, Inc. ("Dean"), a Pennsylvania corporation located at 1501 West Liberty Avenue, Pittsburgh, Pennsylvania. (Amended Statement of Claim at ¶ 1 and Answer to Amended Claim with New Matter at ¶ 1).

2. Dean is a vocational-technical school that provides training to students for careers in various trades. James Dean is Dean's President, Treasurer, and owner. (Notes of Testimony ("N.T.") 34, 106).

3. The Defendant is the Commonwealth of Pennsylvania, Department of Labor & Industry ("Department"), an executive agency of the Commonwealth of Pennsylvania located at the Labor & Industry Building, Seventh and Forster Streets, Harrisburg, Pennsylvania. (Amended Statement of Claim at ¶ 2 and Answer to Amended Claim with New Matter at ¶ 2; Ex. 96; Section 1 of the Act of June 2, 1913 (P.L. 396, No. 267), 71 P.S. § 1441).

4. On August 5, 2009, Dean initiated this proceeding by filing a statement of claim against the Department with the Board of Claims ("Board") seeking payment of 102 invoices for vocational training provided to displaced workers pursuant to a contract with the Department. (Statement of Claim; B.O.C. Docket No. 3972).

5. On August 6, 2009, Dean amended its statement of claim to attach relevant documents as exhibits. (Amended Statement of Claim; B.O.C. Docket No. 3972).

6. On October 2, 2009, the Department filed an answer to the amended claim with new matter. (Answer to Amended Claim/Complaint with New Matter; B.O.C. Docket No. 3972).

7. On October 22, 2009, Dean filed its reply to the Department's new matter, at which point the Board directed the parties to proceed with discovery. (Reply to New Matter; Board letter of October 23, 2009; B.O.C. Docket No. 3972).

8. In 2011, after a period of discovery, the parties filed cross-motions for summary judgment and, on January 18, 2012, Dean filed a motion for leave to amend its amended statement of claim to include reference to a second contract which covered some of the invoices which are referenced in its statement of claim. Specifically, Dean wished to add reference to a 1999 TAA Master Agreement ("1999 Master Agreement"), as opposed to the 2002 TAA Master Agreement ("2002 Master Agreement") for training services already referenced in its claim statements. (Dean's Motion for Summary Judgment filed August 31, 2011; Department's Motion for Summary Judgment filed October 12, 2011; Dean's Motion for Leave to Amend filed January 18, 2012; B.O.C. Docket No. 3972).

9. On March 29, 2012, the Board issued an order disposing of all three motions:

(1) The Board granted the Department's motion for summary judgment in part (finding that Dean had not timely availed itself of its administrative remedies with respect to 19 of the 102 invoices (i.e. those concerning the 1999 Master Agreement) and denied it in part with respect to 83 other invoices (i.e. the 83 disputed invoices still subject of the claim before us) governed by the 2002 Master Agreement and the 2003 Amendment thereto).

(2) The Board denied Dean's motion for summary judgment.

(3) The Board denied Dean's motion to amend its amended complaint.

(B.O.C. Docket No. 3972, Opinion and Order of March 29, 2012).

10. The Board conducted a hearing on the merits with respect to the 83 disputed invoices. Both parties appeared, had representation of counsel, and presented testimony and documentary evidence. (N.T. 1-471; Exs. 1-96, 101-111).

General Chronology of Events

11. For many years the Department has administered, and Dean has participated in, the Trade Adjustment Assistance ("TAA") program. The TAA program is federally funded. It pays for the training of displaced workers in several educational programs offered by institutions like Dean so that the workers may re-train and re-enter the workforce in different occupations that provide similar wages and benefits as the jobs from which they were laid off. (N.T. 35-36, 196-200, 240-241; Ex. 109).

12. On July 3, 2002, Dean and the Department entered into a contract known as the 2002 Master Agreement covering training of the type described above for the five year period of July 1, 2002 through June 30, 2007. (N.T. 38, 45-46, 201; Exs. 1, 109).

13. The Department would typically enter into five-year TAA master agreements with educational providers like Dean. These master agreements would run concurrently with the

period of availability of federal funds to pay for training for that period under the agreement. (N.T. 35-36, 149, 198-199, 223-226, 438-439; Ex. 86).

14. The federal government grants funds for the TAA program for a five year period under the federal Trade Act of 1974 and any unused sums revert to the Federal government at the end of that period. After the end of the 2002 Master Agreement's contract period (and a short reconciliation period thereafter), remaining federal funds for that agreement expired and would no longer have been available to pay for training provided under the agreement. (N.T. 198-199, 221-226, 256-259, 267-268, 437-438, 446-447, 455-458).

15. Dean could enroll new students in TAA funded programs during the first three years of the 2002 Master Agreement (July 1, 2002 to June 30, 2005). Students enrolled during the first three years of the 2002 Master Agreement had until June 30, 2007 to complete such training with payment by the Department. (N.T. 257-259, 455; Ex. 1).

16. The Bureau of Workforce Development Partnership ("Bureau") was the division within the Department that administered the TAA program and made payment of invoices for training provided pursuant to the 2002 Master Agreement. (N.T. 198-199; Ex. 96).

17. The Department, acting through the Bureau, formally approved and "obligated" funding for the purpose of training specific students in the TAA program by a series of addenda to the 2002 Master Agreement. The addenda incorporated TAA student enrollment verification forms for each student, which listed amounts obligated for each student enrolled. (N.T. 38, 40-41, 173-178, 199-200, 209-210, 328, 335-336, 424-426; Exs. 1, 109).

18. If a student's enrollment ended, as might happen if the student dropped out, or if funding from another source were obtained (e.g., a Pell Grant), notice would be given to the Bureau and the Department would "de-obligate" part or all of the funds earmarked for that student's training at Dean. These funds were then available for the training of other displaced workers under the 2002 Master Agreement. (N.T. 171-172, 230-235, 259-261, 428).

19. The 83 disputed invoices here at issue are for vocational training provided to displaced workers over a period stretching from January 2003 to December 2004. The invoices are dated February 2003 to January 2005. (Exs. 3-85).

20. Addenda to the 2002 Master Agreement obligated funding for all students covered by the 83 disputed invoices. (N.T. 174-178; Exs. 1, 109).

21. There is no dispute that the training claimed to have been provided by Dean was actually provided to students participating in the TAA program. Rather, the substance of the dispute is about the timeliness of Dean's billing. (N.T. 41-44, 52, 272).

22. Under Section 4(f) of the 2002 Master Agreement, the deadline for submission of invoices was originally set forth as follows: "the final payment request shall be submitted 30

days prior to the expiration or termination date of the [2002 Master] Agreement and shall be marked 'Final.'" (N.T. 204; Ex. 1).

23. The 2002 Master Agreement also provided a process for obtaining payment. Specifically, Section 4(d) of the 2002 Master Agreement provided that Dean was to submit requests on a prescribed invoice form which was to be sent to the Bureau at the following address:

> TAA Unit/Invoicing Section
> Bureau of Workforce Investment
> Department of Labor and Industry
> 12th Floor, Labor and Industry Building
> Harrisburg, PA 17120

(N.T. 92, 204-206, 212-213; Ex. 1).

24. The 2002 Master Agreement also included, as an attachment, a form for schools to use for invoicing the Department. Section 4(d) of the 2002 Master Agreement and the attached invoicing form differed slightly with respect to order and wording of the address where invoices were to be submitted. The invoice form stated the address as follows:

> Bureau of Workforce Investment
> Department of Labor & Industry
> Attn: Trade Act
> 12th Floor
> Seventh & Forster Streets
> Harrisburg, PA 17120

(N.T. 92-94, 205-206, 213-214; Ex. 1).

25. Although the addresses given in the 2002 Master Agreement and the attached invoice form differed slightly, both specified the "Bureau of Workforce Investment" as recipient, the 12th Floor as the location inside the Labor and Industry Building and 17120 as the ZIP code. Accordingly, we find these two addresses were the same in all material respects. (N.T. 92-94, 102-103, 205-206, 213-214; Ex. 1; F.O.F. 23-24; Board Finding).

26. In 2003, the TAA program, as administered by the Department, became faced with a shortage of funds for enrollment of new students and had to "shut down" for a period. In a review by the federal government, it was recognized that significant amounts of money were going unused by the Department because some students failed to complete their educational

programs yet monies remained "obligated" to them after they had left the program. (N.T. 215-216, 230-234, 261-262, 269-270, 430-432).

27. As a result, the Department changed its invoicing and internal procedures so that funds would become de-obligated more quickly and could then be re-obligated to other student(s). This was done in an effort to allow the training of more displaced workers and reduce the potential for unexpended funds to revert to the federal government at the end of the applicable contract period. (N.T. 214-217, 231-235, 260-262, 268-272, 296, 430-432).

28. As part of the foregoing changes to the TAA program procedures, money would be de-obligated regularly if there was no activity on an account in order to obligate it for another student's training. The "re-obligated" money would then no longer be available for the student for whose training it was originally obligated. (N.T. 215-216, 298-300, 455, 460-465).

29. In conjunction with the changes in the Department's internal procedures, the 2002 Master Agreement was amended by agreement of the parties (the "2003 Amendment"). This amendment was effective October 31, 2003.[1] (N.T. 45-46, 208-210, 263, 430-431; Ex. 2 and 109).

30. Among other things, the 2003 Amendment shortened the deadline for submission of invoices in order to facilitate the aforementioned de-obligation of funds from inactive accounts to other students' training. It stated, in relevant part:

> The Contractor shall **not** be paid if invoices are not received within 60 days of the completion of the training, completion of the semester, term or quarter or the end of the month for training provided on a clock hour basis, whichever is applicable. The last invoice for each student shall be marked "Final." [Emphasis original].

(N.T. 46, 211-212, 226-227; Ex. 2).

31. The 2003 Amendment also modified the invoicing address slightly. Invoices sent for payment were now to list the Grants Management Coordination Services office ("Fiscal" as several witnesses referred to it) <u>within</u> <u>the</u> <u>Bureau</u> as the recipient:

> Grants Management Coordination Services
> Bureau of Workforce Investment
> Department of Labor and Industry

[1] The 2003 Amendment, at Paragraph 7, states: "All other terms and conditions of the Original Agreement remain the same. These Amendments are effective October 1, 2003." However, the parties have stipulated that: "In 2003, the Department and Plaintiff executed an amendment to the 2002 Master Agreement (2003 Amendment), which was effective October 31, 2003." Accordingly, we utilize October 31, 2003 as the effective date of the 2003 Amendment. (Exs. 2, 109).

12th Floor Labor and Industry Building
Harrisburg, PA 17120

(N.T. 212-214; Ex. 2).

32. As with the 2002 Master Agreement, the recipient address in the body of the 2003 Amendment and the new attached invoicing form differed slightly with respect to order and wording. The address on the invoice form was:

Bureau of Workforce Investment
Department of Labor & Industry
Attn: Financial Coordination Services
12th Floor Labor & Industry Building
Seventh & Forster Streets
Harrisburg, PA 17120

(N.T. 212-213; Exs. 2, 3, 14).

33. Although there was, once again, a slight difference in the address given in the 2003 Amendment and the attached invoice form, both specified a subdivision within the Bureau of Workforce Investment as recipient, the 12th Floor as the location inside the Labor and Industry Building, and 17120 as the ZIP code. Here again, we find these two addresses to be the same in all material respects. (N.T. 212-214; Exs. 2, 3, 14; Board Finding).

34. For reasons which remain unclear to the Board, during the period from February 2003 to January 2005, when the 83 disputed invoices were prepared, Dean routinely filled out some invoices (including 81 of the 83 disputed invoices) on a form different than the ones prescribed by either the 2002 Master Agreement or 2003 Amendment. The alternate invoice form Dean utilized for those 81 invoices was on Dean letterhead and set forth a different recipient, a different ZIP code, and failed to identify a specific floor within the Labor and Industry Building. The address used on the alternative invoice was:

Office of Employment Security [or "security," uncapitalized]
Labor and Industry Building
7th & Forster Streets
Harrisburg, PA 17121

This address (sometimes referred to hereinafter as the "Office of Employment Security Address") is materially different from those set forth in either the 2002 Master Agreement, the 2003 Amendment or either of the forms set forth therein. (N.T. 93, 103, 105-106; Exs. 4-13, 15-85; F.O.F. 23-25, 31-33; Board Finding).

35. The Office of Employment Security had been an entity within the Department from 1979 to 1985 that had handled federally funded workforce development and unemployment

compensation matters. The Office of Employment Security has been defunct since 1985. During the period of the 2002 Master Agreement, there was no Office of Employment Security within the Department. (N.T. 242-244, 306-308, 311-314; Ex. 96).

36. Dean claims that it placed the 83 disputed invoices (among others) into envelopes bearing the Office of Employment Security Address and deposited the envelopes in the mail on the dates indicated on the invoices (thereby making the submission of these invoices timely under the terms of both the 2002 Master Agreement and the 2003 Amendment). (N.T. 56-58, 61-62, 64, 146-147, 380-381).

37. The Department asserts that the 83 disputed invoices did not reach it for processing and payment after their alleged mailing in the period of February 2003 to January 2005. (N.T. 280; Ex. 86, 89, 91).

38. The 83 disputed invoices do not represent the totality of Dean's work under the 2002 Master Agreement and the 2003 Amendment during the period covered by those invoices. James Dean, owner and President of Dean, estimated that several hundred other invoices would have been submitted by mail to the Department in that period and successfully paid by the Department. (N.T. 60-61, 113-114, 121, 150-151; Exs. 86, 202).

39. Although Mr. Dean was aware, generally, of slow payment of invoices by the Department, he did not make immediate attempts to collect the amounts payable on late accounts (including the 83 disputed invoices) out of "respect" for Dean's long relationship with the Department and because he was used to slow payment by the Department. (N.T. 67-68).

40. Dean did not make any inquiry concerning the 83 disputed invoices after they were allegedly sent to the Department until 2006. In 2006, Richard Ali, Director of Education at Dean, directed a generalized review of student files for unpaid invoices. (N.T. 186-187, 191).

41. On January 28, 2007, Dean sent a letter to the Department referencing a discussion between the Department and Mr. Ali, enclosing the 83 disputed invoices (among others) and requesting payment for same. In addition to the 83 disputed invoices, several others were submitted with the letter—some covered by the 1999 Master Agreement and others covered by the 2002 Master Agreement which had been paid earlier or would eventually be paid. (N.T. 69, 72-78; Ex. 95, 108).

42. It is uncontroverted that the 83 disputed invoices were received by the Department shortly after they were submitted by cover letter dated January 28, 2007. This was roughly 2 to 4 years after the stated dates on the invoices. (N.T. 74-75, 77-78, 130-131; Ex. 108).

43. On March 15, 2007, the Bureau sent Dean a letter stating, inter alia, that the 83 disputed invoices submitted with the letter could not be paid because the "federal funds for this time frame [2/1/2003 through 12/31/2004] ha[d] expired." This March 15, 2007 letter also referred to the deadline for submission of invoices set forth in the 2003 Amendment. The letter noted further that some invoices (not currently at issue) submitted with Dean's January 28, 2007 letter had been paid already and stated that the invoices for one student (also not now at issue) would be paid. (N.T. 78-79, 114 217-218, 226-227; Ex. 86).

44. Although Mr. Dean testified that continued dialogue over the unpaid invoices took place during 2007 and thereafter, he himself was not part of such dialogue, and no testimony was elicited as to who else may have been involved in these alleged discussions. (N.T. 79-87, 102, 141).

45. On July 30, 2008, Dean sent a second letter to the Department with a "detailed list of students and copies of original invoices." This letter stated that Dean was in the process of "confirming payment." The letter asked the Department to review its records and confirm payment. The Department seems not to have made any response to the July 30, 3008 letter from Dean. (N.T. 80-81; Ex. 87).

46. On August 26, 2008, Dean sent another letter to the Department indicating that it was being audited and seeking confirmation that the Department owed it $204,706.70, as indicated by an enclosed statement listing unpaid invoices. (N.T. 82-83; Ex. 88).

47. On December 29, 2008, the Department sent Dean a letter responding to the August 26, 2008 submission (the Department did not acknowledge Dean's July 30, 2008 letter or submission of invoices). In this response, the Department advised that some of the invoices listed in the submission of August 26, 2008 would be paid (obviously, this did not include any of the 83 disputed invoices). The December 29, 2008 letter also stated that the 83 disputed invoices could not be paid because federal funds for the 2002 Master Agreement had expired and payment could not be made in accordance with the terms of the 2002 Master Agreement. The December 28, 2008 letter also referred to the 60 day deadline for submission of invoices provided in the 2003 Amendment. (N.T. 84-85, 220-221; Ex. 89).

48. On January 20, 2009, Dean sent a letter to the Department stating that it did not agree with the refusal to pay the 83 disputed invoices (among others) and requesting the re-examination of the invoices. By letter dated February 11, 2009, the Department responded to Dean's latest request for review, and again denied payment. In this February response letter, the Department explained that the Department could not be sure it had "received the invoices when they were originally submitted" because the invoices indicated an address different than the one

set forth in the 2002 Master Agreement. The February 11, 2009 letter concluded with an invitation to call the Department with any questions. (N.T. 85-87, 235-236; Exs. 90, 91).

49. On March 20, 2009, Mr. Kaplan, an attorney for Dean, sent a letter to Christine Enright (Director of the Bureau at all times relevant hereto) requesting that the Department reconsider payment on the 83 disputed invoices (among others) (sometimes referred to hereinafter as the "Kaplan Letter"). (N.T. 87-88, 95-97, 194; Exs. 92, 109, 110).

50. There were two versions of this March 2009 Kaplan Letter entered into evidence, one bearing a March 20, 2009 date (but missing the law firm letterhead and signature) and the other bearing the date March 23, 2009 (which was on the law firm's letterhead and had a signature of the attorney and a handwritten notation "file copy"). The Board believes the presence of the firm letterhead, signature, a later date, and the "file copy" notation show the letter dated March 23, 2009 to be the letter that was actually sent (and the copy dated March 20, 2009 to be simply an earlier draft of same). This is further confirmed by the fact that the Department admitted the authenticity of the March 23, 2009 Kaplan Letter in the pleadings. (Dean's Amended Statement of Claim and Department's Answer at ¶¶ 14; N.T. 87-90, 95-98; Exs. 92, 110).

51. Notwithstanding the foregoing, the parties have stipulated that the Kaplan Letter was "sent" on March 20, 2009 as we have found in Paragraph 49 above. That said, Dean further introduced uncontroverted testimony indicating that the Kaplan Letter was "sent" by U.S. mail (or some similar means other than hand or same day delivery) so that it could not have been received by the Department until the next business day at the very earliest. As requested by Dean at hearing, the Board takes judicial notice that March 20, 2009 was a Friday and the next business day was Monday, March 23, 2009. Accordingly, whether we credit the stipulation of the parties (Ex. 109) or the clear import of the documents themselves (Exs. 92, 110), the Board finds that the Kaplan Letter was not received by the Department until March 23, 2009 at the earliest. (N.T. 87-90, 95-98; Exs. 92, 109, 110; F.O.F. 49-50; Board Finding).

52. On July 31, 2009, the chief counsel of the Department sent a response letter to Mr. Kaplan stating that the Department would review Dean's concerns and reply shortly. (N.T. 89-90; Ex. 93).

53. There was no further response from the Department prior to August 5, 2009 when Dean commenced its action before the Board. (N.T. 90; Ex. 93; Original Statement of Claim; B.O.C. Docket No. 3972).

Nature of Claims and Positions of the Parties

54. Dean asserts that it is entitled to payment in the amount of $142,320 for the 83 disputed invoices under theories of breach of contract, unjust enrichment, and equitable estoppel, plus interest at the judgment rate of 6% per annum. (Amended Statement of Claim; Dean's Post-Hearing Brief).

55. With respect to its breach of contract claim, Dean contends (1) that it provided the training services for which its seeks payment and (2) that it complied with the essential invoicing requirements necessary to receive payment under the 2002 Master Agreement and the 2003 Amendment. For the latter assertion, Dean alleges that the 83 disputed invoices were initially mailed on the dates stated on the invoice and relies upon the mailbox rule for the presumption that the Department received the invoices when they were allegedly sent in the period from February 2003 to January 2005. (Dean's Post-Hearing Brief).

56. Alternatively, Dean asserts that the Department should have paid the 83 disputed invoices when they were submitted again in January 2007 because this submission was itself timely and it is undisputed that the Department received all 83 disputed invoices at that time. (Dean's Post-Hearing Brief).

57. Dean also argues that it is entitled to payment from the Department under the doctrines of unjust enrichment and equitable estoppel. (Dean's Post-Hearing Brief).

58. The Department responds that it did not receive the 83 disputed invoices when they were first allegedly mailed and that Dean has not met its burden to establish application of the mailbox rule. It further argues that Dean's bulk submission of the 83 disputed invoices in January 2007 was untimely because this submission failed to meet the deadline provided for in the 2003 Amendment. The Department also argues that Dean cannot rely upon the doctrine of unjust enrichment because the relationship between the parties is controlled by written contract; and that Dean cannot rely upon the doctrine of equitable estoppel because Dean is at fault for its failure to be paid. (Department's Post-Hearing Brief).

59. The Department also argues that Dean's claim was late being filed at the Board and, therefore, that the Board lacks jurisdiction in this matter. (Department's Post-Hearing Brief; Board Finding).

Jurisdiction

60. The current jurisdictional issue revolves around which of multiple items of correspondence between the parties should be deemed to constitute jurisdictional "events" for purposes of applying the deadlines set forth in Section 1712.1 of the Procurement Code, 62

Pa.C.S. § 1712.1. (Department's Post-Hearing Brief; Dean's Post-Hearing Brief; Board Finding).

61. Previously, the Department had asserted in a motion for summary judgment that its March 15, 2007 letter denying payment of the invoices Dean submitted in bulk on January 28, 2007, constituted the accrual of Dean's six month right to file an administrative claim with the Department. The Department then contended that Dean's failure to submit an administrative claim within six months of March 15, 2007 deprived the Board of jurisdiction. The Board accepted this reasoning with respect to the 19 invoices controlled by the 1999 Master Agreement, but rejected it with regard to the 83 invoices under the 2002 Master Agreement (and 2003 Amendment) because training was still ongoing under this agreement and the full extent of Dean's claim under the 2002 Master Agreement (and 2003 Amendment) could not be assessed at that time. Accordingly, the Board found that the March 15, 2007 letter did not meet both prongs of the test for accrual of a claim at that time. (B.O.C. Docket No. 3972, Opinion and Order of March 29, 2012).

62. The Department now argues that Dean's right to make an administrative claim to the Department accrued on December 29, 2008, when the Department stated that it was denying payment of the 83 disputed invoices. It further asserts that Dean's January 20, 2009 letter was Dean's administrative claim and that the Department's February 11, 2009 letter denying payment was its final determination of this administrative claim. Thus, the Department contends Dean had 15 days from February 11, 2009 to file its claim with the Board, and that Dean's claim to the Board was untimely because it was not filed until August 5, 2009. This, the Department argues, deprives the Board of jurisdiction. (Department's Post-Hearing Brief).

63. Dean responds that the December 29, 2008 letter from the Department did not constitute affirmative notice that Dean would not be paid, because it left open the possibility that Dean might be paid by some funds other than those from the 2002 Master Agreement (and 2003 Amendment). Dean further contends that its January 29, 2009 letter was an initial request for payment, that the Department's February 11, 2009 letter was an initial denial of payment giving rise to Dean's right to file an administrative claim, and that the Kaplan Letter received by the Department no earlier than March 23, 2009 constituted its administrative claim. By this reckoning, Dean asserts that, because the Department issued no final determination of its March 23, 2009 administrative claim, its claim before the Board, filed within 135 days of March 23, 2009 (i.e., on August 5, 2009) was timely. (Dean's Post-Hearing Brief; F.O.F. 49-51).

64. The first request by Dean for payment of the 83 disputed invoices after expiration of the training period for the 2002 Master Agreement (and 2003 Amendment) was a letter to the Department dated July 30, 2008. The Department never responded to Dean's July 30, 2008 letter. (N.T. 81-82; Ex. 87).

65. Dean again requested payment of the 83 disputed invoices on August 26, 2008. (N.T. 82-85; Exs. 88, 89).

66. The Department initially responded to Dean's August 26, 2008 request for payment of the 83 disputed invoices by a December 29, 2008 letter. In it, the Department refused payment for the 83 disputed invoices by stating, in relevant part, as follows:

> The remaining students…were enrolled under Master Agreement TAA-0063-2 which commenced on July 1, 2002 and ended June 30, 2007. The federal funds for Master Agreement TAA-0063-2 have also expired. Therefore, payment of invoices for students whose invoices include this timeframe cannot be made according to the terms of the Master Agreement. Please refer to the Amendment to the Master Agreement effective October 31, 2003, , [sic] Page 3, Payment System (f) which states: "the contractor shall not be paid if invoices are not received within 60 days of the completion , [sic] completion of the semester, term, or quarter or end of the month for training on a clock hour basis, whichever is applicable.

(N.T. 84-85; Ex. 89).

67. At the time of the Department's December 29, 2008 letter, the period for training under the 2002 Master Agreement (and 2003 Amendment) had expired and Dean knew the amount due under this agreement and was capable of preparing a concise and specific written statement detailing the injury (unlike the circumstance in March 2007). This December 29, 2008 letter from the Department also affirmatively notified Dean that the 83 disputed invoices would not be paid. (N.T. 84-85; Ex. 89; F.O.F. 60-66; Board Finding).

68. On January 20, 2009, Dean sent another letter to the Department requesting re-examination of the invoices for which payment was denied by the Department's December 29, 2008 letter. Dean did not believe it was responding to a final refusal of payment by its letter of January 20, 2009, but instead regarded itself as being in a dialogue or negotiation regarding payment. (N.T. 85-86; Ex. 90).

69. The Department responded to Dean's January 20, 2009 letter by letter dated February 11, 2009. Although the Department's February 11, 2009 letter states that the invoices would not be paid, it does not contain any indicia that the Department considered Dean's January 20, 2009 letter to have been an "administrative claim." The Department's February 11, 2009 letter contains no statement that it was a final determination denying an administrative claim, no notice that Dean had any right to appeal the February 11 denial to the Board, and no notice of a 15 day statute of limitations or indication of when this 15 day appeal period started, as is typically and prudently given by Commonwealth agencies when denying an administrative

claim. Quite to the contrary, the letter concludes with an invitation to call the Department with any questions. (N.T. 86-87; Ex. 91; Board Finding).

70. The February 11, 2009 letter from the Department neither affirmatively indicated that it was a denial of an administrative claim nor made clear that it was a final determination of the Department subject to appeal to the Board nor did it anywhere indicate the commencement of the 15 day appeal period. (N.T. 86-87; Ex. 91; Board Finding).

71. The Department itself, after inviting Dean to continue to make further inquires to the Department in its February 11, 2009 letter, did not reject the March 2009 Kaplan Letter claim as superfluous. Instead, the Department responded to the Kaplan Letter with a letter dated July 31, 2009, stating that it was considering the issues raised and would respond shortly. Thus, it appears the Department itself did not believe that it had issued a final denial of an administrative claim by Dean as of July 31, 2009. (N.T. 89; Ex. 110; Board Finding).

72. After receiving the Department's February 11, 2009 letter, Dean engaged an attorney to represent it. (N.T. 87-88, 97-98; Ex. 110).

73. The March 2009 Kaplan Letter to the Department from Dean's attorney sets forth the legal and factual underpinning of Dean's claim in some detail (as is expected for an administrative claim) and is the final correspondence from Dean to the Department prior to the filing of its statement of claim before the Board. (Ex. 110).

74. March 23, 2009 was well within six months of December 29, 2008. December 29, 2008 was the first time after the end of the training period on the 2002 Master Agreement (and 2003 Amendment) when Dean was told that the Department would not pay the 83 disputed invoices. (Exs. 89, 110; F.O.F. 59-72; Board Finding).

75. The date Dean filed its original statement of claim with the Board (August 5, 2009) was 135 days from March 23, 2009, the earliest possible date of receipt by the Department of the Kaplan Letter claim which the Board considers to be Dean's administrative claim (counting 8 remaining days in March, 30 in April, 31 in May, 30 in June, 31 in July, and 5 in August). (Ex. 110; F.O.F. 60-74; Board Finding).

Substance of Dean's Claim

76. Dean contends that the Department should have paid the 83 disputed invoices when they were submitted on January 28, 2007. Dean asserts that this submission was timely because it was prior to the expiration of the 2002 Master Agreement (and 2003 Amendment). (Dean's Post-Hearing Brief).

77. The Department responds that the 2003 Amendment's time limit of 60 days after provision of training applied to the 83 disputed invoices submitted in January 2007. It therefore reasons that the invoices submitted in bulk on January 28, 2007 were untimely because they were submitted more than 60 days after the provision of training. (Department's Post-Hearing Brief).

78. Partway through the 2002 Master Agreement, in late 2003, the parties executed the 2003 Amendment. Among other things, this amendment changed (i.e. shortened) the deadline for submission of invoices to the Bureau. The original 2002 Master Agreement provided that "the final payment request shall be submitted 30 days prior to the expiration or termination date of the agreement and shall be marked "Final." The 2003 Amendment provided the following, modified deadline:

> The Contractor shall **not** be paid if invoices are not received within 60 days of the completion of the training, completion of the semester, term or quarter or the end of the month for training provided on a clock hour basis, whichever is applicable. The last invoice for each student shall be marked "Final."

(N.T. 295-298, 430; F.O.F. 12-15, 22, 26-30; Exs. 1, 2).

79. With respect to the status of the 2002 Master Agreement and the effective date of the changes thereto, the 2003 Amendment provided as follows:

> All other terms and conditions of the Original Agreement remain the same. These Amendments are effective October 1, 2003.

Notwithstanding the foregoing, the parties have stipulated that the 2003 Amendment was effective October 31, 2003. Accordingly, we will utilize October 31, 2003 to be the effective date of the 2003 Amendment in all our calculations and will hereinafter refer to the date the 2003 Amendment became effective as the "Effective Date."

(N.T. 296-298; Exs. 2, 109; Board Finding).

80. The 2003 Amendment does not state whether its terms shortened the invoice submission deadline (A) for all invoices submitted on or after the Effective Date, regardless of when the underlying training was provided or (B) only for those invoices for training provided on or after the Effective Date. The 2003 Amendment is ambiguous on this point. The stipulation does not address this point either. (Exs. 2, 109; Board Finding).

81. The Department drafted the contract language in the 2002 Master Agreement and in the 2003 Amendment. (N.T. 201-203, 334-335, 425, 430; Exs. 1, 2).

82. The Department's own witness, under questioning by the Board, testified that it was services provided after the Effective Date which were subject to the terms of the 2003 Amendment. (N.T. 296-298).

83. Sixty-four of the 83 disputed invoices are for training provided prior to the Effective Date of the 2003 Amendment. (Exs. 21-23, 25-85).

84. The 64 invoices for training provided prior to the Effective Date were among those submitted with Dean's letter to the Department on January 28, 2007. (N.T. 69, 72-78; Ex. 108).

85. The January 28, 2007 submission of the 64 invoices for training provided prior to the Effective Date was more than 30 days prior to the expiration of the 2002 Master Agreement. (N.T. 72-78, 267-268; Exs. 1, 21-23, 25-85, 108; F.O.F. 21-22, 79).

86. Department witnesses suggested that aside from the June 30, 2007 expiration of the contract, which obviously had not passed at the time of the January 28, 2007 submission of invoices, funds might have been "expired" or "de-obligated" because the invoices were not timely submitted. However, the Department presented no evidence that funds for those students actually were de-obligated under the terms of the 2002 Master Agreement and witnesses for the Department specifically denied having such knowledge. (N.T. 227-235, 259-263, 449, 460-464, 466-467).

87. The total amount of the 64 invoices for training provided prior to the Effective Date of the 2003 Amendment was $89,867. (Exs. 1, 2, 21-23, 25-85; F.O.F. 76-86; Board Finding).

88. Nineteen (19) of the 83 disputed invoices were for training provided after the Effective Date of the 2003 Amendment. (Exs. 1, 2, 3-20, 24; Board Finding).

89. Dean nonetheless contends that it timely submitted all 83 disputed invoices on an ongoing basis (on the dates indicated on the particular invoice) during the period of February 2003 to January 2005 in compliance with the 2002 Master Agreement and the 2003 Amendment. Dean also contends that it is entitled to the "mailbox rule" presumption of receipt by the Department for these invoices. (Dean's Post-Hearing Brief).

90. The Department asserts that it did not receive any of the 83 disputed invoices on or about the dates stated on the respective invoices or within the deadline provided by the 2003 Amendment. It also argues that Dean is not entitled to the presumption of the mailbox rule: (1) because there is insufficient evidence that the 83 disputed invoices were created in the course of business and placed in the mail at the time indicated on the invoices and (2) because Dean failed to establish that the 83 disputed invoices were mailed to the correct address. (Department's Post-Hearing Brief).

91. On the point of whether it mailed the invoices to the correct address, Dean contends that the Office of Employment Security Address it claims to have used in mailing the invoices should be considered "correct" for purposes of the mailbox rule because Dean was told by the Department to use this alternative address and/or because this became the correct address due to a course of performance established with the Department. The Department denies that such an instruction was given or that such a course of performance was established. (Dean's Post-Hearing Brief; Department's Post-Hearing Brief).

92. The addresses prescribed for submission of invoices in the 2002 Master Agreement and the 2003 Amendment are each materially different than the Office of Employment Security Address which Dean asserts was used on the envelopes containing the invoices. The address purportedly used by Dean indicated a different recipient, Office of Employment Security, did not include a denotation that the 12th Floor of the Labor and Industry Building was the destination, and even included a different ZIP code (17121 instead of 17120). (N.T. 92-94; F.O.F. 22-25, 31-36; Exs. 1-85).

93. Prior to hearing, in its amended statement of claim and motion for summary judgment, and at hearing, Dean asserted that the Department directed Dean to use the Office of Employment Security address. In its post hearing brief, Dean seemingly abandons this contention. (Statement of Claim at ¶ 19; Dean's Motion for Summary Judgment at ¶ 44; Brief in Support of Motion for Summary Judgment at p. 11; cf. Dean's Post-Hearing Brief; F.O.F. 94-96).

94. Mr. Dean testified that a staff member at Dean was given a verbal instruction by the Department to use the Office of Employment Security Address and that he relayed that instruction to his staff. Mr. Dean testified that he believed, but was not sure, that the staff member who received the instruction was Nancy Grom. (N.T. 115-116, 118-120, 128-129, 140-150, 164-165).

95. Ms. Grom testified that she did not receive an instruction to use the Office of Employment Security Address from either the Department or Mr. Dean. Instead, it was her belief that the use of the Office of Employment Security Address was correct based upon longstanding office practice. Ms. Grom could not recall when the address began to be used. (N.T. 386-388, 399, 409).

96. Mr. Dean's initially testified at hearing that Dean first used the addresses contained in the 2002 Master Agreement and/or the 2003 Amendment and then switched to using the Office of Employment Security Address because of advice by the Department. However, this timing is contrary to his statements given in interrogatories which Mr. Dean verified. (N.T. 117-119, 121-122; F.O.F. 97; Board Finding).

97. In interrogatories, Mr. Dean stated that the instruction to use the Office of Employment Security came during the 1998-1999 school year, well before the commencement of the period of the 2002 Master Agreement. Ultimately, when pressed on this issue during cross-examination and under questioning by the Board, Mr. Dean acknowledged that he could not be sure when the alleged instruction to use the Office of Employment Security Address was given and claimed to be confused. (N.T. 128-129, 135-136, 143-145, 149-150).

98. The Board does not find credible Mr. Dean's testimony that the Department directed Dean to send invoices to the Office of Employment Security Address with regard to Dean's performance of either the 2002 Master Agreement or the 2003 Amendment. (N.T. 115, 118-120, 124, 128-129, 135-136, 149-150, 386-388, 399, 409; F.O.F. 35-36, 91-97; Board Finding).

99. Dean also argues that the contractually specified address(es) for submission of invoices under the 2002 Master Agreement and the 2003 Amendment was modified by a course of conduct over the years. (Dean's Post-Hearing Brief).

100. In addition to Mr. Dean, Nancy Grom (formerly Financial Aid Director for Dean during the period at issue and now a part-time clerical employee) also provided considerable testimony as to Dean's invoice mailing practices. (N.T. 375-418).

101. Ms. Grom and Mr. Dean testified that Dean would prepare and mail TAA invoices on the tenth day of the month following the completion of the relevant monthly or quarterly billing period. (N.T. 48-49, 53-57, 61-63, 384, 395, 406).

102. Some programs at Dean were billed on a monthly basis and others on a quarterly basis. This would seem to be reflected in the fact that some invoices bill for a single calendar month while others bill for more than one month (usually three). (N.T. 48, 50, 61-62, 395; Exs. 3-85).

103. During the relevant time period, Ms. Grom and June Ganser (another Dean clerical employee who has since passed away) would fill in TAA invoices with information from Dean records and give them to Mr. Dean for his review. (N.T. 48, 380-382, 405).

104. Ms. Grom testified that most of the responsibility for filling in and mailing the TAA invoices (including addressing the envelopes) belonged to Ms. Ganser. Although Ms. Ganser was nominally supervised by Ms. Grom, Ms. Ganser often worked on TAA invoices at the same time as Ms. Grom and did so without review by Ms. Grom. Ms. Grom did not review Ms. Ganser's work, including what address Ms. Ganser would affix to the envelopes.

(N.T. 106-107, 166-167, 376-380, 382-383, 385, 387-388, 390, 392-393, 397-398, 407; Exs. 3-85).

105. Although she could not remember preparing any of the specific 83 disputed invoices, Ms. Grom testified that she believed she had filled in the ones on the 2003 Amendment's invoice form and that Ms. Ganser had used the alternate form bearing the Office of Employment Security Address. Thus, two invoices prepared the same day might be on different invoice forms. (N.T. 378-380, 388, 392-393, 397-398; Exs. 3, 14 (using form from 2003 Amendment); Exs. 4-13, 15-85 (using alternate form)).

106. Ms. Grom did not know why Ms. Ganser used the alternate form with the Office of Employment Security Address and did not know when she herself had gotten the 2003 Amendment's invoices form that she claims to have used for the invoices she completed. (N.T. 386-387)

107. Mr. Dean testified that he would review the TAA invoices and either sign them or return them to be signature stamped by the clerical staff. However, under deposition, Mr. Dean had testified that he "didn't think" he personally reviewed each invoice before he authorized the use of the signature stamp. (N.T. 50-56, 108-109, 151-152, 158-160).

108. Mr. Dean testified that there was a third person during the period in question who might have prepared invoices. This third person would have been a part-time secretary who Mr. Dean believed, but was not sure, was named Valerie Hagedorn. Ms. Grom's testimony was inconsistent with that of Mr. Dean, in that she testified that only two employees were responsible for preparing TAA invoices. (N.T. 167, 378).

109. Although Ms. Grom testified that Ms. Ganser would always use the Office of Employment Security Address on the envelopes used to submit TAA invoices, Ms. Grom did not check the label on envelopes. Rather, it was only Ms. Grom's belief that Ms. Ganser would use the Office of Employment Security Address on all envelopes containing TAA invoices. (N.T. 388, 391-393, 397-398, 406-409, 418).

110. Because Ms. Grom would normally use the forms prescribed by the Department, the mailing address on the invoices (which varied in accordance with the use of the prescribed form and the alternative form) was not necessarily the same as that placed on the envelope which was used to transmit the invoices. Thus, invoices like those at Exhibits 3 and 14, bearing the Bureau's address, could nonetheless have been mailed to the Office of Employment Security Address. (N.T. 391-393).

111. Ms. Grom also could not remember what address she would use if she needed to address an envelope on occasions when she would do so. (N.T. 418).

112. Ms. Grom's testimony that the invoices were always sent to the Office of Employment Security Address tends to contradict the testimony of Mr. Dean that he directed use of all three addresses at different times during the 2003-2005 time period. (N.T. 117-119, 388, 391-393).

113. Ms. Grom's testimony as to whether all invoices prepared on a given date would be mailed individually in separate envelopes or together in the same envelope was also inconsistent and contradictory. Ms. Grom testified that invoices completed by herself and Ms. Ganser would often be combined into one envelope for mailing. However, in her deposition, Ms. Grom indicated that each invoice would be mailed in an individual envelope (i.e., ten invoices in ten envelopes). Asked to reconcile the conflict between her deposition and hearing testimony, Ms. Grom said that the office would use a single envelope or separate envelopes "at different times." (N.T. 402, 405-408. 411-412, 417-418).

114. Mr. Dean and Ms. Grom testified that, after completion, TAA invoices for a particular day would be placed in one or more envelopes, have postage affixed, and be deposited in an outgoing mailbox for collection by a postal carrier the same day. Mr. Dean would sometimes collect the mail from the outgoing mailbox himself and deposit it in the U.S. mail himself, also on the same day. (N.T. 56-57, 64, 151, 380-382, 384, 399-400, 408).

115. Neither Mr. Dean nor Ms. Grom could recall the mailing of the specific envelopes containing the 83 disputed invoices. (N.T. 109-110, 397-398).

116. The Department produced the testimony of Department managerial and clerical staff that the Bureau was located on the 12th Floor of the Labor and Industry Building and was the only office on that floor; that only mail for the Bureau would have been delivered, received and accepted at that address; and that mail received by the Bureau addressed to a different division of the Department would have either been forwarded to the correct division or returned to the mailroom. (N.T. 237-238, 271, 275, 318-319, 339-340, 345, 347-349, 427, 430-442).

117. Department witnesses testified that they did not and would not have given instructions to submit invoices to the Office of Employment Security; that they did not recall the receipt of mail addressed to the Office of Employment Security; and that, if received, such mail would have been returned to the mailroom. (N.T. 329-334, 339-340, 342-344, 349-351, 355, 443, 454).

118. The Board found the Department's witnesses credible. (F.O.F. 116-117; Board Finding).

119. Although Mr. Dean and Ms. Grom were able to testify as to a general procedure followed by Dean Institute for preparing and mailing TAA invoices, their testimony as to the particulars of the procedure used were inconsistent, uncertain, and—ultimately—not credible for purposes of establishing that the specific 83 disputed invoices were actually mailed to a correct address as claimed (on or about the dates indicated on each invoice) in the period between February 2003 and January 2005. (F.O.F. 91-118; Board Finding).

120. Invoices sent to one address (i.e. the Office of Employment Security Address) cannot be presumed to have been received at another address (i.e. one of those prescribed by the 2002 Master Agreement or the 2003 Amendment) and a mailing that did not reach the Bureau cannot be considered to have been accepted by the Bureau. Conversely, a correctly addressed envelope that reached the Bureau (i.e. one of those prescribed by the 2002 Master Agreement or the 2003 Amendment) would not give the Bureau any opportunity (or reason) to reject an alternative performance (e.g. use of the Office of Employment Security Address) to vary the terms of the contract. (N.T. 118-119, 122-124, 144-145, 328-329, 340-350, 353-354; Exs. 3, 14, 202; Board Finding).

121. Because the testimony presented by Dean conflicts as to whether the Office of Employment Security Address was used for mailing all invoices (as suggested by Ms. Grom) or whether Dean at points used the Bureau's address for mailing some invoices (as suggested by Mr. Dean) and because Mr. Dean's and Ms. Grom's testimony on several key points was unreliable, and because we found the testimony of the Department's witnesses on their mail receipt practices to be credible, the Board cannot find that the alleged repeated occasions of performance of using the Office of Employment Security Address were accepted by the Department with knowledge of the nature of the performance and opportunity for objection. (F.O.F. 90-120).

122. There is insufficient credible evidence regarding Dean's procedures to make a finding that the 83 disputed invoices were both placed in the mail and properly addressed in the period from February 2002 to January 2005. (F.O.F. 90-121; Board Finding).

123. Dean contends that it is entitled to recovery under the equitable doctrines of unjust enrichment and equitable estoppel. The Department responds that Dean is not entitled to relief under the doctrine of unjust enrichment because the relationship between the parties is governed by contract and that Dean is not entitled to relief under the doctrine of equitable estoppel because the Department did not induce Dean to send the invoices to the incorrect address. (Dean's Post-Hearing Brief; Department's Post-Hearing Brief).

124. There was a contract between the parties that included specific provisions addressing the time frame and manner by which Dean was to invoice the Department in order to obtain payment for its services. (Exs. 1, 2; Board Finding).

125. Dean did not provide sufficient credible evidence to establish that the Department induced Dean to send the 83 disputed invoices under the 2002 Master Agreement and/or the 2003 Amendment to the Office of Employment Security Address. (F.O.F. 90-122; Board Finding).

CONCLUSIONS OF LAW

Jurisdiction

1. Under Section 1724 of the Procurement Code, the Board has subject matter jurisdiction to hear and adjudicate claims arising from a contract entered into by a Commonwealth agency. The remaining claim in this matter arises from a contract entered into by the Pennsylvania Department of Labor and Industry. Accordingly, the Board has subject matter jurisdiction over the extant claim before us. 62 Pa.C.S. § 1724(a)(1).

2. Prior to filing a claim with the Board, a claimant whose claim arises from a contract with a Commonwealth agency must follow the procedures set forth in Section 1712.1 of the Procurement Code, which provides as follows:

> § 1712.1. Contract controversies.
>
> (a) Right to claim. --A contractor may file a claim with the contracting officer in writing for controversies arising from a contract entered into by the Commonwealth.
>
> (b) Filing of claim. --A claim shall be filed with the contracting officer within six months of the date it accrues. If a contractor fails to file a claim or files an untimely claim, the contractor is deemed to have waived its right to assert a claim in any forum. Untimely filed claims shall be disregarded by the contracting officer.
>
> (c) Contents of claim. --A claim shall state all grounds upon which the contractor asserts a controversy exists.
>
> (d) Determination. --The contracting officer shall review a claim and issue a final determination in writing regarding the claim within 120 days of the receipt of the claim unless extended by consent of the contracting officer and the contractor. If the contracting officer fails to issue a final determination within the 120 days unless extended by consent of the parties, the claim shall be deemed denied. The determination of the contracting officer shall be the final order of the purchasing agency.
>
> (e) Statement of claim. --Within 15 days of the mailing date of a final determination denying a claim or within 135 days of filing a claim if no extension is agreed to by the parties, whichever occurs first, the contractor may file a statement of claim with the board.

62 Pa.C.S. §§ 1724(a)-(e).

3. A claim accrues when: (1) a claimant is first able to litigate his or her claim, e.g. when the amount due under the claim is known and the claimant is capable of preparing a concise and specific written statement detailing the injury, and (2) the claimant is affirmatively notified that he or she will not be paid by the Commonwealth. Darien Capital Mgmt., Inc. v. Pub. Sch. Employes' Ret. Sys., 700 A.2d 395, 397 (Pa. 1997). Where the clear import of a letter is that the contractor would not be paid, the claimant has been affirmatively notified of payment denial for purposes of Darien. Ferguson Elec. Co., Inc. v. Dep't of Gen. Servs., 3 A.3d 681, 686 (Pa. Cmwlth. 2010). However, the denial of a request for payment must be unequivocal, and both prongs of the Darien test must be satisfied before a claim may be considered to have accrued. Wayne Knorr, Inc. v. Dep't of Transp., 973 A.2d 1061, 1089 (Pa. Cmwlth. 2009). See also, Ferguson, 3 A.3d at 686.

4. In disposing of the Department's motion for summary judgment earlier in this case, the Board determined that Dean could not calculate the amount of its claim with respect to the services provided under the 2002 Master Agreement at the time of Dean's correspondence with the Department in January 2007 because the service period of that contract would not expire until June 30, 2007 and because unresolved invoices for other trainees serviced under the 2002 Master Agreement were outstanding as of March 15, 2007. (B.O.C. Docket No. 3972, Opinion and Order of March 29, 2012; N.T. 78-79; Ex. 86).

5. Because Dean filed a further request for payment of the disputed invoices on August 26, 2008 (after expiration of the service period on the 2002 Master Agreement and 2003 Amendment), and because we have found that the Department clearly and affirmatively denied payment of the 83 invoices by letter dated December 29, 2008, Dean's right to file an administrative claim with the Department for breach of the 2002 Master Agreement (and 2003 Amendment) accrued on December 29, 2008. (C.O.L. 2-4).

6. For purposes of commencing the 15 day appeal period on a party's right to file a statement of claim with the Board, a final determination of an administrative claim must clearly indicate that it is a final determination of an administrative claim and must give the contractor a clear and reliable basis for knowing the number of days remaining in which to file a petition for review with the Board. See, Knorr, 973 A.2d at 1090; See also, Schmidt v. Commonwealth, 433 A.2d 456, 457 (Pa. 1981); In re Appeal of Borough of West View, 501 A.2d 706, 707-708 (Pa. Cmwlth. 1985).

7. Because the Department's February 11, 2009 response to Dean's January 20, 2009 letter lacks both the finality and the certainty requisite to be considered a final determination of an administrative claim and to commence of the running of the 15 day period of limitations, and because the Department itself did not regard this February 11 letter to be a final determination of an administrative claim (as evidenced by both its invitation within the letter for Dean to submit questions to the Department and the Department's July 29, 2009 response to Dean's March 23, 2009 Kaplan Letter), the Board concludes that the Department's February 11,

2009 letter did not begin the 15 day period of limitations for the purpose of filing a claim at the Board under Section 1712.1(d) and (e) of the Procurement Code. (C.O.L. 6-7).

8. Because the March 2009 Kaplan Letter from Dean's attorney states Dean's grounds for disputing the Department's denial of payment and the Board finds this final piece of correspondence sent to the Department prior to the commencement of Dean's claim before the Board to be Dean's administrative claim to the Department we consider this to be Dean's administrative claim for purposes of Section 1712.1(a) through (c) of the Procurement Code. 62 Pa.C.S. § 1712.1(a)-(c).

9. Because the Department failed to respond to Dean's March 2009 Kaplan Letter with a final determination, but instead stated in a letter dated July 29, 2009 that it was considering the issues raised by Dean, the Board considers the Department's failure to issue a final determination to give rise to the 135 day period of limitations set forth in Section 1712.1(e) of the Procurement Code. 62 Pa.C.S. § 1712.1(e).

10. Because the Department did not issue a final determination with respect to Dean's March 2009 Kaplan Letter which was received March 23, 2009 or thereafter by the Department, Dean's statement of claim filed at the Board on August 5, 2009 was timely as being within the 135 day statute of limitations set forth in Section 1712.(e) of the Procurement Code. 62 Pa.C.S. § 1712.1(e). (C.O.L. 6-9).

11. The Board has both subject matter and in personam jurisdiction over the extant claim made here by Dean against the Department of Labor and Industry. (C.O.L. 1-10).

Dean's Claim

12. Under Pennsylvania law, in order to recover on a breach of contract claim, the plaintiff must prove by a preponderance of the evidence: (1) the existence of a valid and binding contract to which plaintiff and defendant were parties; (2) the essential terms of the contract; (3) that plaintiff complied in all material respects with the contract's terms; (4) that the defendant breached a duty imposed by the contract; and (5) that damages resulted from the breach. Technology Based Solutions, Inc. v. Elecs. Coll., Inc., 168 F. Supp. 2d 375, 381 (E.D.P. 2001); A.G. Cullen Constr. Co., Inc. v. State Syst. of Higher Ed., 898 A.2d, 1145, 1161 (Pa. Cmwlth. 2006). In asserting a claim for recovery on a breach of contract, it is the asserting party's burden to show that the facts exist to support the requested recovery. Paliotta v. Dep't of Transp., 750 A.2d 388 (Pa. Cmwlth. 1999).

13. The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties. Where the contract is free from ambiguity, the parties' intent is to be determined from the express language of the contract. LJL Transp., Inc. v.

Pilot Air Freight Corp., 962 A.2d 639, 647 (Pa. 2009); Chester Upland Sch. Dist. v. Edward J. Meloney, Inc., 901 A.2d 1055, 1059 (Pa. Super. 2006).

14. A written instrument is ambiguous if it is reasonably or fairly susceptible of more than one construction. When a contract is ambiguous, the rule of contra proferentem requires the language to be construed against the drafter and in favor of the other party if the latter's interpretation is reasonable. State Pub. Sch. Bldg. Auth. v. Noble C. Quandel Co., 585 A.2d 1136, 1144 (Pa. Cmwlth. 1991); See also, Dep't of Transp. v. Semanderes, 531 A.2d 815, 818 (Pa. Cmwlth. 1987).

15. Parties (and the court) are typically bound by their judicial admissions contained in pleadings, stipulations and the like, unless they request and are allowed to amend same by the court under appropriate circumstances. See e.g., Tops Apparel Mfg. Co. v. Rothman, 244 A.2d 436, 438 (1968); Commonwealth of Pa., Dep't of Transp. v. Brown, 576 A.2d 75, 79 (Pa. Cmwlth. 1990). Compare, Commonwealth v. Daniels, 387 A.2d 861, 862-863 (Pa. 1978)(quoting Carnegie Steel Co. v. Cambria Iron Co., 185 U.S. 403, 444 (1902)).

16. The express terms of the 2003 Amendment stated that its changes were effective October 1, 2003. However, because the parties have stipulated that the 2003 Amendment was "effective on October 31, 2003" we will utilize the latter date as the effective date of the 2003 Amendment and refer to it hereinafter as the "Effective Date." Regardless of whether we utilize October 1 or 31, the provision of the 2003 Amendment which shortened the time for invoice submittal by stating that Dean had only sixty days within which to submit its invoices after the completed period of training gives rise to two reasonable but conflicting interpretations. One, which is urged by the Department, is that the new billing deadline applied to all invoices submitted on or after the Effective Date, regardless of when the training service was performed. The other, which favors Dean, would be that the shortened deadline applied only to invoices for services provided on or after the Effective Date of the amendment (with invoicing for training already provided governed by the original terms of the 2002 Master Agreement). (Exs. 1, 2, 109; C.O.L. 14-15).

17. The Board may entertain extrinsic evidence as an aid to interpreting contract provisions where there is ambiguity in the contract language. Kripp v. Kripp, 849 A.2d 1159, 1163 (Pa. 2004); Hutchison v. Sunbeam Coal Corp., 519 A.2d 385, 390 (Pa. 1986).

18. Because there is ambiguity as to whether the 2003 Amendment's shortened invoicing deadline applied to all invoices submitted on or after the Effective Date or only to invoices for services provided on or after the Effective Date; and because the Department drafted the 2003 Amendment, the rule of contra proferentem, as well as the testimony of the Department's own witness, leads the Board to conclude that the shortened deadline for invoice submittal in the 2003 Amendment was applicable only to invoices for services provided on or after the Effective Date. Accordingly the 2002 Master Agreement's original deadline for submission of invoices (i.e. 30 days prior to the expiration of the 2002 Master Agreement) would apply to invoices for services rendered before the effective date of the 2003 Amendment. (Exs. 1, 2; C.O.L. 13-17).

19. The law does not impute to parties to a contract the intention to reach an absurd result. Reed v. Pittsburgh Bd. of Pub. Educ., 862 A.2d 131, 136 (Pa. Cmwlth. 2004).

20. Because the provision in the 2003 Amendment expressly identifying its Effective Date was ambiguous with regard to invoice submittal, and the Department's suggested construction of the 2003 Amendment (that the shortened deadline be applicable to all invoices submitted on or after the Effective Date) could lead to the absurd result of making it impossible for Dean to submit invoices for unbilled services already rendered as of 60 days before the Effective Date (thereby causing Dean to forfeit moneys already earned), the Board finds this to be an additional reason to conclude that the shortened deadline of the 2003 Amendment for the submission of invoices did not apply to invoices for services provided prior to the Effective Date. (C.O.L. 19).

21. Because the Board construes the 2002 Master Agreement and 2003 Amendment to permit the submission of invoices for training provided prior to the Effective Date to be submitted up until 30 days prior to the June 30, 2007 expiration of the 2002 Master Agreement (i.e. up until May 31, 2007); and because 64 of the 83 disputed invoices were indisputably received by the Department prior to May 31, 2007 through Dean's bulk submission on January 26, 2007; and because the total amount due on these 64 invoices for services rendered prior to October 1, 2003 is $89,867, the Board concludes that the Department owes, and is liable to, Dean for this principal amount by the terms of their contract. (C.O.L. 13-20).

22. The mailbox rule provides that "depositing in the post office a properly addressed, prepaid letter raises a natural presumption, founded in common experience, that it reached its destination by due course of mail." Szymanski v. Dotey, 52 A.3d 289, 292 (Pa. Super 2012) (quoting Jensen v. McCorkell, 26 A. 366, 367 (Pa. 1893)) (emphasis added). The burden of proof lies with the party seeking to invoke the mailbox rule. To trigger the presumption of receipt, "the party who is seeking the benefit of the presumption must adduce evidentiary proof that the letter was signed in the usual course of business and placed in the regular place of mailing." Geise v. Nationwide Life & Annuity Co. of America, 939 A.2d 409, 423 (Pa. Super. 2007).

23. Documentary evidence of mailing or testimony from the author that a document was mailed may establish the presumption of receipt. See, Dep't of Transp., Bureau of Driver Licensing v. Grasse, 606 A.2d 544, 546 (Pa. Cmwlth. 1991). The finder of fact may determine that there is insufficient evidence of mailing. Szymanski, 52 A.3d at 293-295 (testimony did not establish placement of notice in regular place of mailing and on custom of mailing, or that notice was in fact mailed); Geise, 939 A.2d at 425 (jury was justified in finding that notice was not mailed); Commonwealth v. Thomas, 814 A.2d 754, 759-760 (Pa. Super. 2002) (evidence of general practice of mailing without official record of mailing, and without personal recollection of mailing, failed to meet burden).

24. Because Dean failed to meet its burden of demonstrating that the 83 disputed invoices were mailed to the correct address at or about the date indicated on each invoice (between February 2003 and January 2005), it has not met its burden to establish presumption of receipt by the Department under the mailbox rule at or about the date indicated on each invoice (between February 2003 and January 2005). (C.O.L. 22-23).

25. "Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement." Restatement (Second) of Contracts at § 202(4). However, "such 'practical construction' is not conclusive of meaning. Conduct must be weighed in the light of the terms of the agreement and their possible meanings." Restatement (Second) of Contracts at § 202, Comment g.

26. Because Dean failed, inter alia, to adduce credible evidence that all, or even a majority, of TAA invoices from Dean were sent to one address and were received at another address, and because the Board believes that there is insufficient evidence to find that the Department would—or did—both receive and knowingly accept mail sent to the wrong address, there is insufficient evidence to find that there was a consistent course of conduct followed by Dean which the Department knowingly accepted, so as to substitute the "Office of Employment Security Address" (the wrong address) for the addresses indicated in the 2002 Master Agreement and 2003 Amendment (the correct addresses) or to make the Office of Employment Security Address the "correct address" for purposes of the mailbox rule. (C.O.L. 25).

27. Because we have found insufficient evidence to apply the mailbox rule to establish the Department's receipt of the 83 disputed invoices at or about the time of the dates indicated on these invoices (between February 2003 and January 2005); and because the shortened deadline for invoice submittal contained in the 2003 Amendment was applicable to 19 of these disputed invoices, making their submittal in bulk on January 26, 2007 (and all subsequent submittals) late, the Board concludes that the Department is not liable to Dean for the amount claimed on these 19 invoices. (C.O.L. 12-26).

28. Because the doctrine of unjust enrichment is not applicable when the issue in dispute between the parties is addressed and controlled by the terms of a written contract; and because the time for submittal of invoices is specifically addressed in the 2002 Master Agreement and the 2003 Amendment, Dean cannot recover pursuant to the doctrine of unjust enrichment. See, Wilson Area Sch. Dist. v. Skepton, 895 A.2d 1250, 1254 (Pa. 2006); Cooper v. E. Penn Sch. Dist., 903 A.2d 608, 619 (Pa. Cmwlth. 2006).

29. Because there was insufficient credible evidence to establish that the Department induced Dean to believe that it could submit invoices to the Office of Employment Security address and be paid, Dean cannot recover pursuant to the doctrine of equitable estoppel. Zitelli v. Dermatology Educ. & Research Found., 633 A.2d 134, 139 (Pa. 1993).

Calculation of Damages

30. Because, by its January 26, 2007 submission of invoices, Dean submitted 64 of the 83 disputed invoices on a timely basis pursuant to the terms of the 2002 Master Agreement, the Department is liable to Dean for payment of those invoices in the principal amount of $89,867. (C.O.L. 12-21).

31. Dean is entitled to payment from the Department of a principal sum of $89,867, plus pre-judgment interest of $23,252 (calculated at the rate of 6% per annum for the period from March 23, 2009 to date) for a total award of $113,119, and to post-judgment interest on this award until paid in full. 62 Pa.C.S. § 1751.

DISCUSSION

Introduction

At its core, this case is a dispute between Dean Institute of Technology, Inc. ("Dean") and the Commonwealth of Pennsylvania, Department of Labor and Industry ("Department") about whether Dean timely submitted 83 invoices under its contract for the provision of technical training to displaced workers under the Trade Adjustment Assistance ("TAA") program. Timeliness of the invoices submitted is central because the federal funds supporting the training program were available for only a limited time period.

Dean seeks to employ the presumption of the mailbox rule to establish the Department's timely receipt of the original invoices and also asserts that its later submittal of the 83 invoices en masse should be considered timely as well. The Department denies receipt of the original invoice submissions and argues that the later submission of these invoices in bulk, although definitely received, was too late for payment to be made. The Department also denies applicability of the mailbox rule.

The Board of Claims ("Board") finds that Dean failed to establish that the Department received the earlier submissions of original invoices. However, for 64 of the 83 disputed invoices, the later submission in bulk on January 26, 2007 was timely under the submittal deadlines set forth in the contract as originally executed. Therefore, those 64 invoices must be paid by the Department. The remaining 19 were subject to an amendment executed partway through the contract period which shortened the invoice submittal deadline, and were therefore late. These need not be paid under the terms of the contract.

Background

The 83 disputed invoices still at issue in this case[2] are for vocational training provided to displaced workers under the federally-funded TAA program administered by the Bureau of Workforce Investment within the Department (hereinafter the "Bureau") from January 2003 to December 2004. The training was provided by Dean, a vocational-technical school, which participated in the TAA program under a contract known as the 2002 TAA Master Agreement ("2002 Master Agreement"). The 2002 Master Agreement was executed on July 3, 2002 and covered a five-year period from July 1, 2002 through June 30, 2007.

The 2002 Master Agreement was one in an ongoing series of such agreements that the Department made and continues to make with hundreds of educational institutions, executed every three years (i.e., there have been 1999, 2002, and 2005 Master Agreements). Each contract was made concurrent with the period of availability of funding provided by the federal government under the Trade Act of 1974.

Under the 2002 Master Agreement, Dean could enroll students during the first three years of the contract, July 1, 2002 through June 30, 2005. Students enrolled during the first three years would have the final two years to complete their training. The Department, acting through the Bureau, approved students for training and "obligated" funds for individual students through a series of addenda to the 2002 Master Agreement. If a student's enrollment was terminated, as

[2] Initially there were 102 invoices underlying the original and amended claim were subject to two contracts with the Department, the 1999 Master Agreement (19 invoices) and the 2002 Master Agreement (83 invoices). The original and amended claims did not allege the existence of the 1999 Master Agreement. Dean sought to neutralize this issue by filing a motion to amend its amended complaint. The Board denied the motion to amend because the Board found that it lacked jurisdiction over the invoices for training covered by the 1999 Master Agreement. In granting the Department's motion for summary judgment with respect to the 19 invoices subject to the 1999 Master Agreement, the Board determined that Dean's statement of claim was untimely for those invoices. (Board Opinion and Order of March 29, 2012).

might happen if the student dropped out, or if funding from some other source (e.g., a Pell Grant) was obtained, notice would be given to the Bureau and the Department would "de-obligate" part or all of the funds earmarked for that student's training at Dean.

The 83 disputed invoices are for training provided over a period stretching from January 2003 to December 2004, with invoices for same being dated from February 2003 to January 2005. There appears to be no dispute that the training was, in fact, provided to the students. Rather, the substance of the dispute is about the timeliness of Dean's billing.

Under the 2002 Master Agreement, the deadline for submission of invoices was originally set forth as follows: "the final payment request shall be submitted 30 days prior to the expiration or termination date of the Agreement and shall be marked 'Final.'" (Ex. 1). The 2002 Master Agreement also provided a process for obtaining payment. Specifically, Dean was to submit requests on a prescribed invoice form sent to the Bureau at the following address:

> TAA Unit/Invoicing Section
> Bureau of Workforce Investment
> Department of Labor and Industry
> 12th Floor, Labor and Industry Building
> Harrisburg, PA 17120

(Ex. 1).

The 2002 Master Agreement and the attached invoicing form differed slightly with respect to order and wording of the address but were, in the Board's view, the same in all material respects.[3]

In 2003, the TAA program became faced with a shortage of funds for enrollment of new students and had to "shut down" for a period. In a review by the federal government, it was recognized that significant amounts of money were going unused by the Department because some students failed to complete their educational programs yet monies remained "obligated" to them after they had left the programs. As a result, the Department changed its invoicing and internal procedures so that funds would become de-obligated more quickly and could then be re-obligated to other student(s), allowing the training of more displaced workers and reducing the potential for unexpended funds to revert to the federal government at the end of the applicable contract period.

In conjunction with this change in the Department's internal procedures, the 2002 Master Agreement was amended by agreement of the parties effective October 31, 2003 ("2003 Amendment").[4] Of import to the current dispute, both the invoicing instructions and deadlines for submission of invoices were modified by this amendment. The address to which invoices

[3] The invoice form attached to the 2002 Master Agreement lists the following address for the Bureau:

Bureau of Workforce Investment
Department of Labor & Industry
Attn: Trade Act
12th Floor
Seventh & Forster Streets
Harrisburg, PA 17120

Both versions of the address specify the "Bureau of Workforce Investment" as recipient, Seventh and Forster Street as the street address, the 12th Floor as the location inside the Labor and Industry Building and 17120 as the ZIP code. (Ex. 1).

[4] As explained more fully in our Findings of Fact, the text of the 2003 Amendment states it was to be effective "October 1, 2003," but the parties have stipulated it was effective "October 31, 2003." This difference is not material to the outcome of the case.

were to be sent for payment was changed to list "Grants Management Coordination Services" ("Fiscal," as several witnesses put it) within the Bureau as the recipient:

> Grant's Management Coordination Services
> Bureau of Workforce Investment
> Department of Labor and Industry
> 12th Floor Labor and Industry Building
> Harrisburg, PA 17120

(Ex. 1).

As with the 2002 Master Agreement, the recipient addresses in the 2003 Amendment and the attached form differ slightly with respect to order and wording but were again materially the same.[5] The 2003 Amendment also changed the deadline for submission of invoices, giving Dean a shorter timeframe for submission of same:

> The Contractor shall **not** be paid if invoices are not received within 60 days of the completion of the training, completion of the semester, term or quarter or the end of the month for training provided on a clock hour basis, whichever is applicable. The last invoice for each student shall be marked "Final."

(Ex. 2).

For reasons which remain unclear to the Board, Dean completed 81 of the 83 currently disputed invoices on a different form than that prescribed by either the 2002 Master Agreement or the 2003 Amendment (the other two disputed invoices were completed on the 2003

[5] The invoice form attached to the 2003 Amendment lists the following address for the Bureau:

> Bureau of Workforce Investment
> Department of Labor & Industry
> Attn: Financial Coordination Services
> 12th Floor Labor & Industry Building
> Seventh & Forster Streets
> Harrisburg, PA 17120

Both versions of the address specify a subdivision within the Bureau of Workforce Investment as recipient, the 12th Floor as the location inside the Labor and Industry Building, and 17120 as the ZIP code. (Ex. 2).

Amendment's attached form). This alternate form used by Dean was on Dean letterhead and set forth a different recipient and a different ZIP code and failed to identify a specific floor within the Labor and Industry Building:

> Office of Employment Security [or "security"]
> Labor and Industry Building
> 7th & Forster Streets
> Harrisburg, PA 17121

(Exs. 4-13, 15-85) (sometimes referred to hereinafter as the "Office of Employment Security Address"). Dean claims that it placed the 83 disputed invoices (among others) into envelopes bearing the Office of Employment Security Address and deposited the envelopes in the mail on the dates indicated on the invoices (thereby making the submission of these invoices timely).

However, the Department asserts that the 83 disputed invoices did not reach it for processing and payment after their alleged mailing in the period from February 2003 to January 2005. Although the Board agrees with the Department that Dean has failed to establish the Department's receipt of the 83 invoices upon their original mailing, as discussed below, it is undisputed that these 83 invoices were later received by the Department shortly after they were submitted by cover letter sent January 28, 2007, roughly 2 to 4 years after the stated dates on the these disputed invoices.

At this point, it is fair to note that the 83 disputed invoices did not represent the totality of Dean's work under the 2002 Master Agreement and 2003 Amendment during the period covered by these 83 invoices. James Dean, owner and President of Dean, estimated that several hundred other invoices would have been submitted in that period and successfully paid.

Accordingly, although Mr. Dean was generally aware that payment had not been made on some invoices, he testified that he did not question the late payment out of "respect" for the Department, an agency with which Dean had had a long relationship and from which Mr. Dean was used to slow payment. In fact, it was only upon review of files and payment records for unpaid bills done by Richard Ali (Director of Education at Dean) some years later when it was discovered that payment had never been received for several invoices, including the 83 here in dispute.

It was as a result of this review by Mr. Ali that Dean sent a letter to the Department on January 28, 2007, referencing a discussion between the Department and Mr. Ali, enclosing the 83 disputed invoices and others not currently at issue. (Ex. 108). On March 15, 2007, the Department sent Dean a letter stating, inter alia, that the 83 disputed invoices (among others) submitted with the letter could not be paid because the "federal funds for this time frame [2/1/2003 through 12/31/2004] ha[d] expired." The Department's March 15, 2007 letter also referred to the deadline for submission of invoices set forth in the 2003 Amendment. The March 15, 2007 letter further noted that some invoices submitted with Dean's January 28, 2007 letter had been paid already and stated that payment would be made on invoices for one student included with the January 28, 2007 letter.

Mr. Dean testified further that continued dialogue over the unpaid invoices took place during 2007. Then, on July 30, 2008, Dean sent a second letter to the Department with a "detailed list of students and copies of original invoices" stating that Dean was in the process of "confirming payment." The letter asked the Department to review its records and confirm payment. The Department seems not to have made any response to this July 30, 2008 letter from Dean.

On August 26, 2008, Dean sent another letter to the Department indicating that it was being audited and seeking confirmation that the Department owed it $204,706.70, as indicated by an enclosed statement listing unpaid invoices. On December 29, 2008, the Department sent Dean a letter responding to the August 26, 2008 submission (the Department did not acknowledge Dean's July 30, 2008 letter or submission of invoices). In the Department's December 28, 2008 letter, the Department advised that some of the invoices listed in the submission of August 26, 2008 would be paid (obviously, this did not include the 83 disputed invoices). The December 29, 2008 letter also stated that the 83 invoices currently in dispute could not be paid because federal funds for the 2002 Master Agreement had expired and payment could not be made according to the terms of the 2002 Master Agreement. The December 28, 2008 letter also referred to the 60 day deadline for submission of invoices provided in the 2003 Amendment.

On January 20, 2009, Dean sent the Department a letter stating that it did not agree with the refusal to pay the 83 disputed invoices (among others) and requesting re-examination of these invoices. On February 11, 2009, the Department responded to Dean's latest request for review and again denied payment, explaining that the Department could not be sure it had "received the invoices when they were originally submitted" because the invoices indicated an address different than the one set forth in the 2002 Master Agreement. The February 11, 2009 letter concluded with an invitation to call the Department with any questions.

On March 20, 2009, Dean's attorney (Mr. Kaplan) sent a letter to Christine Enright (Director of the Bureau of Workforce Investment) requesting that the Department reconsider its earlier denial of payment on the disputed invoices and setting forth the grounds for this request (sometimes referred to hereinafter as the "Kaplan Letter"). On July 31, 2009, the chief counsel

for the Department sent a letter to Dean's counsel indicating that the Department would review the matter.

On August 5, 2009, Dean initiated this proceeding against the Department by statement of claim filed with the Board. On August 6, 2009, Dean amended its claim to attach relevant documents as exhibits. On October 2, 2009, the Department filed an answer to the amended claim with new matter, to which Dean responded. The parties were then directed to proceed with discovery.

After discovery, the parties filed cross-motions for summary judgment, and Dean sought to amend its statement of claim a second time to include reference to a second contract which covered some of the invoices—a 1999 TAA Master Agreement ("1999 Master Agreement") - as opposed to the 2002 TAA Master Agreement ("2002 Master Agreement") referenced in the original and amended statements of claim. The Board granted the Department's motion for summary judgment, in part, for lack of jurisdiction with respect to 19 of the 102 invoices initially claimed (i.e., those concerning the 1999 Master Agreement) which the Board found to be untimely. However, the Board also denied the Department's motion in part, determining that the Board had jurisdiction over the claim with respect to the 83 disputed invoices under the 2002 Master Agreement and 2003 Amendment. The Board denied Dean's motion for summary judgment and motion to amend.[6] A hearing on the merits ensued.

Legal Questions Presented

Simply put, Dean asserts that it is entitled to payment of the 83 disputed invoices because: (1) it provided the training services for which it seeks payment and (2) it complied with

[6] B.O.C. Docket No. 3972, Order of March 29, 2012.

the essential invoicing requirements necessary to receive payment under the 2002 Master Agreement and 2003 Amendment. For the latter premise, Dean asserts that these invoices were initially mailed on or about the date indicated on the invoice and relies upon the mailbox rule for the presumption that the Department received the invoices shortly after mailing in the period from February 2003 to January 2005. Alternatively, Dean contends that the Department should have paid these invoices as they were still timely when submitted in bulk in January 2007, when it is uncontroverted that the Department actually received all 83 disputed invoices. Dean also argues that it is entitled to payment under the doctrines of unjust enrichment and equitable estoppel should its contract claim fail.

The Department responds that it did not receive these 83 invoices when they were allegedly mailed initially and that Dean has not met its burden to establish application of the mailbox rule. It also maintains that Dean's bulk submission of the 83 disputed invoices in January 2007 was untimely because this submission failed to meet the deadline provided for in the 2003 Amendment. The Department further asserts that Dean cannot rely upon the doctrine of unjust enrichment because the relationship between the parties is controlled by contract, nor can it rely on the doctrine of equitable estoppel because Dean is at fault for its failure to be paid. The Department also argues that Dean's claim is untimely, making yet another jurisdictional challenge based on a timeliness argument different than that previously set forth in its motion for summary judgment.[7]

[7] In its motion for summary judgment, the Department argued that Dean had failed to exhaust administrative remedies or, in the alternative, to seek an administrative remedy on a timely basis. The Department's contention was based on its assertion that its March 15, 2007 letter to Dean denying payment of invoices submitted with Dean's January 28, 2007 letter constituted the accrual of Dean's right to file an administrative claim. The Department argued Dean failed to file an administrative claim within the six months following March 15, 2007, thus depriving the Board of jurisdiction on the later statement of claim. The Board accepted this reasoning with respect to the 19 invoices controlled by the 1999 Master Agreement, but rejected it with regard to the 83 invoices

Analysis and Discussion—The Department's Alternative Jurisdictional Challenge

To begin with, we address the Department's latest contention that the Board lacks jurisdiction over Dean's claim because Dean failed to timely file its statement of claim here at the Board. The parties made arguments supporting their respective positions on this issue in their post-hearing briefs.

Essentially, the current jurisdictional issue revolves around which of the multiple items of correspondence exchanged by the parties should be deemed to constitute jurisdictional "events" for the purpose of applying the deadlines set forth in Section 1712.1 of the Procurement Code, 62 Pa.C.S. § 1712.1.[8] The Department argues that, for purposes of Section 1712.1(b), Dean's six

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under the 2002 Master Agreement on the basis that the full extent of Dean's claim under the 2002 Master Agreement could not be assessed at that time (because that training period was still ongoing) and thus did not meet the test for accrual of a claim set forth in Darien v. PSERS, 700 A.2d 395, 397 (Pa. 1997). (See, B.O.C. Docket No. 3972, Opinion and Order of March 29, 2012).

[8] Section 1712.1 of the Procurement Code, provides, in pertinent part, as follows:

> § 1712.1. Contract Controversies
>
> (a) Right to claim.—A Contractor may file a claim with the contracting officer in writing for controversies arising from a contract entered into by the Commonwealth.
>
> (b) Filing of claim. A claim shall be filed with the contracting officer within six months of the date it accrues. If a contractor fails to file a claim or files an untimely claim, the contractor is deemed to have waived its right to assert a claim in any forum. Untimely filed claims shall be disregarded by the contracting officer.
>
> (c) Contents of claim.—A claim shall state all grounds upon which the contractor asserts a controversy exists.
>
> (d) Determination.—The contracting officer shall review a claim and issue a final determination in writing regarding the claim within 120 days of the receipt of the claim unless extended by consent of the contracting officer and the contractor. If the contracting officer fails to issue a final determination within 120 days unless extended by consent of the parties, the claim shall be deemed denied. The determination of the contracting officer shall be the final order of the purchasing agency.
>
> (e) Statement of claim.—Within 15 days of the mailing date of a final determination denying a claim or within 135 days of filing a claim if no extension is agreed to by the parties, whichever occurs first, the contractor may file a statement of claim with the board.

month right to make an administrative claim (to the Department) on the 83 disputed invoices accrued on December 29, 2008, when the Department issued a letter stating that it was denying payment for these invoices (among others) referenced in a list submitted with Dean's August 26, 2008 letter. Following this, the Department asserts that Dean's January 29, 2009 letter to the Department constituted Dean's administrative claim for purposes of Section 1712.1(b) and that the Department's February 11, 2009 letter to Dean was a final determination denying Dean's administrative claim for purposes of Section 1712.1(d). Thus, the Department contends that Dean's statement of claim to the Board (under Section 1712.1(e)) needed to have been filed within 15 days of February 11, 2009 (i.e., by February 26, 2009). Under this version of the events preceding Dean's claim, the Department reckons that the subsequent letter from Dean's attorney sent in March 2009 (i.e. the Kaplan Letter) and the July 31, 2009 response letter from the Department's legal counsel were both superfluous and that the August 5, 2009 filing of Dean's claim with the Board was untimely for purposes of Section 1712.1(e).

Dean responds with an alternative construction of the multiple pieces of correspondence exchanged between the parties that it contends fits timely within the framework of Section 1712.1. Dean asserts that the December 29, 2009 letter from the Department to Dean did not constitute affirmative notice that Dean would not be paid, but only stated that payment could not be made according to the terms of the 2002 Master Agreement (leaving open the possibility that payment could be otherwise made). Dean also contends that: its January 20, 2009 letter was not an administrative claim, but constituted an initial request for payment; the February 11, 2009 letter from the Department to Dean was not a final determination of an administrative claim, but denial of payment constituting the initial accrual of Dean's right to file an administrative claim

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62 Pa.C.S. § 1712.1(a)-(e).

for purposes of Section 1712.1(b); and that the March 2009 Kaplan Letter to Christine Enright constituted its administrative claim to the Department for purposes of Section 1712.1(b).

Acknowledging that it has presented conflicting evidence as to the date of the Kaplan Letter (i.e March 20 versus March 23),[9] Dean argues that, even if one assumes the earlier of the two possible dates the letter was issued, March 20, 2009 was a Friday,[10] so the Kaplan Letter (which Dean maintains was its administrative claim) could not have reached (i.e. been filed with) the Department before March 23, 2009. Thus, because the Department issued no determination pursuant to this administrative claim letter, Dean contends it had 135 days from March 23, 2009 to file a statement of claim with the Board under Section 1712.1(e). Therefore, Dean asserts its statement of claim was timely filed with the Board on August 5, 2009, exactly 135 days from March 23, 2009.

Since the parties disagree with respect to application of the timeframes set forth in Section 1712.1, the first step in the Board's analysis must be to determine when the claim accrued. For the purposes of Section 1712.1(b), a claim accrues when: (1) a claimant is first able to litigate his or her claim (i.e., when the amount due under the claim is known and the claimant is capable of preparing a concise and specific written statement detailing the injury) and (2) the claimant is affirmatively notified that he or she will not be paid by the Commonwealth. Darien Capital Mgmt., Inc. v. Pub. Sch. Employes' Retirement Sys., 700 A.2d 395, 397 (Pa. 1997). The denial of request for payment must be unequivocal, and both prongs of the Darien test must be satisfied before a claim may be considered to have accrued. Ferguson Elec. Co.,

[9] Two versions of this letter appear in the record. The first (Exhibit 92), dated March 20, 2009, is unsigned on plain paper sans law firm letterhead. (Exhibit 92). The second (Exhibit 110), dated March 23, 2009, is signed and placed on law firm letterhead with a notation identifying it to be a "file copy."

[10] The Board takes judicial notice of this fact.

Inc. v. Dep't of Gen. Servs., 3 A.3d 681, 686 (Pa.Cmwlth. 2010); Wayne Knorr, Inc. v. Dep't of Transp., 973 A.2d 1061, 1089 (Pa. Cmwlth. 2009). Where the clear import of the letter is that the contractor would not be paid, the claimant has been affirmatively notified for purposes of Darien. See also, Ferguson, 3 A.3d at 686.

The Board notes that, in the instant case, the sequence of correspondence is both more complex and nuanced than suggested by either party. A simple look at the timeline of this correspondence demonstrates that the exchange between Dean and the Department does not fit neatly within Section 1712.1's schema:

January 28, 2007	Letter from Dean to the Department
March 15, 2007	Letter from the Department to Dean
July 30, 2008	Letter from Dean to the Department
August 26, 2008	Letter from Dean to the Department
December 29, 2008	Letter from the Department to Dean
January 20, 2009	Letter from Dean to the Department
February 11, 2009	Letter from the Department to Dean
March 20/23, 2009	Letter from attorney for Dean to the Department (Kaplan Letter)
July 31, 2009	Letter from chief counsel for the Department to Dean's attorney

(Exs. 86-93, 108, 110).

Looking into the content of the correspondence involved, it is clear that Dean regarded itself to be in an ongoing negotiation process whereby further requests for review might yield payment for its invoices—a notion that the Department, for the most part, did nothing to dispel and, in fact, encouraged. For its part, the Department neither affirmatively indicated that the process of Section 1712.1 was being utilized nor made clear within its letters the finality of an administrative claim determination it asks the Board to impute to them. Ultimately, our review

of this correspondence, in the factual context presented at hearing, leads us to conclude that Dean's claim to the Board was timely for the reasons explained below.

Dean submitted all of the 83 invoices under dispute, as well as others, on August 26, 2008. On December 29, 2008, the Department responded to Dean's August 26, 2008 letter and stated that, while payment would be made for some invoices submitted, payment would not be made on the 83 disputed invoices. It stated, in relevant part:

> The remaining students…were enrolled under Master Agreement TAA-0063-2 which commenced on July 1, 2002 and ended June 30, 2007. The federal funds for Master Agreement TAA-0063-2 have also expired. Therefore, payment of invoices for students whose invoices include this timeframe cannot be made according to the terms of the Master Agreement. Please refer to the Amendment to the Master Agreement effective October 31, 2003, , [sic] Page 3, Payment System (f) which states: "the contractor shall not be paid if invoices are not received within 60 days of the completion , [sic] completion of the semester, term or quarter or end of the month for training on a clock hour basis, whichever is applicable."

(Ex. 89).

The Board agrees with the Department that the foregoing language, fairly read, was an affirmative notification by the Department to Dean that it would not be paid for the 83 disputed invoices here at issue. Accordingly, the Board finds that the December 29, 2008 letter constituted a denial of payment for purposes of Darien and Section 1712.1(b). We also find that, at the time of the December 29, 2008 letter, no more training could be done under the 2002 Master Agreement (or 2003 Amendment). Therefore, Dean was then able to litigate its administrative claim because Dean knew the amount due and was capable of preparing a concise and specific written statement detailing the injury under the 2002 Master Agreement and 2003 Amendment. Thus, under Section 1712.1(b), Dean's claim accrued on December 29, 2008, and its six months to file an administrative claim began to run on that date.

Next, the Board considers the issue of when Dean submitted its administrative claim to the Department. Here, the Department asks that the Board find Dean's letter of January 20, 2009 to be Dean's administrative claim and the Department's letter of February 11, 2009 to be the Department's final determination of the administrative claim. This would place the statute of limitations for Dean's statement of claim to the Board at February 26, 2009, and render Dean's August 5, 2009 statement of claim untimely. By contrast, Dean asks the Board to consider the March 2009 Kaplan Letter from its attorney to be its administrative claim, rendering the August 5, 2009 statement of claim to the Board timely under Section 1712.1(e) (by reason of the Department's failure to make any determinative response to the Kaplan Letter).

An administrative claim to an agency is expected to "state all grounds upon which the contractor asserts a controversy exists." 62 Pa.C.S. § 1712.1(c). Section 1712.1(d) requires a contracting officer to whom a claim is submitted to issue a "final determination in writing regarding the claim within 120 days of the receipt of the claim unless extended by consent of the contracting officer and the contractor." Dean's January 20, 2009 letter, while setting forth a response to the Department's December 29, 2008 letter, does not purport to be a claim for purposes of Section 1712.1(b) and (c). Furthermore, it appears to the Board that the Department did not, at the time, regard Dean's January 20, 2009 letter to be an administrative claim because, inter alia, the Department's February 11, 2009 letter contains no suggestion that the Department regarded its letter to be a final determination on an administrative claim for purposes of Section 1712.1(d).

The appellate courts of this Commonwealth have required that, in order to commence an appeal period from an agency's decision that is based, like the one asserted here by the Department, on the date of a mailed decision, that agency's notice of the decision must clearly

inform the recipient of the starting date of the appeal period in a manner consistent with the applicable statute. See e.g., Schmidt v. Commonwealth, 433 A.2d 456, 457 (Pa. 1981); In re Appeal of Borough of West View, 501 A.2d 706, 707 or 708 (Pa. Cmwlth. 1985). There is no notice in the February 11, 2009 letter that the right to appeal to the Board had accrued, no indication that any further appeal may be made to the Board of Claims, and no suggestion that a 15 day period of limitations was commenced or when it started. To the contrary, the letter finishes with an invitation to direct further questions to a member of the Department's staff.

The Board considers the absence of the notice elements listed immediately above and the invitation for further discussion to preclude the Department's February 11, 2009 letter from being considered a final determination of an administrative claim. Instead, the Department appears to have been engaged in an ongoing back-and-forth with Dean at this point which lacked any clear cut indication that the Department considered these pieces of correspondence to be dispositive and require recourse to a claim before the Board. Additionally, the Department itself, after inviting Dean to continue to make further inquiries to the Department in its February 11, 2009 letter, did not reject the March 2009 Kaplan Letter for being superfluous, but responded on July 31, 2009 with a letter that it was considering the issues raised and would respond shortly.

All the foregoing persuades us that neither the Department nor Dean considered Dean's January 29, 2009 letter to be an administrative claim or the February 11, 2009 response to be a final administrative claim denial. The Board further finds that, under the circumstances and the particulars of the correspondence, it would be inaccurate to treat Dean's January 20, 2009 letter to be an administrative claim or the Department's February 11, 2009 letter as a final determination when the letters (and actions of the parties at the time) suggest that they are not.

For several reasons, the Board instead considers the March 2009 Kaplan Letter from Dean's attorney to be Dean's administrative claim for purposes of Section 1712.1(b). To begin, the letter sets forth the legal and factual underpinnings of Dean's claim in some detail, as would be expected of an administrative claim. It is also the final correspondence from Dean to the Department prior to the filing of its statement of claim here at the Board. Additionally, the timing of the statement of claim filed at the Board is 135 days after March 23, 2009 (the earliest possible date of receipt by the Department of the Kaplan Letter),[11] which indicates that Dean itself believed this Kaplan Letter to constitute its administrative claim before the Department. Accordingly, we find the Kaplan Letter to be Dean's administrative claim and Dean's statement of claim filed at the Board on August 5, 2009 to have been timely filed in compliance with Section 1712.1 of the Procurement Code.

Discussion and Analysis—Substantive Issues

Turning to the substance of the case, the central disagreement is whether or not Dean timely submitted the 83 disputed invoices to the Department pursuant to the terms of the 2002 Master Agreement and/or the 2003 Amendment. Dean raises two arguments by which it contends that its submission of the 83 disputed invoices was timely. Dean's first argument asserts that it initially mailed the 83 disputed invoices in the period from February 2003 to January 2005 and invokes the mailbox rule for the presumption of receipt by the Department. The second argument asserts that Dean's resubmission of the 83 disputed invoices in bulk on January 28, 2007 (the receipt of which is acknowledged by the Department) was also timely.

[11] For reasons explained in our Findings of Fact at Paragraphs 49 to 51, the Board finds that the Kaplan Letter, sent by U.S. Mail or similar means on March 20, 2003, was not received by the Department until March 23, 2003 at the earliest.

The Board addresses these arguments in reverse order because Dean's second argument is dispositive with respect to the majority of the 83 disputed invoices.

Dean's January 28, 2007 Submittal

Dean argues that the Department should have paid the 83 disputed invoices when Dean submitted them in bulk on January 28, 2007. Dean asserts that this submission was timely because it was prior to the expiration of federal funding for the 2002 Master Agreement on June 30, 2007. The Department responds that the 2003 Amendment's time limit of 60 days after provision of training applied to the 83 disputed invoices submitted in January 2007. Therefore, according to the Department, the invoices submitted on January 28, 2007 were untimely, as they were submitted more than 60 days after the provision of training. For the reasons set forth below, the Board agrees with Dean in large part—i.e. that Dean's January 28, 2007 bulk submission was timely for 64 of the 83 disputed invoices.

It is without dispute that partway through the period of the 2002 Master Agreement (running from July 1, 2002 through June 30, 2007), the parties executed the 2003 Amendment, which changed (i.e. shortened) the deadline for submission of invoices to the Bureau. The original 2002 Master Agreement provided the following deadline:

> the final payment request shall be submitted 30 days prior to the expiration or termination date of the Agreement and shall be marked "Final."

(Ex. 1).

The 2003 Amendment provided the following, modified deadline:

> The Contractor shall **not** be paid if invoices are not received within 60 days of the completion of the training, completion of the semester, term or quarter or the end of the

> month for training provided on a clock hour basis, whichever is applicable. The last invoice for each student shall be marked "Final."

(Ex. 2).

With respect to the status of the 2002 Master Agreement and the effective date of the changes thereto, the 2003 Amendment provided as follows:

> All other terms and conditions of the Original Agreement remain the same. These Amendments are effective October 1, 2003.

Id.

Although the foregoing language states that the amendment was effective as of October 1, 2003, the parties have stipulated that the amendment became effective on October 31, 2003 (referred to hereinafter as the "Effective Date"). Regardless of whether the Effective Date was October 1 or 31, what remains unclear from the language is whether this change was to be effective: (A) for all invoices submitted on or after the Effective Date or (B) for all invoices for services provided (i.e. training provided) on or after the Effective Date. The Department, in essence, asserts that the 2003 Amendment's modified deadline applies to all invoices submitted on or after the Effective Date, regardless of when the underlying service was provided. Under this reading, all 83 invoices would have been untimely when submitted on January 28, 2007. However, if the shorter deadline applied only to invoices for training provided on or after the Effective Date of the 2003 Amendment, then Dean's argument that the January 28, 2007 submission was timely is correct for 64 of the 83 disputed invoices.

In the instant case, the Board rejects the Department's suggested application of the 2003 Amendment's modified payment terms to all invoices submitted on or after the Effective Date. We find instead that the 2003 Amendment applied only to invoices for training services provided

on or after the Effective Date of the 2003 Amendment. We do so for several reasons. To begin with, we find the language of the 2003 Amendment is, at best, reasonably susceptible to either of the two proposed constructions with regard to application of the amended deadline to the invoices in question. As a result, the Board is constrained by the principle of contra proferentem to follow the construction that operates against the Department (as the party who drafted and supplied the terms of the 2003 Amendment) and in favor of Dean.[12] Moreover, the Department's own witness, under questioning by the Board, testified that the 2003 Amendment was applicable to services provided on or after the Effective Date of the 2003 Amendment. (N.T. 297-298).[13]

For the foregoing reasons, the Board construes the 2003 Amendment's shortening of the invoicing deadline to apply only to invoices for training provided on or after the Effective Date (i.e. October 31, 2003 by stipulation). Therefore, regardless of the success or failure of any earlier submission, the January 28, 2007 submission of 64 of the 83 disputed invoices for training provided prior to October 31, 2003 was made more than 30 days prior to the expiration of the 2002 Master Agreement on June 30, 2007. Thus, the submission of those 64 invoices on January 28, 2007 was timely pursuant to the applicable terms of the original 2002 Master Agreement.

[12] A written instrument is ambiguous if it is reasonably or fairly susceptible of more than one construction. State Pub. Sch. Bldg. Auth. v. Noble C. Quandel Co., 585 A.2d 1136, 1144 (Pa. Cmwlth. 1991); State Highway and Bridge Auth. v. E.J. Albrecht Co., 430 A.2d 328 (Pa. Cmwlth. 1981). When a contract is ambiguous, it is undisputed that the rule of contra proferentem requires the language to be construed against the drafter and in favor of the other party if the latter's interpretation is reasonable. Department of Transp. v. Semanderes, 531 A.2d 815, 818 (Pa. Cmwlth. 1987).

[13] Although not essential to our holding, it also appears to the Board that, because one reason for the 2003 Amendment was to keep a closer tab on a student's billing status than was being done under the original terms of the 2002 Master Agreement, we believe that the reading urged by the Department would have presented the potential for an immediate forfeiture by Dean of payment for training provided more than 60 days prior to the Effective Date of the amendment. This makes the Department's reading even less plausible in our view.

The total amount of the 64 invoices timely presented with the January 28, 2007 submission is $89,867. This principal amount is owed to Dean by the Department pursuant to the plain terms of the 2002 Master Agreement.

Conversely, the language of the 2003 Amendment (and the parties' stipulation) provides that invoices for training provided on or after October 31, 2003 must be submitted within 60 days of the completion of the applicable period of training. Thus, the Board concludes that the January 28, 2007 submission of invoices was too late with respect to the 19 invoices for training provided after the Effective Date of the 2003 Amendment.

Earlier Invoice Submittals

The Board now turns to Dean's other argument concerning the timeliness of its submission of all 83 disputed invoices.[14] Dean asserts that, by submitting the 83 disputed invoices on an ongoing basis in the period from February 2003 to January 2005, it has fulfilled the "essential conditions" of the 2002 Master Agreement and the 2003 Amendment for all 83 invoices. Dean also asserts that it is entitled to the presumption that these invoices were received by the Department under the venerable "mailbox rule."

For its part, the Department asserts that it did not receive any of the 83 disputed invoices within the deadline provided by the 2003 Amendment. It also argues that Dean is not entitled to the presumption of the mailbox rule: (1) because there is insufficient evidence that the 83 disputed invoices were created in the course of business and placed in the mail at the time

[14] Although, as a practical matter, the remaining issue affects entitlement to only the remaining 19 invoices for services provided on or after October 1, 2003, the parties and relevant testimony speak in terms of all 83 disputed invoices, so we will address the issue regarding all 83 as well.

indicated on the invoices and (2) because Dean failed to establish that the 83 disputed invoices were mailed to the correct address.

To this latter point, Dean contends that even though the Department address used to mail some of the invoices may not match the contractually prescribed address, the alternative address used by Dean in mailing the invoices originally should be considered "correct" for purposes of the mailbox rule because Dean was told by the Department to use the alternative address and/or due to a course of performance established with the Department. The Department denies such an instruction was given or that such a course of performance was established.

For the reasons set forth below, the Board finds that Dean did not meet its burden to establish application of the "mailbox rule." As Dean has not met this burden, and the Department denies receipt of the disputed invoices prior to the January 28, 2007 submittal, the Board also finds that Dean failed to establish that the Department received the 83 disputed invoices in a timely manner during the period of February 2003 to January 2005.

The aforementioned mailbox rule provides that "depositing in the post office a properly addressed, prepaid letter raises a natural presumption, founded in common experience, that it reached its destination by due course of mail." Szymanski v. Dotey, 52 A.3d 289, 292 (Pa. Super. 2012) (quoting Jensen v. McCorkell, 26 A. 366, 367 (Pa. 1893)) (emphasis added). The burden of proof lies with the party seeking to invoke the mailbox rule. To trigger the presumption of receipt, "the party who is seeking the benefit of the presumption must adduce evidentiary proof that the letter was signed in the usual course of business and placed in the regular place of mailing." Geise v. Nationwide Life & Annuity Co. of America, 939 A.2d 409, 423 (Pa. Super. 2007). The finder of fact may determine that there is insufficient evidence of

mailing. Szymanski, 52 A.3d at 293-295 (testimony did not establish placement of notice in regular place of mailing and on custom of mailing, or that notice was in fact mailed); Geise, 939 A.2d at 425 (jury was justified in finding that notice was not mailed); Commonwealth v. Thomas, 814 A.2d 754, 759-760 (Pa. Super. 2002) (evidence of general practice of mailing without official record of mailing and without personal recollection of mailing failed to meet burden).

The parties' arguments regarding application of the mailbox rule focus on the sufficiency of evidence presented by Dean that the invoices were actually timely mailed and whether the invoices were in a "properly addressed" envelope as required by the mailbox rule. Because the evidence suggest to the Board that the addresses on the envelope and on the invoice forms did not necessarily match, the Board does not focus its inquiry upon whether Dean used the correct forms for invoicing, but whether or not the invoices, completed on any form, were mailed in such a fashion as to establish a presumption of receipt by the Department.[15]

Irrespective of Dean's use of contract or alternative invoice forms, the Board finds that there was insufficient credible evidence to establish that the 83 invoices here at issue were actually mailed at or about the time indicated on the invoice to a correct address. To begin, Dean's witnesses did not testify that its invoices (including the 83 in dispute) were mailed to any of the addresses prescribed under the terms of the contract. In fact, it was their testimony that Dean's mailings of invoices bore a different address than those set forth in either the 2002

[15] At several points in their arguments and proposed findings of fact and conclusions of law, the parties appear to confuse the issue of whether the address on the form of the 83 disputed invoices was correct with the issue of whether the 83 disputed invoices were mailed to the correct address (i.e., whether the correct address was on the mailing envelopes), suggesting that the former is dispositive evidence of the latter. In fact, the Department did pay invoices completed by Dean using the alternate form with the Office of Employment Security address (Ex. 95). It is the address on the transmittal envelope which remains of sole significance for purposes of applying the mailbox rule.

Master Agreement or the 2003 Amendment. This difference was material. Among other things, the address allegedly used by Dean indicated a different recipient, Office of Employment Security (which bureau or office had been defunct since approximately 1985); did not include a denotation that the 12th Floor (where the Bureau was located) was the destination; and even included a different zip code (17121 instead of 17120). Given the foregoing evidence, the Board cannot utilize the "mailbox rule" to presume that the invoice mailings at issue reached their contractually prescribed destination (the Bureau).

Despite its apparent failure to consistently utilize the addresses set forth in the 2002 Master Agreement and 2003 Amendment, Dean still asserts that the mailings were properly addressed because, either through some verbal modification to the contract or some course of conduct, the Department had substituted the Office of Employment Security Address for the Bureau address. The Board finds a lack of credible evidence for these contentions as well.

Mr. Dean testified (and Dean initially argued) that Dean was given a verbal instruction by the Department to use the Office of Employment Security Address. [16] Mr. Dean also testified that that he instructed Dean staff at different points to use the Bureau addresses set forth in the 2002 Master Agreement and 2003 Amendment, as well as the Office of Employment Security Address. However, Mr. Dean's testimony was uncertain and less than credible in several ways. For instance, Mr. Dean could not identify the person at the Department who gave the alleged instruction to use the Office of Employment Security Address and, upon further questioning, revealed that this instruction was not given to him, but to Nancy Grom, an employee. However, Ms. Grom testified that she did not receive instructions from the Department about where to send

[16] The Office of Employment Security was an entity within the Department that existed from 1979 to 1985. It has been defunct since that time, its former functions reassigned to other entities within the Department.

the invoices. Dean also had no documentary record of receipt of an instruction to use the Office of Employment Security Address.

Mr. Dean's testimony as to the sequence of events which led him to instruct staff to use the Office of Employment Security Address during the period of the 2002 Master Agreement also showed material inconsistencies. His testimony that Dean initially used the addresses contained in the 2002 Master Agreement and/or the 2003 Amendment and then switched to using the Office of Employment Security Address because of advice by the Department is contrary to his statements given in interrogatories which Mr. Dean himself verified. In the interrogatories, Mr. Dean stated that the instruction to use the Office of Employment Security Address came during the 1998-1999 school year, well before the commencement of the period of the 2002 Master Agreement. Ultimately, when pressed on this issue, Mr. Dean acknowledged he could not be sure when the alleged instruction to use the Office of Employment Security Address was given.

Nancy Grom, Financial Aid Director for Dean during the years in question, also provided considerable testimony as to Dean's invoice mailing practices. Although she had no specific recollection of mailing any of the 83 invoices here in dispute, she testified generally that she and another employee, June Ganser (now deceased), would prepare invoices for Mr. Dean's review and signature, and then place them in an envelope which was deposited in an outgoing mailbox. Ms. Grom testified that she herself would usually, but not always, use the contractually prescribed invoice forms (i.e. the invoice form(s) with the correct address for the Bureau) while Ms. Ganser would always use the alternative invoice form with the Office of Employment Security Address.

Ms. Grom also testified that both she and Ms. Ganser filled in invoices and that these invoices were often combined in one mailing envelope which Ms. Ganser would address. Thus, according to Ms. Grom, the mailing address on the invoices (which varied between use of the prescribed form and the alternative form) was not necessarily the same as that placed on the mailing envelope. In other words, according to Ms. Grom, contractually prescribed invoice forms similar to those used for the invoices at Exhibits 3 and 14 were nonetheless mailed to the Office of Employment Security Address.

Although the foregoing testimony from Ms. Grom tends to support Dean's argument that the contractually specified address(es) for submission of invoices was modified by a course of conduct over the years, the Board found troubling inconsistencies in Ms. Grom's testimony concerning Dean's process for mailing invoices that result in our inability to rely on same. For instance, after Ms. Grom had testified that all invoices sent on a given date were sent in a single envelope, cross-examination revealed deposition testimony wherein Ms. Grom indicated that each invoice would be sent in an individual envelope (i.e., ten envelopes for ten invoices). On re-direct, counsel for Dean attempted to rehabilitate Ms. Grom's testimony on this point by adducing an affirmative response to the question of whether the office would have used a single envelope or several envelopes for mailing the invoices "at different times." While any of the answers independently may have been satisfactory, the multiple answers to the same question cast doubt on the reliability of Ms. Grom's testimony. More significantly, her testimony that invoices were always sent to the Office of Employment Security Address is contradicted by Mr. Dean's testimony that he directed use of all three addresses at different times during the 2002-2005 time period. Ms. Grom's testimony was further undermined by Mr. Dean's testimony

that not just Ms. Grom and Ms. Ganser prepared invoices, but that a third person (a part-time secretary named Valerie Hagedorn) may also have prepared invoices during this time period.

Most significantly, full questioning of Ms. Grom revealed that, on certain key points, Ms. Grom's testimony represented her belief or presumption as to what would occur rather than her actual observation and memory. Although Ms. Grom was Ms. Ganser's supervisor, and would sometimes work with her on invoices, it was Ms. Ganser who would type most of the invoices for the TAA program and who would work on invoices independently of Ms. Grom. Therefore, while Ms. Grom testified that the Office of Employee Security Address was always placed on envelopes containing TAA invoices, in actuality, she did not check the address label when an envelope went out. In the absence of records establishing what mailing address was used, the Board does not find that Ms. Grom could testify with certainty as to what address was placed on invoice envelopes.

For its part, the Department produced various Department managerial and clerical staff who testified that, at all times relevant hereto, the Bureau was on the 12th Floor of the Labor and Industry Building, was the only office on that floor, and that only mail for the Bureau would have been received and accepted at that address. Bureau witnesses testified that they did not and would not have given instructions to submit invoices to the Office of Employment Security; that they did not recall the receipt of mail addressed to the Office of Employment Security; and that, if received, such mail would have been returned to the mailroom. The Board finds no reason to doubt this testimony.

Based upon the testimony and evidence before it, the Board does not credit Dean's claim that it was instructed by the Department to use the Office of Employment Security Address as an

alternative to the addresses specified in the 2002 Master Agreement and/or the 2003 Amendment.

Moving to Dean's argument that the Office of Employment Security Address became the "correct" address through some course of conduct, the Board also finds credible evidence for this proposition to be lacking. We begin by accepting the principle that "[w]here an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement." (See, Restatement (Second) of Contracts at § 202(4)). However, in the case at bar, Dean did not provide sufficient evidence to show that there was a consistent course of conduct followed by Dean which the Department knowingly accepted. Among other things, the testimony presented by Dean conflicts as to whether the Office of Employment Security Address was used for mailing all invoices, as suggested by Ms. Grom, or whether Dean, at other relevant times, used one or more of the Bureau's addresses stated in the contract for the mailing of some invoices, as suggested by Mr. Dean.

Under the foregoing circumstances, the Board cannot find that the alleged repeated occasions of performance changing the mailing address to the Office of Employment Security Address were accepted by the Department "with knowledge of the nature of the performance and opportunity for objection." The Board does not believe that invoices sent to one address can be presumed to have been received at another address, nor do we believe that a mailing which cannot be shown to have reached the Bureau can be considered to have been accepted by the Bureau. Conversely, a correctly addressed envelope that reached the Bureau would not give the Bureau any opportunity to accept an alternative address to vary the contract term. The Board

rejects the contention of Dean that the Office of Employment Security Address can be interpreted as the correct address through the course of conduct of the parties.

To summarize, the Board does not find sufficient credible evidence to establish that these 83 disputed invoices were both placed in the U.S. mail by Dean and that they were correctly addressed. Accordingly, we cannot apply the mailbox rule's presumption that the Department received these invoices at or near the time of the dates indicated on same. Therefore, because the Board has concluded that the 2003 Amendment's revised payment terms (including the deadline for submission of invoices 60 days from provision of services) did apply to 19 of the 83 disputed invoices for services provided on or after October 31, 2003; and because those 19 invoices cannot be presumed to have been received pursuant to mailings from February 2003 to January 2005, the Board cannot find such invoices to have been timely submitted. Dean is not entitled to payment of those 19 disputed invoices under the applicable terms of the 2003 Amendment.

Equitable Claims—Unjust Enrichment and Equitable Estoppel

Dean also contends that it is entitled to payment under the doctrine of unjust enrichment. The Department responds by arguing that the doctrine of unjust enrichment is inapplicable when the relationship between the parties is founded upon a written agreement or express contract, regardless of how "harsh the provisions of such contracts may seem in the light of subsequent happenings." See, Wilson Area Sch. Dist. v. Skepton, 895 A.2d 1250, 1254 (Pa. 2006); Cooper v. E. Penn Sch. Dist., 903 A.2d 608, 619 (Pa.Cmwlth. 2006). In the instant case, the relationship between the parties, including the time frame and manner by which Dean was to invoice the Department in order to obtain payment for its services, were expressly addressed by a written

contract. We agree with the Department that the doctrine of unjust enrichment is unavailable to alter the terms of the applicable contract. [17]

Finally, Dean argues that it is entitled to payment of the disputed invoices under the doctrine of equitable estoppel because of the Department's alleged payment of hundreds of invoices utilizing the alternative form sent to the Office of Employment Security Address. The Department responds that Dean is not entitled to assert equitable estoppel because it was Dean's own actions that resulted in the Department's not paying these invoices.

Equitable estoppel is a doctrine that prevents one from doing an act differently than the manner in which another was induced by word or deed to expect. Kreutzer v. Monterey County Herald Co., 747 A.2d 358, 361 (Pa. 2000). As the Supreme Court has explained,

> [Equitable estoppel] arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." When estoppel is established, the "person inducing the belief in the existence of a certain state of facts is estopped to deny that the state of facts does in truth exist, aver

[17] Regardless of the unavailability of the doctrine of unjust enrichment here, Dean, in our view, has not shown its right to relief under the doctrine even if it were available. The elements necessary to prove unjust enrichment are as follows:

> (1) Benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under circumstances that it would be inequitable for defendant to retain the benefit without payment of value. The application of the doctrine depends on the particular factual circumstances of the case at issue. In determining if the doctrine applies, [the court's] focus is not on the intention of the parties, but rather on whether the defendant has been unjustly enriched.

Schenck v. K.E. David, Ltd. 666 A.2d 327, 328 (Pa.Super 1995).

In the instant case, the funds for payment of TAA students were obtained by grant from the federal government for the sole purpose of training displaced workers and reverted to the federal government if unspent. Dean was or should have been fully aware of this; the process of de-obligation and of the need for a careful and timely billing procedure. The evidence indicates Dean was far from careful in its billing practices and, as a result, the federal funds providing payment for these 19 remaining invoices expired through no fault of the Department. Under these circumstances we find it neither unconscionable nor inequitable to deny Dean payment on these 19 invoices.

> a different or contrary state of facts as existing at the same time, or deny or repudiate his acts, conduct, or statements."
>
> There are two essential elements to estoppels: inducement and reliance. "The inducement may be words or conduct and the acts that are induced may be by commission or forbearance provided that a change in condition results causing disadvantage to the one induced."

Zitelli v. Dermatology Educ. & Research Found., 633 A.2d 134, 139 (Pa. 1993)(citations omitted).

The Court went on to emphasize:

> There can be no equitable estoppel where the complainant's act appears to be rather the result of his own will or judgment than the product of what defendant did or represented. The act must be induced by, and be the immediate or proximate result of, the conduct or representation, which must be such as the party claiming the estoppel had a right to rely on. The representation or conduct must of itself have been sufficient to warrant the action of the party claiming the estoppel. If notwithstanding such representation or conduct he was still obliged to inquire for the existence of other facts and to rely on them also to sustain the course of action adopted, he cannot claim that the conduct of the other party was the cause of his action and no estoppel will arise.

Id. at 139-40 (quoting In re Estate of Tallarico, 228 A.2d 736, 741 (Pa. 1967).

The Board has found that the Bureau did not direct Dean to use the Office of Employment Services Address and that there was insufficient evidence to support a finding that the Bureau induced Dean to believe that it could submit invoices to the Office of Employment Security Address and be paid. The evidence presented by Dean does not satisfy the requirements of an action sounding in equitable estoppel.

Conclusion

Dean is entitled to payment of the 63 invoices for services provided under the 2002 Master Agreement prior to the effective date of the 2003 Amendment (October 1, 2003) in the amount of $89,867 because they were submitted to the Department within the time specified for

submission in the 2002 Master Agreement. The Board rejects the balance of Dean's claim because it has not established that the 19 remaining invoices were timely submitted and because we find no grounds for Dean to recover on its equitable claims. The principal amount owed to Dean by the Department is $89,867, plus interest at the legal rate of six percent per annum running from March 23, 2009 (the date Dean filed its claim in this matter with the Department) until paid. The prejudgment interest to the date of this Order totals $23,252. Thus, the Board enters the following Order:

ORDER

AND NOW, this 29th day of July, 2013, it is **ORDERED** and **DECREED** that judgment is entered against the Commonwealth of Pennsylvania, Department of Labor & Industry, Bureau of Workforce Development Partnership and in favor of Dean of Technology, Inc. in the amount of $113,119, comprised of the principal amount of $89,867 plus pre-judgment interest in the amount of $23,252. Dean is further awarded post-judgment interest at the legal rate of 6% per annum on the outstanding amount of this judgment until paid.

BOARD OF CLAIMS

ORDER SIGNED

_____
Jeffrey F. Smith
Chief Administrative Judge

_____
Harry G. Gamble, P.E.
Engineer Member

_____
Andrew Sislo
Citizen Member