

COMMONWEALTH OF PENNSYLVANIA

LOBAR ASSOCIATES, INC. : BEFORE THE BOARD OF CLAIMS  
: VS. :  
COMMONWEALTH OF PENNSYLVANIA, :  
PENNSYLVANIA TURNPIKE COMMISSION : DOCKET NO. 4173

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**FINDINGS OF FACT**

1. Claimant is Lobar Associates, Inc. (“Lobar”), a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with a principal place of business at 4 Barlo Circle, P.O. Box 432, Dillsburg, PA 17019-0432. (Statement of Claim, hereafter, “Claim” at ¶ 8)
2. Respondent is the Commonwealth of Pennsylvania, Pennsylvania Turnpike Commission (“PTC”), an agency organized and existing under the laws of the Commonwealth of Pennsylvania. (Claim at ¶ 9)
3. Lobar filed a Statement of Claim with the Board of Claims (“Board”) on September 14, 2017. (BOC Docket No. 4173)
4. PTC filed preliminary objections and brief in support to Lobar’s Statement of Claim on October 16, 2017. (BOC Docket No. 4173)
5. In its preliminary objections, PTC raised the following: (1) lack of jurisdiction, based on assertions that Lobar did not timely file its administrative claim with the contracting officer within six months from the date its claim accrued; and (2) legal insufficiency (demurrer) of Lobar’s unjust enrichment claim. (Respondent’s Preliminary Objections to Claimant’s Statement of Claim, filed October 16, 2017, BOC Docket No. 4173)
6. Lobar filed its response to the preliminary objections and brief in opposition on November 15, 2017. (BOC Docket No. 4173)
7. In its response to PTC’s preliminary objections, Lobar asserted that it did timely file its administrative claim within six months of the date it accrued citing several factors, including the following: (1) the initial payment request denial was not done by the PTC’s authorized Representative and therefore lacked authority to deny Lobar’s full request for payment; (2) the denial of Lobar’s full request for payment was not made in accordance with Contract provisions for approving a supplemental job order and was, therefore, invalid; and (3) the PTC’s conduct acknowledged that Lobar’s claim did not accrue on September 21, 2016, the date of initial payment denial. Lobar also asserted the propriety of its unjust enrichment claim. (Claimant’s Memorandum of Law Following Evidentiary Hearing as to Jurisdiction, filed April 12, 2018, BOC Docket No. 4173)

8. On December 20, 2017, the Board issued an Order scheduling an evidentiary hearing for March 12, 2018 to address the jurisdictional issues raised in the PTC's preliminary objections. (BOC Docket No. 4173)

9. An evidentiary hearing was held before the Board on March 12, 2018. (N.T. 1)

10. On June 18, 2014, pursuant to the Procurement Code, 62 Pa. C.S. §§ 101 et seq., Lobar and the PTC entered into Job Order Contract #4400004857. This Job Order Contract was "an indefinite quantity contract pursuant to which the contractor will perform an ongoing series of individual projects at different locations on the Pennsylvania Turnpike System." In essence, the Job Order Contract constituted an "umbrella contract" from which individual "job orders" or "projects" could be awarded and/or issued. (N.T. 24-25; 131-131; Exs. C-1, C-2, C-3)

11. On or about March 23, 2015, Lobar was selected to construct the Somerset Materials Testing Lab, Project No. 02-2015-G-009 (the "Project") by way of a Job Order Contract Project Initiation Form issued on that same date (the "Job Order"). This Job Order (which referenced the plans and specifications for the Project) and the Job Order Contract (including the General Provisions and the Special Provisions referenced therein) collectively constitute the "Contract" for this Project. (N.T. 20; Ex. C-4)

12. The Project entailed constructing a materials testing laboratory of approximately 2,431 square feet at mile marker 113.82 of the Pennsylvania Turnpike Eastbound. (N.T. 20; Ex. C-4)

13. Mr. Robert Kleimenhagen, Jr. was the PTC's project manager for the Project. (N.T. 36-37, 128-129, 168-169, 172; Ex. C-4)

14. Gary Madey was the PTC's consultant from Michael Baker International, who served as construction manager on the Project. (N.T. 130, 138-139)

15. During the early stages of the Project, issues arose over whether or not certain items of work were properly considered extra work outside the scope of the Contract. (N.T. 38-40)

16. In response to these issues, Mr. Kleimenhagen, in August 2015, instructed Lobar to keep an Excel spreadsheet tracking log of any work that Lobar considered to be outside the design plans or specifications, which log would be reviewed at the end of the Project. (N.T. 38-40, 133-135, 176-182)

17. Lobar also discussed work it was "adding" to the Project at job conferences with Mr. Madey. Mr. Madey told Lobar that the Contract was a lump sum fixed payment contract and apparently did not wish to entertain the possibility that extra work was being done on the Project. (N.T. 71-74)

18. On December 1, 2015, in response to Lobar's ongoing assertion it was doing work beyond the scope of the Contract, Mr. Madey sent an email to Lobar reiterating his earlier position that the Project was a lump sum, fixed price project. This email began "As the PTC designated representative on the . . . Project . . . ." (Ex. R-2)

19. Lobar completed work on the Project in the second week of June, 2016. (N.T. 43-44)

20. On July 27, 2016, Lobar submitted to Mr. Madey (with a copy to Mr. Kleimenhagen) a written request for additional payment of \$150,925.19 for 28 extra work items along with the Excel spreadsheet it had created during the Project. (Exs. C-5, C-6)

21. Items Lobar included in the spreadsheet as extra work, listed on a line by line basis with specific dollar amounts identified for each, fell into the following 28 categories: silt sock changes, existing building footer demolition, demolish existing duct bank, underground utilities, temporary electric, door change, Miller Building door, pulldown stairs, drywall removal and replacement, temporary heat, insulate ceiling in mechanical room, FRP at mop sink, gas line relocation, shelving, roof penetrations and eye bolts, modify ceiling, patch VTC, revised soffit detail and additional layer of house wrap, cut out stainless steel sinks, door pull added, wood platform in attic, SOG at new gas meter, landscaping, form support walls for Miller Building, crane to set Miller Building, winter protection, Bobcat on site, and masonry prism. (Ex. C-5)

22. Lobar's July 27, 2016 request for additional payment with itemized Excel spreadsheet confirms that, from this point in time onward, Lobar was able to litigate its claim (i.e. Lobar was capable of preparing a concise and specific written statement detailing its alleged injury and the cost of its alleged extra work). (Exs. C-5, C-6; Board Finding)

23. On August 26, 2016, Mr. Kleimenhagen, on behalf of the PTC, requested additional information from Lobar in order to complete the PTC's review of Lobar's request for additional payment. (N.T. 54; Ex. C-7)

24. The PTC made no further communication to Lobar between August 26, 2016 and September 21, 2016. (N.T. 55)

25. On September 21, 2016, Mr. Kleimenhagen sent an email to Lobar which stated as follows:

The PTC has completed the review of your supplemental job order request submitted on July 27, 2016. Please find attached an EXCEL spreadsheet which provides an explanation for each category/line in the proposal, and our position on whether the line item will be paid or not by the PTC. The entire construction management team (PTC, Michael Baker, Inc. (CM/CI), and Crabtree, Rohrbaugh & Associates) thoroughly reviewed your submission by comparing it to the project design drawings, specifications, special provisions, and on-site inspections during construction. Our determination is the acceptable additional work costs submitted by Lobar is \$35,233.05 not \$150,925.19.

I have created JOC Project 02-2015-G-009.01 in the E-Gordian system, and respectfully request that you submit a revised proposal for the “pay” items listed in the attached EXCEL spreadsheet at your earliest convenience. Once I receive the proposal in E-Gordian, I will process the supplemental Job Order ASAP.

(Ex. C-9)

26. The September 21, 2016 email informed Lobar that the PTC had “completed the review” of Lobar’s request for additional payment and further informed Lobar of the PTC’s “determination” regarding the requested payment. (Ex. C-9)

27. The September 21, 2016 email from Mr. Kleimenhagen denied payment on the majority of items identified by Lobar as extra work on the Project, but stated that Lobar was entitled to \$35,233.05 for certain items of work claimed, rather than the \$150,925.19 submitted by Lobar. (N.T. 142; Ex. C-9)

28. The September 21, 2016 email contained a copy of the initial spreadsheet provided by Lobar along with the PTC’s line by line analysis of exactly how much, if anything, would be paid on each item submitted, and typically included explanations as to why each line item would or would not be paid. (N.T. 142; Ex. C-9)

29. Although the September 21, 2016 email from Mr. Kleimenhagen did not explicitly state to Lobar that “your claim is denied”, the email referred Lobar to the attached spreadsheet with line by line notations as to which items would be paid and which items would not be paid with specific dollar amounts that would be paid (or zero) indicated for each line item. (Exs. C-9, C-12)

30. Because the language of the September 21, 2016 email specifically stated that the PTC had completed its review of Lobar’s request for payment and that the PTC had made its determination, and because the email included line by line notations of exactly what would and would not be paid (with specific amounts for each line item), the September 21, 2016 email amounted to an affirmative and unequivocal denial of those work items which were designated for nonpayment. (Ex. C-9; Findings of Fact (“F.O.F”) 25-29, 68-71; Board Finding)

31. Lobar did not submit a Notice of Intent to Claim to the PTC within 10 days of the September 21, 2016 email. (N.T. 78- 79; Ex. C-3)

32. On October 6, 2016, apparently believing the September 21, 2016 determination was subject to further discussion/negotiation, Lobar sent a letter dated October 5, 2016 to Mr. Kleimenhagen requesting further review of Lobar’s July 27, 2016 request for additional payment. (N.T. 58-59, 61; Ex. C-10)

33. Mr. Kleimenhagen was out of the office attending a conference in California between October 5, 2016 and October 10 or 11, 2016. (N.T. 150)

34. On October 17, 2016, the PTC, through Mr. Kleimenhagen, sent an email to Lobar stating:

In response to your email and attached letter dated October 5, 2017, as outlined in the emailed (sic) sent to you on September 21<sup>st</sup> the PTC has completed the review of your supplemental job order request submitted on July 27, 2016. Once again please find attached an EXCEL spreadsheet which provides an explanation for each category/line in the proposal, and our position on whether the line item will be paid or not by the PTC. The entire construction management team (PTC, Michael Baker, Inc. (CM/CI), a Crabtree, Rohrbaugh & Associates) thoroughly reviewed your submission by comparing it to the project design drawings, specifications, special provisions, and on-site inspections during construction. Our determination is the acceptable additional work costs submitted by Lobar is \$35,233.05 not \$150,925.19.

I have created JOC Project 02-2015-G-009.01 in the E-Gordian system, and respectfully request that you submit a revised proposal for the “pay” items listed in the attached EXCEL spreadsheet at your earliest convenience. Once I receive the proposal in E-Gordian, I will process the supplemental Job Order ASAP.

(Ex. C-12)

35. The spreadsheet PTC returned to Lobar on October 17, 2016 was unchanged from that sent to Lobar on September 21, 2016. (Exs. C-12, R-3)

36. On October 18, 2016, Lobar submitted a Notice of Intent to Claim to the PTC. (Ex. C-15)

37. Following his receipt of the October 18, 2016 Notice of Intent to Claim, Mr. Kleimenhagen consulted with PTC’s legal department. (N.T. 155)

38. On November 17, 2016, Ms. Fleming-White, Legal Department Manager for Lobar, sent Mr. Kleimenhagen a letter stating that Lobar had not received a response to its Notice of Intent to Claim and telling PTC that Lobar was filing a claim under Section 105.01 of the Contract. (Ex. C-16)

39. On November 22, 2016, Mr. Kleimenhagen responded via letter to Ms. Fleming-White, stating that the Notice of Intent to Claim was “untimely and the Commission had no obligation to respond to same.” (N.T. 118-119; Ex. C-17)

40. Despite communicating in the November 22, 2016 letter that the PTC viewed the Notice of Intent to Claim as untimely, Mr. Kleimenhagen nevertheless told Lobar in that letter that the PTC would schedule a claim review meeting. (Ex. C-17)

41. On December 19, 2016, Lobar, through its counsel, sent Mr. Kleimenhagen a letter stating that Lobar would file its claim on or before April 17, 2017, because Lobar viewed the PTC's October 17, 2016 email as PTC's final denial of its additional payment request. (Ex. C-18)

42. On January 5, 2017, the PTC, through its legal counsel, Ms. Kelly Decker (the PTC's General Litigation and Construction Counsel) responded by letter to the December 19, 2016 letter from Lobar's counsel. (N.T. 103-104, 105; Ex. R-4)

43. In this January 5, 2017 letter, Ms. Decker, on behalf of the PTC, clearly stated that the PTC disagreed with Lobar's assertion that the deadline for Lobar to file its administrative claim was April 17, 2017 (six months from the October 17, 2016 email). In fact, Ms. Decker put Lobar on notice that Lobar's administrative claim was, at the latest, "due by March 21, 2017, six months from the earlier and identical determination" made by the PTC in the September 21, 2016 email which expressly stated what would and would not be paid on Lobar's additional payment request. (N.T. 103-107; Ex. R-4)

44. The January 5, 2017 letter put Lobar on notice that the PTC intended the September 21, 2016 email to be a final decision on Lobar's request for additional payment and considered Lobar's claim to have accrued no later than September 21, 2016. (N.T. 107; Ex. R-4)

45. The January 5, 2017 letter also specifically noted that the PTC would wait to address the timeliness issue at the claim review meeting. (Ex. C-20)

46. As of the January 5, 2017 letter, Lobar had approximately 75 days to submit its claim within a six month deadline beginning from September 21, 2016, when the PTC first denied payment for those items listed for nonpayment on Lobar's itemized spreadsheet attached to the September 21, 2016 email. (N.T. 107:6-11; Ex. R-4)

47. On March 27, 2017, Lobar filed an administrative claim with Mr. Kleimenhagen. (Ex. C-20)

48. After receiving Lobar's March 27, 2017 administrative claim, Mr. Kleimenhagen convened a claim review meeting, which was held on June 28, 2017. (N.T. 195-197)

49. The issue of the timeliness of Lobar's administrative claim was discussed at the claim review meeting. (N.T. 199)

50. The PTC made a final determination of Lobar's administrative claim on August 31, 2017. (Ex. R-17)

51. In response to the PTC's assertion that the Board lacks jurisdiction over the instant claim because Lobar failed to file its administrative claim with the PTC within six months of the date the claim accrued, Lobar argues that the September 21, 2016 email denying payment for the bulk of the items submitted as extra work cannot be considered a proper, unequivocal or final refusal of its payment request because, among other things: Mr. Kleimenhagen did not have authority to issue a final denial of Lobar's July 27, 2016 request for additional payment on behalf

of the PTC because he was not the PTC's designated "Representative" on the Project; the PTC's actions and/or communications indicate that the PTC itself did not consider the September 21, 2016 email to be a final determination of Lobar's request for additional payment; and the PTC's misconduct in failing to follow the supplemental job order process required by the Contract in responding to its request for additional payment made the September 21, 2016 email ineffective as a denial of its additional payment request and/or led Lobar to reasonably believe that the September 21, 2016 email was not a final or unequivocal determination of this request for additional payment. (Lobar's Post-Hearing Proposed Findings of Fact, Conclusions of Law and Memorandum)

52. Section 105.01(a) of the General Provisions provides, in relevant part, as follows:

**105.01 AUTHORITY OF THE REPRESENTATIVE**

**(a) General.** The representative and agents of the Pennsylvania Turnpike Commission, representatives of the Pennsylvania Department of Transportation and the Consulting Engineer, will be permitted at all times to inspect all work, materials, payrolls, records of personnel, invoices of materials and other relevant data and records.

To prevent disputes and litigation, the Representatives will:

- determine the appropriateness of each task in the Price Proposal
- determine whether an item of work is a Prepriced Task or a Non-Prepriced Task;
- determine the quantity of the kinds of work and the quality of material for which payment will be made under the contract;
- determine the answer to questions in relation to the project and its construction; and
- decide differences concerning the performance of the work covered by the contract.

All such determinations, decisions, directions and explanations necessary to complete, explain or make definite any provisions of the Detailed Scope of Work and contract will be given promptly to the Contractor . . . .

(Ex. C-3)

53. The General Provisions of the Contract define the "Representative" as "the authorized representative acting on behalf of the Director of Facilities and Energy Management Operations or the Chief Engineer." (Ex. C-3)

54. Mr. Kleimenhagen worked in the Facilities and Energy Management Operations department of the PTC and served generally as the project manager for this department. (N.T. 128-129; Ex. C-4)

55. Mr. Kleimenhagen was designated by the Director of the Facilities and Energy Management Operations department as the authorized representative for the PTC on the Project. (N.T. 169-176)

56. No one from the PTC ever specifically stated to Lobar that Mr. Kleimenhagen was the PTC's authorized representative on the Project acting on behalf of the Director of Facilities and Energy Management Operations. Conversely, no one from Lobar ever questioned Mr. Kleimenhagen's authority as the PTC's representative on the Project, and Mr. Kleimenhagen did, in fact, function as the primary PTC contact person for Lobar on the Project. (N.T. 36, 47-49, 201; F.O.F. 13, 15-16, 20, 23, 25-41, 52-55)

57. Lobar sent its July 27, 2016 request for payment of the extra work items to Mr. Madey, with a copy of same to Mr. Kleimenhagen. Attached to the July 27, 2016 request for additional payment was an Excel spreadsheet/tracking log detailing the alleged extra work items. Lobar created the Excel spreadsheet/tracking log pursuant to the instructions of Mr. Kleimenhagen, not Mr. Madey. (N.T. 39-40; Exs. C-5, C-6)

58. Mr. Kleimenhagen sent Lobar the September 21, 2016 email specifically identifying what items the PTC would and would not pay of Lobar's request for additional payment. (Ex. C-9)

59. Lobar sent its October 6, 2016 request for further review of its request for additional payment following the September 21, 2016 denial to Mr. Kleimenhagen. (Ex. C-10)

60. Mr. Kleimenhagen sent Lobar the PTC's October 17, 2016 response to Lobar's request for further review. (Ex. C-12)

61. Lobar addressed its October 18, 2016 notice of intent to file a claim to Mr. Kleimenhagen. (Ex. C-13)

62. Lobar addressed its November 17, 2016 letter informing PTC that it was proceeding with filing a claim under section 105.01 of the Special Provisions of the Contract to Mr. Kleimenhagen. (Ex. C-16)

63. Mr. Kleimenhagen sent the November 22, 2016, letter to Lobar's legal office indicating that PTC would convene a claim review meeting. (Ex. C-17)

64. Lobar's legal counsel sent a letter regarding the issues to Mr. Kleimenhagen on December 19, 2016. (Ex. C-18)

65. Lobar's legal counsel sent a letter regarding the issues to Mr. Kleimenhagen on March 27, 2017. (Ex. C-21)

66. Throughout the Project, and continuing through the request for payment and claim process, Mr. Kleimenhagen acted as the PTC's representative on the Project. (F.O.F. 13, 15-16, 20, 23, 25-41, 52-56; Board Finding)

67. Despite the fact that Mr. Kleimenhagen functioned, in essence, as the PTC's representative and primary PTC contact person for Lobar on the Project, some confusion was created as to who the official PTC designated representative was by reason of a December 1, 2015 email sent to Lobar by Mr. Madey. (Ex. R-2; F.O.F. 15-23, 56-66; Board Finding)

68. This December 1, 2015 email was drafted by Mr. Kleimenhagen in response to an email from Lobar in November 2015 containing a partial list of work items Lobar considered to be extra work. Mr. Kleimenhagen drafted the email response to Lobar which commenced "As the PTC designated representative on the Project..." (N.T. 173-176; Ex. R-2)

69. However, the foregoing email, drafted by Mr. Kleimenhagen identifying himself as the PTC designated representative, was first sent by Mr. Kleimenhagen to Mr. Madey, who then sent the email to Lobar on December 1, 2015 under his own name, without changing the opening line of the email. (N.T. 173-176; Ex. R-2)

70. The entire management team on the Project reviewed Lobar's July 27, 2016 request for additional payment respecting the alleged extra work items. (N.T. 140-141, 144, 211-213)

71. The September 21, 2016 email specifically indicated that the "entire management team" had reviewed Lobar's request for additional payment and that the determination of what would and would not be paid was made by this management team (which included both Mr. Madey and Mr. Kleimenhagen). (N.T. 211-213; Exs. R-3, C-5, C-9 and C-12)

72. Because the September 21, 2016 email specifically stated that the entire management team had reviewed Lobar's request for payment; and because this email therefore informed Lobar that Mr. Kleimenhagen, Mr. Madey, and others had made the decision expressed in the September 21, 2016 email respecting Lobar's request for additional payment, we find that Mr. Madey's mistaken identification of himself as the PTC's designated representative in his December 1, 2015 email did not reasonably or materially mislead Lobar into concluding that the September 21, 2016 email was not an effective or final denial of Lobar's request for additional payment made by the PTC's designated representative for the Project. (Ex. C-9; F.O.F. 25-30, 67-71; Board Finding)

73. Lobar also argues that the PTC's actions and/or communications demonstrate that the PTC did not consider the September 21, 2016 email to be a final denial, and that this misled Lobar to delay filing its claim with the PTC within six months of September 21, 2016. Among other things, Lobar asserts that the following actions by the PTC were misleading: first, that the PTC's October 17, 2016 email did not state that Lobar's claim was already time-barred because Lobar had not submitted a notice of intent to claim within ten days of September 21, 2016; second, because the PTC's October 17, 2016 email did not explicitly state that the PTC had already made a determination; and third, because the Commission deliberated on Lobar's request for further review for over a week. Lobar also asserts the fact that the PTC held a claim hearing rather than immediately disregarding the claim suggests the PTC did not consider the September 21, 2016

email as a final and unequivocal denial of Lobar's request for additional payment. (Claimant's Memorandum of Law Following Evidentiary Hearing)

74. Lobar submitted a request for further review of the September 21, 2016 denial of its additional payment request via email on October 6, 2016 (by attaching a letter dated October 5, 2016 to this email). (N.T. 14; Ex. C-10)

75. Mr. Kleimenhagen responded to Lobar's request for further review by email of October 17, 2016. In contrast to the September 21, 2016 email, the October 17, 2016 email adds a prefatory clause to the first sentence as follows: "In response to your email and attached letter dated October 5, 2017 (sic), as outlined in the emailed (sic) sent to you on September 21<sup>st</sup> . . . ." (Exs. C-9, C-12)

76. In contrast to the September 21, 2016 email, the second sentence of which states "Please find attached an Excel spreadsheet which provides an explanation for each category/line in the proposal...." The October 17, 2016 email adds a prefatory clause, "Once again" to the sentence "please find attached an Excel spreadsheet...." (Exs. C-9, C-12)

77. The October 17, 2016 email from Mr. Kleimenhagen to Lobar specifically noted that the PTC was merely sending the same information it had already sent to Lobar on September 21, 2016. Specifically, the October 17, 2016 email stated: "Once again, please find attached an Excel spreadsheet which provides an explanation for each category/line in the proposal, and our position on whether the line item will be paid or not by the PTC." (Ex. C-12)

78. The Excel spreadsheet with line by line analysis of which items would and would not be paid which was returned to Lobar in the October 17, 2016 email in response to Lobar's request for additional review was unchanged from the Excel spreadsheet sent to Lobar on September 21, 2016. (N.T. 152; Exs. C-9, C-12)

79. Neither the September 21, 2016 email, which Lobar argues did not constitute a final denial, nor the October 17, 2016 email, which Lobar now asserts did constitute a final denial, include words such as "denial" or "will not be paid." (Exs. C-9, C-12)

80. With the exception of the prefatory clauses to the first two sentences, the October 17, 2017 email is identical to the September 21, 2016 email. (Exs. C-9, C-12)

81. Mr. Kleimenhagen was not in the PTC offices from October 5 through October 10 or 11, 2016, because he was attending a conference in California. (N.T. 150)

82. Taking Mr. Kleimenhagen's absence from the office into consideration, Mr. Kleimenhagen responded to Lobar's October 6, 2016 request for further review within four business days. (Exs. C-10, C-12; Board Finding)

83. There was no significant delay in the PTC's response to Lobar's request for additional consideration of the September 21, 2016 payment determination, and the four business

day delay does not suggest to the Board that the PTC undertook additional review of Lobar's request for payment after September 21, 2016. (F.O.F. 74-82; Board Finding)

84. The PTC did not perform any additional review or reconsideration of Lobar's request for additional payment after September 21, 2016. (N.T. 94-96, 151-152)

85. Mr. Kleimenhagen considered the review of Lobar's request for additional payment complete as of September 21, 2016. (N.T. 145-147)

86. After Lobar submitted its administrative claim to the PTC contracting officer (Mr. Kleimenhagen), the PTC held a claim review meeting to discuss the claim and the timeliness of the filing of the claim. (N.T. 195-197; Ex. C-17)

87. The Board does not infer that the PTC considered Lobar's administrative claim to be timely merely because it consented to hold a claim hearing where it could fully elicit all the salient facts before making an administrative determination on the claim, be it one based on timeliness or merit. (N.T. 198-199; Board Finding)

88. Because the October 17, 2016 email clearly indicates that the PTC was merely repeating the decision it had already sent to Lobar on September 21, 2016, we do not agree with Lobar that the PTC's failure to explicitly state in the October 17, 2016 email: (1) that the PTC had already made a determination with respect to Lobar's request for additional payment or (2) that this claim was already time-barred, reasonably or materially misled Lobar to conclude that the September 21, 2016 email was not intended or considered by the PTC to be an effective and final denial of Lobar's request for additional payment. (Exs. C-9, C-12; F.O.F. 25-30, 34-35, 70-87; Board Finding)

89. The October 17, 2016 email clearly indicates that the PTC was merely repeating the decision it had already sent to Lobar on September 21, 2016. The PTC did not engage in further review of Lobar's request for payment after the September 21, 2016 email. Additionally we see nothing in the acts or communications of the PTC subsequent to its issuance of the September 21, 2016 email that would mislead Lobar into concluding that the September 21, 2016 email was not intended or considered by the PTC to be an effective and final denial of Lobar's request for additional payment (with the possible exception of Mr. Kleimenhagen's reference to this request as a "supplemental job order" in his September 21 and October 17, 2016 emails, which we discuss below). (Exs. C-9, C-12; F.O.F. 25-30, 34-35, 70-88, 100-103; Board Finding)

90. Section 109.03 of the General Provisions provides as follows:

**109.03 ADDITIONAL WORK**

**(a) General.** Work specified in Sections 104.02 and 104.03 will be paid, if authorized in writing by the Representative, as a Supplemental Job Order developed in accordance with the procedures for developing a Job Order set forth in the Special Provisions. Compensation will be limited to the work authorized in writing and actually performed. Work performed before written authorization will be at the Contractor's risk.

A Supplemental Job Order identifying the work to be done and the price to be paid therefore will be processed before or during the performance of the work. To avoid interrupting the project, written authorization to perform work under this section will be in the form of a letter, telegram, mailgram, or other writing from the Representative, or the Inspector-in-Charge, in writing to the Contractor when confirming an oral authorization of the Representative, issued within a reasonable length of time.

Payment for a Supplemental Job Order is accepted as payment in full for all profit and all equipment, labor, material, field overhead, home office and general administrative expenses, and every other expense incurred as a result of the Supplemental Job Order. No claims for additional compensation of any kind arising out of or relating to such work can be asserted against the Commission with the Board of Claims. [Emphasis added]

(Ex. C-3)

91. Section 104.02 of the General Provisions, provides as follows:

**104.02 ALTERATION OF DETAILED SCOPE OF WORK –**

The Commission reserves the right to order, at any time during the progress of the work, increases or decreases in quantities and alterations in the Detailed Scope of Work as may be necessary or desirable. Any such order will be in writing by the Representative. Also, should any item contained in the Detailed Scope of Work be found unnecessary for the proper completion of the work, a written order will be given to eliminate such item from the contract. Such increases, decreases, eliminations, and/or alterations will not invalidate the contract or Job Order, nor release the surety.

If the aforementioned changes in quantities or alterations of the construction documents will significantly increase or decrease the cost of performing the work directly affected, perform such work only when authorized in writing, as specified in Section 109.03(a). Payment for such work will be made under Section 109.03.

With the exception of advance warning signs, detour signs, work zone traffic control devices, and other items that may be specified in the

contract, perform no work beyond the limits of the project, except as authorized in writing by the Representative.

If an item of work is eliminated, reimbursement will be made as specified in Section 109.03(d). If the aforementioned changes in the quantities or alterations of the drawings are of such magnitude as to require a change in the time to complete the project, a time adjustment will be made in accordance with Section 108.05.

(Exhibit C-3)

92. Section 109.03 of the General Provisions of the Contract states, inter alia, that supplemental job orders would be handled using the same procedure as the initial job order. (Ex. C-3 at ¶ 109.03)

93. Provisions related to “Job Order Contracting” are set forth in the Special Provisions of the Contract, which provides at Paragraph 9, as follows:

A Job Order Contract is an indefinite quantity contract pursuant to which the contractor will perform an ongoing series of individual projects at different locations on the Pennsylvania Turnpike System. The bid documents include a Construction Task Catalog (CTC) containing construction tasks with preset unit prices. All unit prices are based on prevailing wage labor, local material and equipment prices and are for the direct cost of construction.

The contractor will bid two Adjustment Factors to be applied to the unit prices. One Adjustment Factor for performing work during Normal Working Hours and a second Adjustment Factor for performing work during Other Than Normal Working Hours. The same two Adjustment Factors apply to every task in the CTC.

The contract will be awarded to the lowest responsive and responsible bidder.

Thereafter, as projects are identified the contractor will jointly scope the work with the Commission. The Commission will prepare a Detailed Scope of Work and issue a Request for Proposal to the contractor. The contractor will then prepare a Price Proposal for the project including a Schedule, and any required sketches or drawings, a list of subcontractors, and other requested documentation. If the Price Proposal is found to be reasonable, a Job Order may be issued.

A Job Order will reference the Detailed Scope of Work and set forth the Job Order Completion Time and the Job Order Price. The Job Order Price is determined by multiplying the preset unit prices by the appropriate quantities and by the appropriate Adjustment Factor. The Job Order Price shall be a lump sum, fixed price for the completion of the Detailed Scope

of Work. A separate Job Order will be issued for each project. Additional work, credits, and deletions will be contained in Supplemental Job Orders.

The contractor is required to complete each Detailed Scope of Work for the Job Order Price within the Job Order Completion Time.

This contract is for construction work and related services to be performed within a designated area of the system. However, if the need arises, the Commission reserves the right to request the contractor to work in another area at the Adjustment Factors Bid.

(Ex. C-2)

94. Paragraph 9 of the Special Provisions to the Contract states that, as part of the initial Job Order process, the parties (contractor and PTC) would jointly scope the work and discuss same before arriving at pricing for the work. (Ex. C-2 at ¶ 9)

95. Section 109.03 of the Contract, however, also states that supplemental job orders are to be processed before or, at the latest, during the performance of the work. It further states that work performed before such written authorization will be at the Contractor's risk. (Ex. C-3 at ¶ 109.03)

96. The work for which Lobar sought additional payment in its July 27, 2016 request for additional payment was performed and completed before July 27, 2016 and before written authorization for such work. (Exs. C-5, C-6; F.O.F. 15-22)

97. Section 109.03 of the General Provisions of the Contract does not describe a procedure to claim payment for extra work made after the work was completed without prior written authorization. (N.T. 182; Ex. C-3 at ¶109.03; F.O.F. 90-95; Board Finding)

98. The process for jointly scoping and pricing a supplemental job order pursuant to Paragraph 109.03 of the General Conditions and Paragraph 9 of the Special Provisions was not followed by PTC when Lobar submitted its request for additional payment and Excel spreadsheet after the conclusion of work on the Project. (N.T. 167)

99. As noted earlier, when issues arose over whether or not certain items of work were properly considered extra work outside the scope of the Contract during the early stages of the Project, Mr. Kleimenhagen instructed Lobar to maintain an Excel spreadsheet to keep track of changes in quantities or changes in scope of work that would be reviewed at the end of the Project. However, he did not state to Lobar that this Excel spreadsheet would be reviewed "as a Supplemental Job Order." (N.T. 39-40, 134-135, 176-181; F.O.F. 16, 85; Board Finding)

100. Although Mr. Kleimenhagen did not tell Lobar, in August of 2015 or thereafter, that the supplemental job order process set forth in the Contract would be followed when Lobar eventually submitted its request for additional payment for alleged extra work items, Mr. Kleimenhagen did refer to Lobar's request for additional payment as a "supplemental job order" in his September 21, 2016 email (and in his October 17, 2016 email). (Exs. C-9, C-12; F.O.F. 99)

101. Despite Mr. Kleimenhagen's use of the term "supplemental job order" in the September 21, 2016 email, that email did not invite Lobar to engage in dialog about the PTC's determination that the amount PTC would pay was only \$35,233.05 of the \$150,925.19 which Lobar had requested. (Ex. C-9)

102. Any possible confusion created by Mr. Kleimenhagen's mistaken reference to Lobar's July 27, 2016 request for additional payment as a "supplemental job order request" in his September 21 and October 17, 2016 emails was effectively corrected by Ms. Decker's letter of January 5, 2017, which clarified, among other things, that the supplemental job order procedure was not being followed and that the PTC considered the September 21, 2016 email to be the final decision on Lobar's request for additional payment and the latest point from which the six month period to file Lobar's administrative claim commenced. Moreover, because this January 5, 2017 letter was issued to Lobar some 75 days before the six month period would run from September 21, 2016, the Board is unable to find that the PTC materially misled Lobar in a way which caused Lobar to miss the March 21, 2017 deadline for filing its administrative claim. (N.T. 104-107; Exs. C-9, C-12, R-4; F.O.F. 41-46; Board Finding)

103. Because Mr. Kleimenhagen did tell Lobar to create an Excel spreadsheet itemizing tasks which Lobar considered to be extra work to submit at the end of the Project that would be reviewed, but did not tell Lobar this would be reviewed as a supplemental job order request; and because there were no other actions by, or communications from, the PTC which could reasonably have misled Lobar into believing the September 21, 2016 email was not an affirmative, unequivocal and final denial of its request for additional payment (with the possible exception of Mr. Kleimenhagen's reference to this request as a "supplemental job order request" in his September 21 and October 17, 2016 emails); and because any confusion created by this mistaken use of the "supplemental job order request" phrase in these two emails was corrected by Ms. Decker's letter of January 5, 2017 clarifying, inter alia, that the supplemental job order procedure was not being followed and that the PTC considered the September 21, 2016 email to be the final decision on Lobar's request for additional payment and the latest point from which the six month period to file Lobar's administrative claim commenced; and because this January 5, 2017 letter was issued to Lobar some 75 days before the six month period would run from September 21, 2016, the Board is unable to find that the PTC materially misled Lobar in a way which caused Lobar to miss the March 21, 2017 deadline for filing its administrative claim. (Exs. C-9, C-12, R-4; F.O.F. 41-46, 70-89, 96-97, 99-102; Board Finding)

104. Six months from September 21, 2016 expired on March 21, 2017. (Board Finding)

105. Lobar's administrative claim to the PTC contracting officer was made on March 27, 2017. (Ex. C-21)

106. Lobar's claim to the PTC contracting officer was not filed within six months of the date Lobar's request for additional payment was affirmatively, unequivocally and finally denied for those alleged extra work items designated for nonpayment in the September 21, 2016 email. (Exs. C-9 and C-21)

## CONCLUSIONS OF LAW

1. Pa.R.C.P. § 1028(a)(1) addresses preliminary objections filed on the grounds of lack of jurisdiction over the person and/or subject matter of the action. Pa.R.C.P. 1028.

2. Challenges to Board jurisdiction may be addressed during the preliminary objection phase by application of the law and, if necessary, by taking evidence to resolve any material issues of fact relevant to the challenge. Pa.R.C.P. 1028(c)(2); see also Ferguson Elec. Co., Inc. v. Department of Gen. Servs., 3 A.3d 681, 688 (Pa. Cmwlth. 2010) (approving the Board's procedure of conducting evidentiary hearings to determine preliminary objections based on lack of jurisdiction).

3. The Procurement Code at 62 Pa.C.S. § 1724(a)(1) provides, inter alia, that:

- (a) Exclusive jurisdiction.—The board shall have exclusive jurisdiction to arbitrate claims arising from all of the following:
  - (1) A contract entered into by a Commonwealth agency in accordance with [the Procurement Code] and filed with the board in accordance with section 1712.1 (relating to contract controversies).

. . .

- (c) Limitations. — The board shall have no power and exercise no jurisdiction over a claim asserted under subsection (a)(1) unless it is filed with the board in accordance with section 1712.1 . . . .

62 Pa.C.S. § 1724(a)(1) and (c).

4. Section 1712.1 of the Procurement Code states 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 a claim.—A claim shall be filed with the contracting officer within six months of the date the claim 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 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.
- (f) Applicability.—The provisions of 2 Pa.C.S. (relating to administrative law and procedure) shall not apply to this section.

62 Pa.C.S. § 1712.1(a)-(f).

5. Section 1712.1(b) requires, as a prerequisite to filing a claim with the Board, that a contractor initially file an administrative claim with the agency’s contracting officer “within six months of the date the claim accrues.” Id.

6. The Pennsylvania Supreme Court has adopted a two-part test for determining when a contract claim accrues. That test provides:

[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 Management, Inc. v. Public Sch. Employees’ Retirement System, 700 A.2d 395, 397 (Pa. 1997) (emphasis in original).

7. The agency’s denial of a contractor’s request for payment must be unequivocal for a claim to accrue; however, an agency need not use the specific words such as “denied” or “will not be paid.” Id.; see also Dean Institute of Technology, Inc. v. Commonwealth of Pennsylvania, Dep’t of Labor and Industry, BOC Docket No. 3972, Opinion and Order of July 29, 2013, pp. 23 and 43, *affirmed*, 88 A.3d 317 (Pa. Cmwlt. 2014).

8. Both prongs must be satisfied for a claim to be considered to have accrued, and only then will the limitation period commence. Id.

9. Once the jurisdictional issue is properly raised, the burden of proving jurisdiction is upon the party asserting it, in this case, Lobar. Deyarmin v. CONRAIL, 931 A.2d 1, 14 (Pa. Super. 2007).

10. As the finder of fact, the Board is charged with the duty of determining the credibility of evidence and resolving conflicting testimony. The Board may believe all, or part, or none of the testimony of any witness. The Board’s factual findings must be supported by substantial evidence. Department of General Services v. Pittsburgh Building Co., 920 A.2d 973, 989 (Pa. Cmwlt. 2007); A.G. Cullen Const., Inc. v. State System of Higher Educ., 898 A.2d 1145, 1155 (Pa. Cmwlt. 2006); Commonwealth v. Holtzapfel, 895 A.2d 1284, 1249 (Pa. Cmwlt. 2006); Miller v. C.P. Centers, Inc., 483 A.2d 912, 915 (Pa. Super. 1984).

11. Because we have found that Mr. Kleimenhagen served as the project manager for the Facilities and Energy Management Operations department of the PTC and was designated by the director of this department to be the PTC's representative on this Project, we conclude that Mr. Kleimenhagen was the Representative of the PTC for this Project as defined in the Contract and therefore authorized to issue a final payment determination on Lobar's request for additional payment submitted to the PTC on July 27, 2016. Ex. 3 at ¶¶ 101.03 and 105.01.

12. The September 21, 2016 email sent to Lobar by Mr. Kleimenhagen was an authorized and effective denial of Lobar's request for additional payment on all items identified for nonpayment in the attached Excel spreadsheet. Ex. C-9, Ex. 3 at ¶ 105.01.

13. Because we have found that Lobar was clearly able to prepare a concise and specific written statement detailing its alleged injury by July 27, 2016 when it submitted its request for additional payment; and because we have found that the PTC issued an affirmative, unequivocal and final denial of Lobar's request for additional payment in the September 21, 2016 email, Lobar's claim for the items identified for nonpayment in that email accrued on September 21, 2016. Darien Capital Management, Inc. v. Public Sch. Employes' Retirement System, 700 A.2d 395, 397 (Pa. 1997); Dean Institute of Technology, Inc. v. Commonwealth of Pennsylvania, Dep't of Labor and Industry, BOC Docket No. 3972, Opinion and Order of July 29, 2013, pp. 23 and 43, *affirmed*, 88 A.3d 317 (Pa. Cmwlth. 2014).

14. Because we have found that Mr. Madey's mistaken identification of himself as the PTC's designated representative on the Project by forwarding Mr. Kleimenhagen's email to Lobar on December 1, 2015, without modifying the beginning of the email which began "As the designated representative on the . . . Project" did not reasonably or materially mislead Lobar into concluding that the September 21, 2016 email was not an effective or final denial of Lobar's request for additional payment because, *inter alia*, the September 21, 2016 email made it abundantly clear that Mr. Madey (as part of the entire management team) had reviewed Lobar's July 27, 2016 request for additional payment and joined in the payment denial decision stated in this email, we conclude that Mr. Madey's mistaken identification of himself as the PTC's designated representative on the Project is an insufficient factual basis to estop the PTC from asserting the six month statute of limitations pursuant to the legal standard set forth in Commonwealth, Dep't of Pub. Welfare v. UEC, Inc., 397 A.2d 779, 784 (Pa. 1979).

15. The Supplemental Job Order procedure described in the Contract was not applicable to Lobar's request for additional payment submitted on July 27, 2016, after all the alleged additional (extra) work had been performed without prior written authorization from the PTC. Ex. C-3 at ¶¶ 101.03, 104.02, 109.03.

16. Because we have found, as matters of fact, that: Mr. Kleimenhagen did tell Lobar to create an Excel spreadsheet itemizing tasks which Lobar considered to be extra work to submit at the end of the Project that would be reviewed, but did not tell Lobar this would be reviewed as a supplemental job order request; and there were no other actions by, or communications from, the PTC which could reasonably have misled Lobar into believing the September 21, 2016 email was not an affirmative, unequivocal and final denial of its request for additional payment (with the possible exception of Mr. Kleimenhagen's reference to this request in his September 21 and October 17, 2016 emails); and because any confusion created by this mistaken use of the

“supplemental job order request” phrase in these two emails was corrected by Ms. Decker’s letter of January 5, 2017 clarifying, inter alia, that the supplemental job order procedure was not being followed and that the PTC considered the September 21, 2016 email to be the latest point from which the six month period to file Lobar’s administrative claim commenced; and this January 5, 2017 letter was issued to Lobar some 75 days before the six month period would run from September 21, 2016; and because, as a result of the foregoing, the Board is unable to find that the PTC materially misled Lobar in a way which caused Lobar to miss the March 21, 2017 deadline for filing its administrative claim, we conclude that Lobar has not established a sufficient factual basis to estop the PTC from asserting the six month statute of limitations pursuant to the legal standard set forth in Commonwealth, Dep’t of Pub. Welfare v. UEC, Inc., 397 A.2d 779, 784 (Pa. 1979).

17. Lobar’s claim for this Project, submitted to the PTC contracting officer on March 27, 2017, was untimely for purposes of Section 1712.1 of the Procurement Code. Accordingly, the Board lacks jurisdiction over Lobar’s claim in this matter. 62 Pa.C.S. §§ 1712.1, 1724(a) and (c).

## OPINION

### **Introduction**

This case is before the Board of Claims (“Board”) to rule on the preliminary objections filed by Respondent, Commonwealth of Pennsylvania, Pennsylvania Turnpike Commission (“PTC”) to the Statement of Claim of Claimant, Lobar Associates, Inc. (“Lobar”). The case commenced on September 14, 2017, with the filing of the statement of claim with the Board. On October 17, 2017, PTC filed preliminary objections and a brief in support. On November 15, 2017, Lobar filed its response in opposition to the preliminary objections and brief in support.

On December 20, 2017, the Board issued an order scheduling an evidentiary hearing to determine all factual issues pertinent to the Board’s jurisdiction over the claim. The evidentiary hearing was held on March 12, 2018. On April 12, 2018, Lobar filed proposed findings of fact and conclusions of law and a Memorandum of Law Following Evidentiary Hearing as to Jurisdiction. On May 2, 2018, the Commonwealth filed proposed findings of fact and conclusions of law and a brief in support of its preliminary objections. Lobar filed a reply memorandum on May 14, 2018. The matter is ripe for disposition.

### **Preliminary Objections**

PTC raises the following preliminary objections: (1) lack of jurisdiction over the person, pursuant to Pa.R.C.P. 1028(a)(1) (POs, ¶ 47); (2) failure to exhaust administrative remedy, pursuant to Pa.R.C.P. 1028(a)(7) (POs, ¶ 47); and (3) legal insufficiency (demurrer), pursuant to Pa.R.C.P. 1028(a)(4) (POs, ¶ 48). In the alternative, PTC asserts that Lobar’s claim for unjust enrichment must be dismissed as being legally insufficient. Because the Board finds the first

preliminary objection to the Board’s jurisdiction to be dispositive, our discussion will focus on this issue.

### **General Background**

Lobar completed construction on the Somerset Materials Testing Lab, Project No. 02-2015-G-009 (the “Project”) in mid-June 2016. On July 27, 2016, Lobar sent what it describes as a “supplemental job order” request and a detailed Excel spreadsheet to the PTC (via Mr. Gary Madey), requesting payment for \$150,925.19 for 28 categories of extra work items. On September 21, 2016, Mr. Robert Kleimenhagen, on behalf of the PTC, sent an email to Lobar stating that it would pay only \$35,233.05 and included a copy of the spreadsheet indicating exactly which items on Lobar’s list would and would not be paid. On October 6, 2016, Lobar emailed a letter dated October 5, 2016 to Mr. Kleimenhagen. This letter expressed disagreement with the September 21, 2016 determination of items that would and would not be paid and asked for further review of same. On October 17, 2016, Mr. Kleimenhagen sent another email to Lobar. The October 17, 2016 email acknowledged receipt of Lobar’s October 5, 2016 email and letter, but otherwise referred Lobar back to the decision communicated in the September 21, 2016 email, essentially repeating same. On March 27, 2017, Lobar made its administrative claim to the PTC contracting officer.

At issue in the PTC’s jurisdictional challenge is whether or not Lobar’s administrative claim was timely filed. This, in turn, requires a determination as to when Lobar’s claim first accrued.

Section 1724 of the Procurement Code provides, inter alia, that:

- (a) Exclusive jurisdiction. – The board shall have exclusive jurisdiction to arbitrate claims arising from all of the following:
  - (1) A contract entered into by a Commonwealth agency in accordance with this part and filed with the board in accordance with section 1712.1 (relating to contract controversies).
  - ...
- (c) Limitations - The board shall have no power and exercise no jurisdiction over a claim asserted under subsection (a)(1) unless it is filed with the board in accordance with section 1712.1 . . . .

62 Pa.C.S. § 1724(a)(1) and (c).

Section 1712.1(b) requires that “[a] claim shall be filed with the contracting officer within six months of the date the claim accrues.” 62 Pa.C.S.A. § 1712.1(b). 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. Such denial of payment must be affirmative and unequivocal. Darien Capital Management, Inc. v. Public Sch. Employes’ Retirement System, 700 A.2d 395, 397 (Pa. 1997) (emphasis in original).

There is no doubt that more than six months elapsed between Mr. Kleimenhagen’s September 21, 2016 email and March 27, 2017, when Lobar filed its administrative claim with the PTC. The PTC asserts that Lobar’s claim accrued on September 21, 2016 and was, therefore, untimely, depriving the Board of jurisdiction in this matter for Lobar’s failure to comply with Section 1712.1 of the Procurement Code. 62 Pa. C.S. §1712.1. In contrast, Lobar asserts that the September 21, 2016 email is not properly considered an effective, unequivocal or final denial of its additional payment request. Accordingly, Lobar’s position is that its claim did not accrue until

the PTC sent the second email on October 17, 2016.<sup>1</sup> This, of course, would make its administrative claim timely and confirm the Board’s jurisdiction.

## **Arguments**

The PTC’s argument is straightforward. Specifically, the PTC asserts that Lobar received a proper, affirmative, and unequivocal “no” to the bulk of its outstanding claim by email from Mr. Kleimenhagen on September 21, 2016. Among other things, it points to the detailed itemization of the alleged extra work items claimed by Lobar and submitted at the end of the Project (Exhibit C-5), and to the equally detailed response from Mr. Kleimenhagen on September 21, 2016, identifying specifically what items of work claimed would be paid and what items would not be paid. (Exhibit C-9). Because the detailed itemization of the claimed extra work originally submitted by Lobar on July 27, 2016 (with costs assigned to each item) makes it clear that the first prong of Darien was satisfied by that time, and because the PTC response on September 21, 2016 clearly, affirmatively, and unequivocally identified what items would be paid and what items would not, the PTC argues the claim accrued at this point on September 21, 2016.

In further support, PTC points out that the plain language of the September 21, 2016 email demonstrates it is a clear and final determination on Lobar’s request for payment for what Lobar considered extra work items. First, the email indicates that the PTC “has completed the review” of Lobar’s request. (Exhibit C-8). Second, the email states that “[o]ur determination is that the acceptable additional work costs submitted by Lobar is \$35,233.05 not \$150,925.19” and attaches a copy of the spreadsheet submitted by Lobar with specific notations as to what would, and would not, be paid for each line item. (Exhibit C-9). PTC thus characterizes the September 21, 2016

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<sup>1</sup> Although Lobar seems content to consider October 17, 2016 as its claim accrual date, two of its three arguments for overcoming the current jurisdictional challenge would, instead, lead to the conclusion that its claim has not yet accrued. We discuss these arguments infra.

email as an affirmative, unequivocal, and final “no” to the claimed extra work items not identified for payment.

While it appears Lobar does not (and cannot) argue that the first prong of Darien was not satisfied by July 27, 2016 with the production of its detailed extra work itemization, Lobar disagrees with the PTC’s characterization of the September 21, 2016 email from Mr. Kleimenhagen. Specifically, Lobar contends that the September 21, 2016 email denying payment for the bulk of the items submitted as extra work cannot be considered a proper, final or unequivocal refusal of its payment request. First, Lobar argues that Mr. Kleimenhagen did not have authority to issue a final denial of its July 27, 2016 request for additional payment on behalf of the PTC. Second, Lobar asserts that the PTC’s actions and/or communications indicate that the PTC itself did not consider the September 21, 2016 email to be a final determination on Lobar’s claim. Third, Lobar asserts that the PTC’s misconduct in failing to follow the supplemental job order process set out in the Contract made the September 21, 2016 email ineffective as a denial of its additional payment request and/or led Lobar to reasonably believe that the September 21, 2016 email was not a final or unequivocal denial.

## **Discussion**

Regarding Mr. Kleimenhagen’s authority to issue a denial of Lobar’s additional payment request for alleged extra work by way of the September 21, 2016 email, it would appear this argument of Lobar’s is based upon two contract provisions and a statement in a December 1, 2015 email sent by Mr. Gary Madey to Lobar.<sup>2</sup> This email begins “As the PTC designated representative on the . . . Project.” The first contract provision noted identifies the

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<sup>2</sup> Mr. Madey was the representative for Michael Baker International on the Project. Michael Baker International was the design professional employed by the PTC to perform construction management for the Project.

“Representative” for the Project to be the “authorized representative acting on behalf of the Director of Facilities and Energy Management Operations or the Chief Engineer.” The second provision states, inter alia, that it is the “Representative” who will

- determine the appropriateness of each task in the Price Proposal
- determine whether an item of work is a Prepriced Task or a Non-Prepriced Task;
- determine the quantity of the kinds of work and the quality of material for which payment will be made under the contract;
- determine the answer to questions in relation to the project and its construction;
- and
- decide differences concerning the performance of the work covered by the contract

Therefore, according to Lobar, Mr. Madey, not Mr. Kleimenhagen, was the only person who could issue a decision to Lobar on its initial request for additional payment. Because this was not done, argues Lobar, no proper decision had been made on its request for additional payment by the September 21, 2016 email (and, by logical extension, no decision on its payment request has yet been made and its claim not yet accrued).

Undermining this argument, however, are several factors. For one, the Contract definition of “Representative” identifies this person as the “authorized representative acting on behalf of the Director of Facilities and Energy Management Operations or the Chief Engineer.” Pursuant to direct testimony elicited at hearing, which the Board finds convincing, the actual PTC “Representative” on the Project was Mr. Kleimenhagen who served generally as “the project manager for the facilities energy management operations department” of the PTC and who was

designated by that department's director to be the PTC's representative on this Project, not Mr. Madey.<sup>3</sup>

Moreover, the evidence indicates that Mr. Kleimenhagen functioned throughout the entire Project as the primary PTC contact person for Lobar and that nearly all communications between Lobar and the PTC went through him. For example, although Lobar sent its initial request for additional payment to Mr. Madey (with a copy to Mr. Kleimenhagen), it was Mr. Kleimenhagen who responded. When Lobar asked for further review of this request after the September 21, 2016 email, Lobar sent it to Mr. Kleimenhagen. Indeed, in sending this list of items for additional payment, Lobar was following the direction of Mr. Kleimenhagen, not Mr. Madey (who had earlier outright refused to consider any such additional payment). In addition, while Lobar now seems to consider the October 17, 2016 email a final determination, it too was issued by Mr. Kleimenhagen. Finally, even if we were to consider Mr. Madey to be the only person who could make a decision on Lobar's request for additional payment (which we do not), Mr. Kleimenhagen's September 21, 2016 email (as well as the October 17, 2016 email) makes it abundantly clear that the "entire management team" (which would include Mr. Madey) reviewed Lobar's request for additional payment and that the decision expressed in the email was a determination of the whole management team (e.g. "Our determination . . ."). For all these reasons, the Board finds no merit to Lobar's argument that the September 21, 2016 email was ineffective as a response to its request for additional payment or that Mr. Madey's error in his December 1, 2015 email materially misled Lobar to hold the September 21, 2016 email as ineffective.

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<sup>3</sup> The confusion stems from the fact that it was Mr. Kleimenhagen, referring to himself as the "designated representative" for the PTC, who drafted the December 1, 2015 email which was eventually sent by Mr. Madey. For the reasons discussed in the accompanying text, the Board does not find this confusion of material import.

Similarly, we find no merit to Lobar's argument that the PTC's actions and/or communications indicate that the PTC itself did not consider the September 21, 2016 email to be a final and unequivocal refusal of those extra work items claimed by Lobar which were identified for nonpayment. We reach this conclusion, once again, for multiple reasons.

While the denial of a payment request must be affirmative and unequivocal, this Board has previously found that the denial need not contain specific words such as the claim "will not be paid" or "the claim is denied" but must be assessed in the full context of the communication. See Dean Institute of Technology, Inc. v. Commonwealth of Pennsylvania, Dep't of Labor and Industry, BOC Docket No. 3972, Opinion and Order of July 29, 2013, pp. 23 and 43, *affirmed*, 88 A.3d 317 (Pa. Cmwlth. 2014) See also Ferguson Electric Co., Inc. v. Department of Gen. Servs., BOC Docket No. 3934 Opinion and Order of Sept. 23, 2009, *affirmed*, 3 A.3d 681, 686 (Pa. Cmwlth. 2010). In this case, the September 21, 2016 denial did not use the words "denial" or "will not be paid." Rather, the September 21, 2016 email specifically stated what would be paid (\$35,233.02) and, through attachment of the line-by-line notations on the spreadsheet, specifically identified what would not be paid. Because the September email and the returned spreadsheet clearly note "whether the line item will be paid or not by the PTC" and provides the exact dollar figure that the PTC would or would not pay for each item, we consider the September 21, 2016 email to be an affirmative and unequivocal denial of the payment items refused. Accordingly, we find Lobar's complaint that the PTC did not use the word "denied" or other specific statements in its September 21, 2016 email to be wholly unpersuasive.

We also find Lobar's other arguments based on the timing of the PTC's responses and/or the phrasing in the September and October emails to be unpersuasive. In addition, we disagree with Lobar's assertion that nothing in the September email suggests it was a final determination. To the contrary, the September email begins with the statement that "[t]he PTC has completed

the review of your supplemental job order....” (emphasis added) which the Board believes lends substantial weight to the September email being a “final” determination of Lobar’s claim. Both the September 21, 2016 and October 17, 2016 emails include the following sentence as the last sentence in the first paragraph: “Our determination is the acceptable additional work costs submitted by Lobar is \$35,233.05 not \$150,925.19.” Unlike Lobar, the Board gives no greater weight to the use of the word “determination” in the October email than the same use of the word in the September email.

We also find that the actual differences in wording between the two PTC emails (e.g. the introductory phrasing in the October 17, 2016 email which acknowledges Lobar’s October 5, 2016 letter, expressly refers back to the September 21, 2016 email, and adds the phrase “Once again”, while otherwise repeating the September 21, 2016 email verbatim) does not, in our view, convey that the PTC “reconsidered” its decision between September and October 2016. To the contrary, the Board understands Mr. Kleimenhagen’s October email response and repetition of the September email to indicate that nothing had changed as to the PTC’s September 21, 2016 email response to Lobar’s claim, and that Lobar should consider the September response as final.

As to Lobar’s suggestion that Mr. Kleimenhagen’s “delay” in responding to Lobar’s October 5, 2016 request for further review indicates that the PTC did further review, Mr. Kleimenhagen testified as to being out of his office at a conference from October 5<sup>th</sup> to the 10<sup>th</sup> or 11<sup>th</sup> of 2016. Accordingly, Mr. Kleimenhagen’s response to the October 5, 2016 letter was only four business days from his actual receipt of same. We do not infer an additional review occurred from this interval.

In sum, these communications and Lobar’s attempt to “read in” its assumptions to same are contradicted by unchallenged testimony that there was no further review of Lobar’s additional payment request after the September 21, 2016 email response. Both Lobar’s suggested inferences

and its expectation of alternative phrasing are, ultimately, unpersuasive. As we have held before, merely asking again and again for reconsideration of a payment denial does not restart the running of the six month time limitation. See e.g. Dean Inst. of Technology, Inc. v. Dep't of Labor and Industry, BOC Docket No. 3972, Opinion and Order of March 29, 2012, p. 9 (citing Dep't of Pub. Welfare v. Jerrytone, 545 A.2d 345, 398 (Pa. Cmwlth. 1988)).

Moreover, we find absolutely nothing in the fact that Lobar was given the courtesy of an administrative hearing in this matter to suggest that the PTC itself believed that Lobar's administrative claim was timely. While the PTC could reasonably have taken the position that the claim was untimely and skipped a hearing, we would never discourage a Commonwealth agency from conducting a hearing to fully elicit all the salient facts before making a determination, be it one based on timeliness or merit.

Finally, Lobar asserts that the PTC's conduct in failing to follow the supplemental job order process set out in the Contract for addressing its request for additional payment was both ineffective and misleading. More specifically, Lobar first argues that the supplemental job order process (outlined in the Contract) was the prescribed process for dealing with its request for additional payment, and because this was not followed, this payment request has not yet been properly denied (and by logical extension, its claim not yet accrued). Alternatively, Lobar argues that the PTC's failure to follow this supplemental job order process in responding to its additional payment request on September 21, 2016 was, at the very least, misleading. That is to say, Lobar appears to suggest that it was misled into thinking that the September 21, 2016 email response to its additional payment request was neither unequivocal nor final because the prescribed supplemental job order process required, inter alia, an interactive discussion between it and the PTC before a final decision would be made on its additional payment request. The Board finds both aspects of this last argument unpersuasive.

To begin with, we agree with Lobar that the supplemental job order process prescribed by the Contract does contemplate a “give and take” dialog between contractor and agency before arriving at an agreed upon price for extra-contractual work. However, we disagree with Lobar’s assertion that the supplemental job order process was applicable to its request for additional payment here at issue. While Lobar is correct that a supplemental job order request may be submitted before a job is closed out and a final accounting done, it is not correct that a supplemental job order is the prescribed vehicle by which to request payment for disputed work that has already been performed. To be specific, Section 109.03 of the General Provisions provides, in relevant part, as follows:

Section 109.03

(a) General. Work specified in Sections 104.02 and 104.03 will be paid, if authorized in writing by the Representative, as a Supplemental Job Order developed in accordance with the procedures for developing a Job Order set forth in the Special Provisions. Compensation will be limited to the work authorized in writing and actually performed. Work performed before written authorization will be at the Contractor’s risk.

A Supplemental Job Order identifying the work to be done and the price to be paid therefore will be processed before or during the performance of the work. To avoid interrupting the project, written authorization to perform work under this section will be in the form of a letter, telegram, mailgram, or other writing from the Representative, or the Inspector-in-Charge, in writing to the Contractor when confirming an oral authorization of the Representative, issued within a reasonable length of time.

Payment for a Supplemental Job Order is accepted as payment in full for all profit and all equipment, labor, material, field overhead, home office and general administrative expenses, and every other expense incurred as a result of the Supplemental Job Order. No claims for additional compensation of any kind arising out of or relating to such work can be asserted against the Commission with the Board of Claims. [Emphasis added]

(Ex. C-3)

Section 104.02 provides as follows:

104.02 ALTERATION OF DETAILED SCOPE OF WORK – The Commission reserves the right to order, at any time during the progress of the work, increases or decreases in quantities and alterations in the Detailed Scope of Work as may be necessary or desirable. Any such order will be in writing by the Representative. Also, should any item contained in the Detailed Scope of Work be found unnecessary for the proper completion of the work, a written order will be given to eliminate such item from the contract. Such increases, decreases, eliminations, and/or alterations will not invalidate the contract or Job Order, nor release surety.

If the aforementioned changes in quantities or alterations of the construction documents will significantly increase or decrease the cost of performing the work directly affected, perform such work only when authorized in writing, as specified in Section 109.03(a). Payment for such work will be made under Section 109.03.

With the exception of advance warning signs, detour signs, work zone traffic control devices, and other items that may be specified in the contract, perform no work beyond the limits of the project, except as authorized in writing by the Representative.

If an item of work is eliminated, reimbursement will be made as specified in Section 109.03(d). If the aforementioned changes in the quantities or alterations of the drawings are of such magnitude as to require a change in the time to complete the project, a time adjustment will be made in accordance with Section 108.05.

(Ex. C-3)

Based on both the Board's reading of the foregoing Contract provisions, as well as our years of experience in resolving contract claims, a supplemental job order, like a change order (which was to accompany same here per the General Provisions) is the process used when both contractor and owner/agency agree the work is beyond the scope of the original design/specifications and determine that they can negotiate a price for the new work and add it to the contract before the new work is done without delaying the project. It is not the process prescribed or utilized when the parties do not agree as to whether the disputed work is or is not within the original scope of the contract or have not determined to resolve the issue before the alleged extra work occurs. Instead, the process prescribed here by Mr. Kleimenhagen (i.e. continue with the work, keep track of what the contractor believes to be extra work, and seek

resolution at the end of project work) is the more typical method for resolution of such disputed tasks as we have here in this case.

Based on the plain language of the Contract, particularly that of Section 109.03 of the General Provisions, to which Lobar wishes strictly to hold the PTC, we conclude that, strictly speaking, this provision is not applicable to a claim for extra work made after the work was performed and done prior to written authorization. Therefore, to the extent Lobar claims the PTC's denial of its request for additional payment was ineffective for failure to observe the supplemental job order process, we disagree.

With regard to Lobar's assertion that it was misled into thinking the supplemental job order process would be followed for its request for additional payment by the Contract provisions and/or by actions or statements of the PTC representatives, we find this to be a closer question. Lobar's currently alleged (mis)understanding of this process is highlighted by its proposed finding of fact versus what actually was said by Mr. Kleimenhagen when this extra work issue was brought to him by Lobar during the early stages of work on the Project. At its Proposed Finding of Fact No. 27, Lobar proffers the following:

During the course of that discussion, Mr. Kleimenhagen instructed Lobar to maintain an Excel spreadsheet to keep track of changes in quantities or changes in scope of work, and that the spreadsheet would be reviewed at the end of the Somerset Project as a Supplemental Job Order. (N.T. 39:1-40:9).

(Claimant Lobar Associates, Inc.'s Proposed Findings of Fact and Conclusions of Law as to Jurisdiction, p. 7)

However, when we compare Lobar's proposed finding of fact (above) to the evidence actually adduced at hearing (including testimony from Carl Barker, Lobar's project manager on this job), we find that Mr. Kleimenhagen did instruct Lobar to maintain an Excel spreadsheet to keep track of changes in quantities or changes in scope of work that would be reviewed at the end of the

Project, but did not state to Lobar that this Excel spreadsheet would be reviewed “as a Supplemental Job Order.”<sup>4</sup>

Notwithstanding the foregoing, we would be remiss were we not to entertain the possibility that Lobar may have been misled into thinking its request for additional payment would be treated by the PTC as a supplemental job order request given that the September 21, 2016 email does expressly refer to this request as such (as does the October 17, 2016 email). Were these the last (or standing) communications from the PTC on this subject, we might be tempted to agree with Lobar that it was misled into thinking the supplemental job order process would be followed and some further discussion would ensue after its initial submittal. However, this is not the case.

Contrary to Lobar’s suggestion that it was misled as to its six month filing deadline by the PTC, it appears to the Board that the PTC took affirmative steps to ensure that Lobar was aware that the PTC intended the September 21, 2016 denial of Lobar’s claim to be final and that the six-month deadline ran from this point in time. In particular, the Board finds the letter of January 5, 2017, from Ms. Kelly Decker (the PTC’s General Litigation and Construction Counsel) to Lobar’s legal counsel quite sufficient to clear up any possible misunderstanding on Lobar’s part as to the effect of the September 21 and October 17 emails. In this letter, the PTC very specifically disagrees with Lobar’s assertions that its claim must be filed “on or before April 17, 2017,” (six months from the October 17, 2016 email). Ms. Decker’s letter, in our view, puts Lobar on notice that the PTC considered the “earlier and identical” September 21, 2016 email

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<sup>4</sup> The Board acknowledges there is some degree of conflicting testimony as to whether or not Mr. Kleimenhagen himself eventually considered Lobar’s request for additional payment to be a “supplemental job order” request versus what he told Lobar initially in addressing the extra work issue. However, on balance, the Board finds the weight of evidence establishes that Mr. Kleimenhagen did not tell Lobar that this extra work payment request would be treated as a supplemental job order request or refer to any particular Contract provision when he instructed Lobar to compile its spreadsheet of extra work. (See N.T. 39-40, 134-135, 176-181).

to be the latest date from which to begin the six month period for filing a claim (and putting this deadline at no later than March 21, 2017). That is to say, the January 5, 2017 letter from Ms. Decker, in our view, cleared up any possible confusion engendered by the loose usage of the “supplemental job order” term and indicated that Lobar’s request for payment was finally denied on the September 21, 2016 date, at the latest. Significantly, the January 5, 2017 letter was sent 75 days before the six month time period would have run from this final denial on that September 21, 2016 date, giving Lobar ample notice that it should file its claim before March 21, 2017 if it wished to preserve its right to do so.

For all the foregoing reasons, and after careful consideration of all the testimony and evidence presented in this matter, the Board is unable to find that the PTC materially misled Lobar in a way which caused Lobar to miss the deadline for filing its administrative claim, even under the relaxed standard of an “unintentional deception” noted by the Pennsylvania Supreme Court in Commonwealth, Dep’t of Pub. Welfare v. UEC, Inc., 397 A.2d 779, 784 (Pa. 1979). Accordingly, this last argument of Lobar’s fails as well.

Having found that the plain language of the September 21, 2016 email affirmatively, unequivocally, and finally denied the items specified for nonpayment in the detailed spreadsheet attached thereto, and having found no grounds to support Lobar’s claims that certain Contract provisions or actions of the PTC made this denial ineffective, or misled Lobar into thinking it had more time to file its administrative claim than six months from the September 21, 2016 email, the Board is left with the filing dates. As already discussed, Lobar’s claim to the contracting officer was filed more than six months after the September 21, 2016 final denial of payment issued by the PTC. Accordingly, the Board lacks jurisdiction over this matter.

**ORDER**

**AND NOW**, this 28<sup>th</sup> day of June, 2018, upon consideration of the preliminary objections filed by the Pennsylvania Turnpike Commission to the Statement of Claim of Lobar Associates, Inc., all subsequent filings of record, and the evidence presented at hearing, it is hereby **ORDERED** and **DECREED** that the preliminary objection to Board jurisdiction is **SUSTAINED**, and this matter is **DISMISSED**.

BOARD OF CLAIMS

**OPINION SIGNED**

\_\_\_\_\_  
Jeffrey F. Smith  
Chief Administrative Judge

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Harry G. Gamble, P.E.  
Engineer Member

\_\_\_\_\_  
Gregory C. Fajt, Esquire  
Citizen Member