



SENT VIA E-MAIL

June 16, 2016

Bryan H. Babb
Bose McKinney and Evans, LLP
111 Monument Circle, Ste. 2700
Indianapolis, IN 46204
BBabb@boselaw.com/cosman@boselaw.com

Dear Mr. Babb:

The Indiana Department of Education ("IDOE"), with the assistance of the Attorney General's Office, have examined CTB's (now Data Recognition Corporation (DRC)) performance and delivery of key deliverables under A58-5-15AS-2300. IDOE continues to maintain that CTB breached its contractual duty to deliver items 31 and 32 within the agreed upon time, namely, on or before September 16, 2015. Items 31 and 32 can be found in Exhibit B to the now-expired contract.

On October 26, 2015, we received your response letter to IDOE's demand letter. In that letter, CTB opposed IDOE's position that September 16, 2015, was the agreed upon due date for items 31 and 32. Instead, CTB offered that it committed to presenting cut score recommendations to the State Board of Education ("Board") at the October or November 2015 Board meeting. However, an email received by Dr. Michele Walker of IDOE from Kristine Nickerson of CTB on May 4, 2015, supports IDOE's position that September 2015 was the expected delivery date for items 31 and 32.

Enclosed please find a copy of the above referenced May 4, 2015, e-mail from Ms. Nickerson. As you can see, the subject line of Ms. Nickerson's e-mail reads "Post Assessment Activities estimated timeline." The attachment to that email indicates that CTB committed to delivering items 31 and 32 in August and September. *At a minimum*, Ms. Nickerson's e-mail confirms September was within the agreed upon expected delivery window. CTB, however, failed to deliver the items in September; instead, CTB delivered item 31 on October 8, 2015, and delivered item 32 on October 22, 2015.

The contract at issue provided that, in the event of CTB's failure to meet a key performance date, liquidated damages would accrue for each calendar day of CTB's failure to perform. The contract further provided that IDOE would be entitled to liquidated damages for each deliverable that CTB failed to timely deliver. As to the amount of liquidated damages to which IDOE would be entitled, the contract provided a daily amount that would increase with time, with the total liquidated damages amount capped at 10% of the contract cost.

Being mindful that Ms. Nickerson's email attachment did not give specific delivery dates for items 31 and 32; and IDOE staff believed the items were to be delivered not later than September 16, the amounts

below use September 16th as the day liquidated damages began to toll. Applying the break down below, each failure warrants damages which far exceed the 10% cap of \$2,385,607.90¹:

Item 31:

<u>Calendar days</u>	<u># of days</u>	<u>Daily amount</u>	<u>Total amount</u>
1-5	5	\$50,000.00	\$250,000.00
6-10	5	\$150,000.00	\$750,000.00
>10	12	\$250,000.00	\$3,000,000.00

Aggregate total: \$4,000,000.00

Item 32:

<u>Calendar days</u>	<u># of days</u>	<u>Daily amount</u>	<u>Total amount</u>
1-5	5	\$50,000.00	\$250,000.00
6-10	5	\$150,000.00	\$750,000.00
>10	26	\$250,000.00	\$6,500,000.00

Aggregate total: \$7,500,000.00

The total liquidated damages due to delayed delivery for items 31 and 32 is \$11,500,000. In addition to the late delivery of items 31 and 32, in August 2015, Ellen Haley, CTB's then-president, informed the Board that cut score setting would be delayed until October/November due to an unforeseen scoring issue caused by the shortening of the test and lack of field testing. Ms. Haley explained that the scoring matrixes that were created for the operational field test did not fully capture all of the possible ways students may respond. Accordingly, CTB had to consider the student answers, build the unanticipated correct answers into the scoring matrix and rescore accordingly. This rescore was necessary to ensure that students received credit for their correct answers. The delay in cut score setting caused a ripple effect in Indiana's accountability and teacher evaluation system. The delay was so disruptive to Indiana that the General Assembly had to take action during the legislative session following the administration of the ISTEP+ test to limit harm to teachers who were at risk of not receiving a performance award.

While the contract caps liquidated damages at 10% of the contract amount, that amount cannot begin to make Indiana whole. Accordingly, IDOE demands \$4M in damages from CTB for failure to timely deliver items 31 and 32, as well as the delay caused by the rescore in full and final resolution of all disputed issues between IDOE and CTB.

We look forward to receiving your response and discussing the tender of payment by your client.

Sincerely,



Bernice A. N. Corley
General Counsel

¹ The total contract price of \$23,856,079.00 yields a liquidated damages, capped at 10%, in the amount of \$2,385,607.90

From: [Nickerson, Kristine](#)
To: [Michele Walker](#)
Cc: [Robinson, Cece](#)
Subject: Spring 2015 ISTEP+ Post-Assessment Estimated Timeline_CTB
Date: Monday, May 04, 2015 1:55:37 PM
Attachments: [Spring 2015 ISTEP+ Post-Assessment Estimated Timeline_CTB.docx](#)
[image001.png](#)

Michele,

Attached is the updated timeline for ISTEP+ Post-Assessment Activities.

Thank you,

Kristine

cid:image003.png@01CF8ED8.A07B77C0



Kristine A. Nickerson | Senior Program Manager | CTB
McGraw-Hill Education | 20 Ryan Ranch Road, Monterey, CA 93940
C: 973-803-9139 | kristine.nickerson@mheducation.com | mheducation.com



Spring 2015 ISTEP+ Post-Assessment Estimated Timeline

An overview of the tasks included in the process of scoring and reporting for the new Spring 2015 ISTEP+ test aligned to college- and career-ready standards is presented in the following table.

Estimated Timeline	Task Details
June/July	<ul style="list-style-type: none"> • Scoring of open-ended (applied skills) items • Scores for all items provided to psychometric staff for analysis
July/Aug	<ul style="list-style-type: none"> • Item-level statistics delineated • Selection of items for Spring 2015 test form
Aug	<ul style="list-style-type: none"> • Creation of vertical scale • Paper/pencil and online comparability studies • Begin cut score setting preparation
Sep	<ul style="list-style-type: none"> • Complete cut score setting preparation • Conduct cut score setting
Oct	<ul style="list-style-type: none"> • Indiana Education Roundtable cut score review/approval • State Board of Education cut score review/approval • Cut scores applied to generate reports
Nov	<ul style="list-style-type: none"> • Quality control checks of data/reports • Reports available electronically • Individual Student Reports and labels disseminated to schools
Nov/Dec	<ul style="list-style-type: none"> • Rescore request window • Rescoring of open-ended (applied skills) items
Jan	<ul style="list-style-type: none"> • Rescore reports available • Validity and reliability study results <u>Draft of Technical Report</u> • Test score data provided for accountability calculations