

COMMONWEALTH OF PENNSYLVANIA

ON-POINT TECHNOLOGY SYSTEMS, INC. : BEFORE THE BOARD OF CLAIMS
: VS. :
: COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF REVENUE and :
DEPARTMENT OF GENERAL SERVICES : DOCKET NO. 2267

FINDINGS OF FACT

1. The Plaintiff, On-Point Technology Systems, Inc. (“On-Point”) is a Nevada corporation with its principal place of business at 1370 W. San Marcos Boulevard, Suite 100, San Marcos, California 92069. Stipulated Findings of Fact Not In Dispute (Stipulation of Facts (hereinafter S.F). 1; Amended Complaint para. 1)

2. The Defendant, Commonwealth of Pennsylvania, Department of Revenue is an administrative agency of the Commonwealth of Pennsylvania which has the power and duty to administer the State Lottery (the “Lottery”). (S.F. 3; Amended Complaint and Answer paras. 2, 3; 72 P.S. § 3761-6 (a))

3. The Defendant, Commonwealth of Pennsylvania, Department of General Services is authorized to contract for services for administrative agencies of the Commonwealth of Pennsylvania and to act as the purchasing agency for the administrative agencies. (S.F. 4; Amended Complaint and Answer para. 4; 71 P.S. §§ 631.17 (7) & 633 (e))

4. On-Point is authorized to conduct business within Pennsylvania under a Certificate of Authority issued by the Pennsylvania Department of State. (S.F. 2)

5. On August 15, 1996, On-Point changed its corporate name from Lottery Enterprises, Inc. to On-Point Technology Systems, Inc., but retained Lottery Enterprises as a registered fictitious name. (S.F. 5)

6. The Board of Claims has jurisdiction over the parties and the subject matter in dispute pursuant to 72 P.S. §§4651-1 to 10. (Board Finding)

7. As of March 12, 1993, On-Point executed an agreement for three (3) years, April 1, 1993 to March 31, 1996, for instant lottery game services with the Department of Revenue. (S.F. 8, 11)

8. The Lottery initially sold instant tickets at retailer locations in plastic bins which were kept

on the counters of retail locations and sold manually by the clerk. (N.T. 39-40)

9. An instant ticket lottery game utilizes tickets produced and distributed by the Lottery and sold at retail locations throughout the Commonwealth which a purchaser may purchase and determine immediately whether that ticket had a winning prize. (N.T. 39; S.F. 10)

10. There are numerous types of instant ticket games that lotteries may offer. (N.T. 40)

11. The Lottery has utilized instant ticket games since at least the 1980s. (N.T. 731)

12. Prior to 1991, the Lottery offered four or five instant ticket games at a time. (N.T. 40)

13. In the late 1980s, Instant Ticket Vending Machines (hereinafter "ITVMs") were introduced into the market. (N.T. 117)

14. Instant lottery game tickets are lottery tickets upon which are printed unique play symbols that are covered by a latex coating. A player scratches off the latex to reveal the play symbols and the prize, if any, to which the player is entitled. These tickets are sometimes known as "scratch off tickets." (S.F. 10)

15. On-Point's predecessor invented ITVMs and was the first company to market them. (N.T. 117)

16. ITVMs are self-service type vending machines that dispense instant lottery game tickets. (S.F. 9)

17. A player operates an ITVM by inserting money into the machine through a bill collector and pushing a button to designate which specific game the player wishes to play and then the machine dispenses the ticket(s). (N.T. 669-670)

18. In 1991 and 1992, the Lottery investigated the potential use of ITVMs. (N.T. 41-43)

19. On October 23, 1992, the Commonwealth issued a Request for Proposal ("RFP") for ITVMs and related services. (S.F. 6)

20. The Commonwealth is bound to comply with the procedures set forth in a RFP. (N.T. 923)

21. The Commonwealth is required to act in good faith with the proposers, giving each a fair shot and not providing one proposer greater access to the Commonwealth than another. (N.T. 744; Exhibit P-1, Sec. 1.8)

22. One of the reasons the Commonwealth must fairly deal with proposers is to insure that reputable and qualified companies will be willing to deal with the Commonwealth. (N.T. 736-737)
23. Generally, most of the items in a RFP are open to negotiation, including price and delivery terms. (N.T. 609)
24. When an RFP is issued and a proposal is sent in response to the RFP, both documents become part of the contract that is negotiated with the successful proposer. (N.T. 609)
25. On December 1, 1992, On-Point submitted a Response to the October RFP. (S.F. 7)
26. As of March 12, 1993, On-Point executed an Agreement for Instant Lottery Game Services for IGPATs (ITVMs) (“1993 Agreement”) with the Department of Revenue. (S.F. 8)
27. The initial term of the 1993 Agreement was for three years from April 1, 1993 to March 31, 1996. (S.F. 11)
28. In the 1993 Agreement, On-Point agreed to sell and install one thousand (1,000) ITVMs to the Commonwealth, train the Lottery’s employees and retailers, and provide preventative maintenance for the machines. Additionally, the 1993 Agreement gave the Commonwealth the right to order another 200 ITVMs (for a total of 1,200 ITVMs). (Exhibit P-4)
29. Pursuant to the terms of the 1993 Agreement, the Department of Revenue agreed to pay On-Point, an annual fee, in advance, for preventative maintenance and related services based upon \$37 per month, per ITVM. (N.T. 129; Exhibit P-4)
30. This fee included preventative maintenance for each machine on a monthly basis, maintaining a service center and training Lottery employees and retailers. (N.T. 29)
31. In the 1993 Agreement, On-Point warranted the bill acceptor for one year and the remainder of the ITVMs for the term of the 1993 Agreement (i.e. three years). (Exhibit P-4)
32. During the term of the 1993 Agreement, any service calls for machine breakdowns or malfunctions, and the cost of any replacement parts, were covered by the warranty. (Exhibit P-4)
33. The 1993 Agreement did not cover, address or obligate On-Point to provide services for machine breakdowns or malfunctions or provide any replacement parts once the warranty expired on the machine, or state the amounts On-Point would charge if On-Point elected to provide such services. (Exhibit P-4)
34. The parties partially addressed these issues by executing the Second Amendment to the

1993 Agreement dated November 15, 1994, under which the Lottery paid \$5.50 per month, per machine, to cover the repair and replacement of bill acceptors. (N.T. 132-133; Exhibit P-19)

35. The 1993 Agreement provided that in the event On-Point failed to meet its installation, maintenance or training obligations, On-Point was to pay as damages an amount equal to lost ticket sales. (N.T. 666-667)

36. Pursuant to the terms of the 1993 Agreement, On-Point began providing approximately 1,000 ITVMs to the Lottery in the Fall of 1993. (N.T. 59-60)

37. After On-Point was awarded the 1993 Agreement, Interlott wrote to the Department of Revenue questioning whether On-Point was an acceptable vendor. (N.T. 56; Exhibit P-7)

38. The Department of Revenue investigated Interlott's allegations and determined that they were untrue. (N.T. 57-58; Exhibit P-8)

39. The Lottery found that the performance of On-Point's ITVMs was, in the words of their own personnel, "terrific." (N.T. 545)

40. Lottery instant ticket sales increased by 47% after the Lottery began using On-Point's ITVMs (N.T. 52, 65-66, 750; Exhibit P-12)

41. On-Point's ITVMs allowed the Lottery to sell instant tickets in retail stores, such as supermarket chains, that would not sell the tickets by hand. (N.T. 541-542, 751-752; Exhibit P-12)

42. The ITVMs provided to the Lottery by On-Point operated satisfactorily and were regularly maintained by On-Point technicians. (N.T. 54, 752)

43. The Lottery determined that it wanted to purchase additional machines to install at more retailers. (N.T. 60)

44. The Lottery intended to purchase all of these machines from On-Point. (Exhibit P-12)

45. However, the Lottery determined that, under the Commonwealth procurement requirements, it could buy no more than the additional 200 ITVMs from On-Point that were authorized under the terms of the 1993 Agreement, and that it would have to seek competitive bids or proposals for the remainder of the ITVMs it wanted to purchase. (N.T. 67-68; Exhibit P-13)

46. In June 1994, On-Point and the Commonwealth executed the First Amendment to the

1993 Agreement, to purchase an additional 200 machines from On-Point. (N.T. 67-68; S.F. 12)

47. In order to purchase additional ITVMs, the Lottery began the long process of developing a RFP. (N.T. 733-746, 756, 920-924)

48. The only difference between the ITVMs which the Lottery had already purchased from On-Point and the ITVMs the Lottery sought to obtain from the new RFP was that the Commonwealth wanted some of the new ITVMs to sell eight (8) different games at once (the original machines could only dispense four (4) different games at once.) (N.T. 72, 78)

49. In May 1995, the Department of Revenue formed a Committee (the "Selection Committee") to evaluate the RFP that had been prepared by Lottery officials and, eventually, to evaluate the Proposals that the Lottery anticipated would be submitted. (N.T. 74-75, 735-736; S.F. 15, 16; Exhibit P-26)

50. The members of the Selection Committee were individuals knowledgeable about Lottery technology and familiar with the needs of the Lottery. (N.T. 735-736)

51. On August 28, 1995, the Department of Revenue, acting through the Department of General Services, issued a RFP. (S.F. 13)

52. The RFP specifically provided that:

Negotiations will be undertaken with the responsible vendor whose responsive proposal best meets the needs of the Commonwealth in terms of the requirements of the RFP. These negotiations with the Commonwealth will result in a formal contract between the parties.
(Exhibit P-22, para I-5)

53. The RFP further provided that:

Vendors whose proposals are not selected will be notified of the name of the selected vendor and will be given the opportunity to be debriefed. The purpose of the debriefing is not to compare the proposal of the selected Vendor with the proposal(s) of any unsuccessful vendor(s) or to provide data on score or costs, but to provide data that may assist the non-selected vendor in making better proposals in the future.

The issuing office will schedule the date and the place of the debriefing.

(Exhibit P-22, para. I-13)

54. Often times unsuccessful proposers will request information or meet with the Commonwealth officials to discuss why they were not selected. This process often goes beyond the debriefing process in large procurements. (N.T. 747)

55. On-Point and Interlott were the only companies to submit responses to the RFP and present machines for evaluation by the Lottery. (N.T. 80-81)

56. On-Point elected to respond to the RFP and devoted substantial time and expense exceeding \$90,000 in preparing and presenting its Proposal in response to the RFP. (N.T. 134-137, 144)

57. On October 5, 1995, On-Point submitted a proposal (containing two alternatives) to the Department of Revenue setting forth in detail the specific types of machines it proposed to sell to the Lottery, the number of machines, the prices it would charge, the warranties it would offer, the manner of delivery and the nature of maintenance and service it would provide. (N.T. 82; S.F. 14)

58. On-Point's proposal met all of the administrative standards the Lottery set forth in the RFP. (N.T. 82-84)

59. In its proposal, On-Point indicated that it was necessary to increase the ITVM fee for maintenance and related services to \$67.50 per month per ITVM. (N.T. 271)

60. Also, in its proposal, On-Point offered to sell up to 2,400 of its ITVMs at \$4,900 per machine. (Exhibit P-42)

61. The RFP Committee conducted a detailed review and analysis of the Proposals that included attending interviews with and presentations by the vendors and testing model machines. The RFP Committee used a sophisticated scoring procedure to analyze the terms of the Proposals in an effort to identify which was most responsive to the Commonwealth's needs as set forth in the RFP. The proposal garnering the highest score was deemed the most responsive. (N.T. 79-83)

62. The Commonwealth reviews financial stability as one of the factors it takes into consideration in determining whether a proposer is qualified and able to perform. (N.T. 740-741)

63. During the proposal evaluation process, On-Point was investigated by the Department of Revenue and the Selection Committee evaluated On-Point's proposal. This investigation included a review of On-Point's financial condition. (N.T. 78-82, 740-744)

64. Where the company is publicly traded, such as On-Point, the financial information is readily available to the Commonwealth. (N.T. 742-743)

65. The Commonwealth monitored the financial stability of companies with which it was already doing business. (N.T. 753)

66. Pursuant to the 1995 RFP, the Department of Revenue required all proposers to demonstrate the performance of their ITVMs. On-Point complied with the requirement and demonstrated the performance of their ITVMs to the Evaluation Committee. (N.T. 79-80; S.F. 23)

67. Based on the objective scoring mechanism, the RFP Committee selected one of On-Point's Proposals as the most responsive. (N.T. 83-84; S.F. 17; Exhibits P-22, P-52)

68. On-Point's alternative proposal was scored as the second most responsive. (N.T. 83)

69. On November 14, 1995, Secretary of Revenue, Robert Judge, signed approved the selection of On-Point, and recommended to the Department of General Services that a contract be awarded to On-Point by a memo dated November 15, 1995. (N.T. 341, 924; S.F. 19; Exhibit P-53)

70. George C. Fields, Deputy Secretary for Procurement, by memo dated November 14, 1995, acknowledged and approved the selection of On-Point. (N.T. 926-928; S.F. 20, 22; Exhibit P-51)

71. In November 1995, the Lottery received an unmarked envelope containing newspaper articles with negative comments about On-Point and positive comments about Interlott as well as a faxed copy of On-Point's quarterly financial report filed with the Securities and Exchange Commission ("SEC"). (N.T. 88-89)

72. On December 13, 1995, Secretary Judge sent a letter to On-Point informing it that its Proposal was the most responsive to the Commonwealth's RFP. (N.T. 913-914; S.F. 22)

73. The second paragraph of the letter stated: "This letter is to be considered a letter of intent to enter into a contract negotiation. Be advised, however, that this letter is not binding in any way nor will the Commonwealth be bound until a formal contract has been negotiated and authenticated by all signatures." (N.T. 239)

74. The only open items were delivery dates and which maintenance option the state desired. (N.T. 235, 244-245)

75. Before the Commonwealth had informed On-Point that it had been awarded the Contract, representatives of Interlott learned of the selection of On-Point's Proposal as the most responsive and began to challenge On-Point's selection. (N.T. 149, 774-775)

76. The Commonwealth considers such a disclosure to be in violation of its procurement procedures. (N.T. 374)

77. While On-Point was preparing to perform under the contract, Interlott engaged William Warren, a lobbyist who previously served as Chief Counsel of the Department of General Services (1987-1989) and Chief of Litigation, Office of General Services (1989-1991), of the Commonwealth, to complain to the Commonwealth about the designation of On-Point as the most responsive proposer. (N.T. 761-762)

78. In a series of letters to the Commonwealth, dated January 5, 1996, January 26, 1996 and April 16, 1996, Mr. Warren falsely alleged that On-Point did not have the financial ability to perform under the new ITVM contract. (N.T. 356-357; S.F. 27-28; Exhibits P-62, 64, 75)

79. Mr. Warren demanded to meet with Lottery representatives. (Exhibit P-62, 64, 75)

80. Charles Kline, the Lottery's Executive Director, did not believe he had authority to meet with Mr. Warren, but forwarded this request to Secretary Judge. (N.T. 774-777)

81. Pursuant to the RFP, the Commonwealth was only permitted to meet with a disappointed vendor to discuss "the strengths and weaknesses of their proposal." (N.T. 337, 347)

82. In violation of this requirement, Secretary Judge instructed his staff to meet with Interlott to discuss On-Point's financial stability and ability to perform under the new contract. (N.T. 917; S.F. 29)

83. On or about February, 1996, Charles Kline, Executive Director of the Lottery, and Julia Sheridan, counsel to the Lottery, met with Mr. Warren and Mr. Titelman, contract lobbyist for Interlott to discuss Interlott's assertions about On-Point's financial condition and complaints about the RFP process. (N.T. 356, 361-362)

84. There were to be no comparisons made of the successful and unsuccessful vendors at this meeting, but rather, the Interlott representatives complained about the RFP process and again claimed that On-Point was financially unstable. (N.T. 347-348, 352)

85. After receiving notification that it had been deemed the most responsive bidder, On-Point began making preparations for the performance of the contract, which included ordering necessary materials and the building up of \$932,507.89 worth of this inventory, all of which it has not, and will not, be able to use for any other purpose. (N.T. 123, 142, 146, 251-252)

86. The Lottery indicated that it wanted the ITVMs as soon as possible. (N.T. 247)
87. The Lottery did not inform On-Point of its meetings with Interlott and On-Point continued its preparations. The Lottery offered various excuses to On-Point when asked why contract documents were not being sent. (N.T. 291)
88. At the same time, lower level Lottery employees were making plans for mobilizing and administering the new ITVMs to be received from On-Point under the new contract. (N.T. 549-555, 658; Exhibit P-67)
89. On February 23, 1996, the Department of Revenue submitted a draft contract to On-Point. (N.T. 244, 357-358; S.F. 25)
90. The contract document for the purchase and servicing of ITVMs as presented by the Commonwealth identified only a few technical issues that it wanted to address with On-Point. (N.T. 87; Exhibit P-55)
91. The Commonwealth's proposed additions to the Contract were acceptable to On-Point. (N.T. 154)
92. On-Point considered itself to be contractually bound as a result of the December 1995 letter from Secretary Judge. (N.T. 238-239, 249, 392)
93. In March 1996, the Department of Revenue notified On-Point that it intended to extend the 1993 Agreement for one year and asked On-Point to agree that the extension would be under the same terms and conditions as the 1993 Agreement. (N.T. 161, 782-783; Exhibit P-68)
94. The Department of Revenue represented to On-Point that this extension was necessary because the new contract documents would not be completed by the expiration of the original terms of the 1993 Agreement on March 31, 1996. (N.T. 161)
95. The Commonwealth represented to On-Point that the extension would essentially be an interim agreement to bridge the gap between the 1993 Agreement and the new contract. (N.T. (Roberts) at 161-162)
96. In reliance on these representations and, in an effort to facilitate the execution of the contract documents for the 1995 Agreement, On-Point executed an amendment to the 1993 Agreement on April 5, 1996 extending the Agreement for one year. (N.T. 288; S.F. 12; Exhibit P-68)
97. Recognizing that the warranty provided under the 1993 Agreement was to expire, On-Point

prepared a letter of interpretation through which it advised the Commonwealth that the execution of the Amendment did not extend the warranty and that it would begin charging for necessary repair parts. (N.T. 161-164; Exhibit P-72)

98. The Commonwealth never advised On-Point that it disagreed with this interpretation before accepting On-Point's services. (N.T. 289)

99. In April 1996, On-Point sent an invoice, in the amount of \$607,410, to the Commonwealth for the advance payment of the maintenance fees for the year beginning April 1, 1996 through March 31, 1997. (N.T. 167; Exhibit P-90)

100. The Department of Revenue refused to pay the On-Point invoice for the service fee for the period of the extended 1993 Agreement. (N.T. 167-170)

101. After hearing that questions were being raised regarding On-Point's financial stability, On-Point contacted the Commonwealth, in the beginning of March 1996, and the Commonwealth acknowledged that the issue was raised. (N.T. 400-402)

102. On March 27, 1996, the Commonwealth finally told On-Point that it was delaying the implementation of the new ITVM contract because of allegations raised by Interlott, and asked On-Point to respond to those allegations. (S.F. 31)

103. In response, On-Point provided detailed information to show financial stability, including its recent investment of over Six Million Dollars (\$6,000,000) in the company. (N.T. 263, 363-364, 406; S.F. 30, 31)

104. Senior Lottery officials, including Mr. Kline, were satisfied that On-Point was financially stable, able to perform its obligations under the new contract and would provide the Commonwealth additional performance assurances, such as a bond or transfer of repair parts. (N.T. 412-416; S.F. 31; Exhibit P-78)

105. The Commonwealth assured On-Point that it would proceed with finalizing the contract documents. (N.T. 416)

106. Mr. Kline advised Secretary Judge that, "[w]ith all the information now before us, it is our opinion that there is insufficient evidence to delay this process further. As such, we are requesting your approval to resume contract negotiations with L.E.I." (Exhibit P-76)

107. At or about this time, Secretary Judge met with William Titelman, a well-known lobbyist. Mr. Titelman urged Secretary Judge to select Interlott over On-Point. (N.T. 947-948)

108. Secretary Judge discussed this with the Governor's Chief Counsel. (N.T. 948-949)
109. On-Point provided services to the Department of Revenue between April 1, 1996 and July 15, 1996 and the Department of Revenue accepted those services despite the fact that the Third Amendment had not been signed. (N.T. 289; S.F. 33)
110. In June 1996, the Commonwealth decided to terminate the 1995 RFP process and began to prepare an Invitation to Bid to acquire the needed ITVMs. (N.T. 780-781)
111. The Department of Revenue received an executed amendment extending the term of the 1993 Agreement on April 5, 1996, but did not return executed copies to the amendment until June 24, 1996. (N.T. 164)
112. On July 25, 1996, the Commonwealth advised On-Point that the RFP was canceled. (S.F. 32)
113. The Department of Revenue's rejection of On-Point's proposal was based upon considerations other than the required "uniform selection criteria and weighing techniques." (N.T. 950-951)
114. On-Point would not have agreed to the amendment if it had been told that the RFP was canceled. (N.T. 166)
115. At a July 1996, dinner in Saratoga, New York, the Executive Director of the Lottery, Charles Kline, informed On-Point Vice President Brian Roberts that On-Point had been "screwed." (N.T. 201-204)
116. On-Point provided repair and maintenance services to the Commonwealth consistent with the requirements of the 1993 Agreement and without material deviation from those requirements. (N.T. 180)
117. The Department of Revenue did not pay On-Point the full amounts due under the extended 1993 Agreement, for the months of April 1996 to August 1996, but made a partial payment on September 30, 1996, and never paid the full amount due. (N.T. 168-169; Exhibit P-114)
118. The Department of Revenue also withheld "penalties" in the amount of \$37,694.38. (N.T. 175, 185; Exhibit P-151)
119. The Department of Revenue reduced payments due On-Point under the extended 1993 Agreement for "missed preventative maintenance" in the amount of \$21,645. (N.T. 183, 638-645; Exhibit P-151)

120. There was no provision in the 1993 Agreement that permitted the Commonwealth to withhold or assess penalties. (N.T. 666; Exhibit P-151)

121. The Department of Revenue withheld these amounts as “lost ticket sales,” regardless of whether the machine’s ability to dispense tickets was impaired or whether actual sales were lost due to delayed repairs. (N.T. 638-645)

122. The “penalties” were calculated based upon a formula unilaterally adopted and implemented by the Department of Revenue and which failed to recognize the other services On-Point rendered, which fall under the \$37 per month maintenance fee. (N.T. 170, 665-666)

123. The only damages the contract permitted the Commonwealth to seek from On-Point were for actual lost ticket sales as a result of delayed or missed service. (Exhibit P-22, para. 20)

124. It was possible for the Commonwealth to calculate actual lost ticket sales, but it failed to do so. (N.T. 668)

125. The Commonwealth improperly assessed penalties against On-Point based on the status of the ITVM, not on actual ticket sales. (Exhibit P-96)

126. The Commonwealth assessed penalties even when there was “no problem found.” (Exhibit P-96)

127. The reduced payment of \$21,645 and the penalty assessed of \$37,694.38 were improper. (Board Finding)

128. On-Point is entitled to be paid the reduced payment of \$21,645 and the penalty assessed of \$37,694.38. (Board Finding)

129. The Commonwealth refused to pay On-Point for the parts used or service calls specifically made to repair malfunctioning machines on which the warranties had expired. (N.T. 181)

130. On-Point is entitled to be paid for the parts and service calls made upon machines on which the warranty had expired. (Board Finding)

131. On-Point suffered losses in the amount of \$70,202 because the Commonwealth failed to pay for replacement parts on ITVMs for which the warranty had expired. (N.T. 857; Exhibit P-132(a))

132. On-Point serviced the existing ITVMs from April 1, 1996 to July 22, 1997, and the Commonwealth accepted those services, which were based on extension of the 1993 Agreement. (Exhibit P-122)

133. On-Point and the Commonwealth entered into a Fourth Amendment to the 1993 Agreement under which On-Point continued to service ITVMs through March 31, 1998. (Exhibit P-122)

134. Under the Fourth Amendment to the 1993 Agreement, the Commonwealth agreed to pay On-Point \$59.50 per month per machine for preventative maintenance and \$18.75 per month per machine for an extended warranty. (Exhibit P-122)

135. The Fourth Amendment to the 1993 Agreement also modified the damages provisions of the 1993 Agreement to permit the Commonwealth to withhold penalties based on estimated lost ticket sales due to missed services or repairs. (Exhibit P-122)

136. The 1995 RFP states that the Lottery planned to purchase approximately 1,000 and up to 2,500 machines. (N.T. 273; Exhibit E)

137. Pennsylvania's demographics were such that there was not space for more than 2,400 machines in the retailer establishments. (N.T. 604)

138. The Commonwealth ultimately obtained 2,400 ITVMs from Automatic Wagering, Inc. ("AWI") through an "Options" provision in a 1998 RFP for on-line lottery game services, and entered into a second amendment providing a monthly fee for each machine. (N.T. 380-383; Exhibit P-146, 149)

139. The Commonwealth has taken delivery of all but 250 of these ITVMs supplied by AWI by Interlott and it was established that the Lottery intended to acquire the last 250 machines for a total of 2,400 ITVMs. (N.T. 383)

140. Prior to repudiating the contract between the parties on July 26, 1996, the Commonwealth and On-Point had agreed to all terms of the contract and by their actions intended to be bound by the terms of the contract. (Board Finding)

141. The Commonwealth, at various times, assured On-Point that the contract was completed and only required signatures. (N.T. 161-162, 288, 416; S.F. 12; Exhibit P-68)

142. The 1995 RFP was a binding contract between On-Point and the Commonwealth as signatures were not a condition to the formation of the contract. (Board Finding)

143. The Commonwealth breached the 1995 RFP between it and On-Point. (Board Finding)

144. The 1995 RFP entitled On-Point to sell 1,000 machines to the Commonwealth; the remaining 1,500 machines were optional with the Commonwealth. (Exhibit E)

145. The only sales guaranteed to On-Point was 1,000 machines. (Exhibit E)
146. On-Point's profit per machine was \$1,851.00. (Exhibit 132(a))
147. The ascertainable lost profit of On-Point caused by the breach of the Commonwealth on the sales of new machines is \$1,851,000. (Board Calculation & Finding)
148. Under the 1995 RFP, On-Point was to receive \$67.50 per month, per machine as an annual service fee payable in advance, for an annual revenue per machine of \$810.00. (Exhibit E, Exhibit 132(a))
149. At the time of the Commonwealth's breach, On-Point's profit on the annual service revenue was \$323 annually per machine. (Exhibit 132(a))
150. Based upon On-Point's past performance, it is reasonable to assume that all 1,000 machines would have been in place by December 31, 1996. (Board Finding from Record)
151. Accordingly, On Point's loss of profit on the annual service fee of the RFP contract caused by the breach of the Commonwealth would have been \$323,000 per year for a five year period totaling \$1,615,000. (Board Calculations)
152. On-Point is entitled to damages of \$1,615,000 for loss of profit on the RFP contract. (Board Finding)
153. The total loss of profit from the breach of the RFP contract to which On-Point is entitled is \$3,466,000 (\$1,851,000 + \$1,615,000). (Board Finding)
154. As On-Point did not object to being paid its annual service fee on a monthly basis, rather than being paid annually in advance, under the terms of its 1993 contract and amendments, On-Point is not entitled to claimed lost interest. (N.T. 815; Exhibit 132(a))
155. The rate for service under the 1993 contract, third amendment for the period April 1, 1996 through 1997, on the 1,196 machines in place at that time, was \$37 per month, per machine. (Exhibit P-68)
156. The rate for service under the 1993 contract fourth amendment for the period of April 1, 1997 through March 31, 1998 that On-Point was entitled to receive on 1,196 machines in place was \$59.50 per month, per machine. (Exhibit D, Exhibit P-122)
157. The calculations presented by On-Point were based upon a rate of \$67.50 per machine contained in the 1995 contract, and do not apply to the 1993 contract and its amendments. (Board

Finding)

158. Except for adjustments for payment and penalties improperly made, the Commonwealth paid On-Point its service fees due. (N.T. 635; Exhibit 132(a))

159. By awarding the reduced payment and the penalties to On-Point, On-Point has received all the payments it is entitled to. (Board Finding; utilizing: N.T. 635; Exhibit 132(a) Calculations)

160. Although the interest was stipulated to by the Commonwealth, the Board deducted the interest in the claim for replacement parts, penalties and preventative maintenance as statutory interest at 6% from the dates due will be applied in the award. (Board Finding)

161. On-Point is entitled to reliance damages of \$932,507.52. (N.T. 123, 142, 146, 251-252)

162. In summary, On-Point is entitled to the following damages:

- (a) \$932,507.52 in reliance damages with interest at 6% per annum from July 25, 1996, the date of the Commonwealth's breach.
- (b) \$1,851,000 for loss of profit from sales of machines under the 1995 contract with interest at 6% per annum from December 31, 1996, the estimated completed delivery date.
- (c) \$1,615,000 for loss of profits from service of machines under the 1995 contract with 6% interest per annum in phases as follows:
 - (1) on \$323,000 commencing December 31, 1996.
 - (2) on \$323,000 commencing December 31, 1997.
 - (3) on \$323,000 commencing December 31, 1998.
 - (4) on \$323,000 commencing December 31, 1999.
 - (5) on \$323,000 commencing December 31, 2000.
- (d) \$70,202 for unpaid replacement parts with interest at 6% per annum from March 15, 1997, the date of the last parts shipment.
- (e) \$37,695 for penalties wrongfully withheld with interest at 6% per annum from

April 1, 1996, the payment due date.

- (f) \$21,645 for wrongfully reduced preventative maintenance deductions with interest at 6% per annum from April 1, 1996, the payment due date.

163. The total principal award to which On-Point is entitled is \$4,528,049.52.

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the parties and the subject matter in dispute pursuant to 72 P.S. §§4651-1 to 10.

2. On August 28, 1995, the Commonwealth, acting through the Department of General Services issued a Request for Proposal (hereinafter referred to as "RFP") and is bound to comply with the procedures set forth in the RFP.

3. The Commonwealth is required to act in good faith with proposers giving every proposer equal access to the Commonwealth and is not to provide one proposer greater access than another proposer.

4. The RFP constituted an offer to participate in a contract forming process to be conducted in the manner set forth in the RFP.

5. On-Point's proposal in response to the 1995 RFP constitutes a valid offer.

6. The Commonwealth's December 13, 1995 letter communicated the Commonwealth's acceptance of On-Point's offer.

7. The acceptance of the On-Point proposal entitled On-Point to finalize the purchase and sale with the Commonwealth without interference from outside parties.

8. The Commonwealth and On-Point reached agreement on the essential terms concerning the purchase and maintenance of the ITVMs.

9. A contract existed between On-Point and the Commonwealth as there was an offer, acceptance, consideration and mutual meeting of the minds.

10. The procurement regulations set forth in the Guide for Procurement of Automated Technology Resources by the RFP process expressly state that all proposals must be kept confidential in order to avoid “[a]ttempts to influence the agency head’s decision by outside parties.”

11. The Commonwealth is required to follow these regulations in any RFP process for the acquisition of automated technology resources.

12. Under Pennsylvania law, an agreement to negotiate in good faith is enforceable.

13. By expressly stating in the RFP that the Commonwealth would enter into contract negotiations with the most responsive vendor and by communicating its “intent to enter into contract negotiations,” the Commonwealth undertook an obligation to do so.

14. The Commonwealth breached its procurement obligations when its representatives met with Interlott and permitted Interlott to challenge On-Point’s financial status.

15. The meetings between the Commonwealth and Interlott violated the express provisions of the RFP because the meetings were solely for the purpose of discussing the ability of On-Point to perform under the contract.

16. Commonwealth breached its obligation to negotiate with On-Point in good faith.

17. Prior to repudiating the contract between the parties on July 26, 1996, the Commonwealth and On-Point had agreed to all terms of the contract and by their actions intended to be bound by the terms of the contract.

18. The 1995 RFP and response was a binding contract between On-Point and the Commonwealth as signatures were not a condition to the formation of the contract.

19. The Commonwealth breached the self-imposed terms of the 1995 RFP and contract between it and On-Point.

20. On-Point is entitled to an award of the profits it would have earned from the sale and maintenance of ITVMs under the 1995 contract.

21. On-Point is entitled to reliance damages for the monies expended in anticipation of the contract start based upon the conduct of the Commonwealth.

22. The evidence introduced by On-Point and its experts provided a reasonable basis to estimate what damages On-Point was entitled to because of the Commonwealth’s breach.

23. Where the terms of the contract are unambiguous, the parties' intent should be ascertained from the language of the written agreement.

24. The only damages the 1993 contract and its amendments permitted the Commonwealth to seek from On-Point were for actual lost ticket sales as a result of delayed or missed service.

25. The Commonwealth breached the 1993 Agreement by improperly assessing penalties against On-Point based on the status of the ITVMs, not on actual ticket sales.

26. The Commonwealth breached the 1993 Agreement by refusing to pay On-Point amounts due for repairs and parts for malfunctioning machines on which the warranties had expired.

27. The Commonwealth breached the 1993 Agreement by refusing to pay On-Point the monthly service fee in advance for the period of the Third Amendment to the Service Agreement, April 1, 1996 through March 31, 1997.

28. By reason of the breach of the Commonwealth on the 1995 and 1993 Agreements, On-Point is entitled to the following damages:

a.	Reduced payment withheld on the 1993 contract.	\$ 21,645.00
b.	Improper penalty assessment under the 1993 contract.	\$ 37,695.00
c.	Repair and service upon expired warranty items.	\$ 70,202.00
d.	Loss of profits, 1995 contract upon sales.	\$1,851,000.00
e.	Loss of profits, 1995 contract upon annual service.	\$1,615,000.00
f.	Reliance damages for advance money spent.	\$ 932,507.52
	TOTAL PRINCIPAL DAMAGE	<u>\$4,528,049.52</u>

29. Six percent (6%) interest is to run on the principal amounts as follows:
- a. On \$21,645.00 from April 1, 1996, the payment due date.
 - b. On \$37,695.00 from April 1, 1996, the payment due date.
 - c. On \$70,202.00 from March 15, 1997, the date of the last shipment.
 - d. On \$1,851,000.00 from December 31, 1996, the estimated completion delivery date.

 - e. On \$1,615,000.00 upon annual due payments as follows:
 - (1) \$323,000.00 commencing December 31, 1996.
 - (2) \$323,000.00 commencing December 31, 1997.
 - (3) \$323,000.00 commencing December 31, 1998.
 - (4) \$323,000.00 commencing December 31, 1999.
 - (5) \$323,000.00 commencing December 31, 2000.
 - f. On \$932,507.52 from July 25, 1996, the date of the Commonwealth's breach.

OPINION

On March 12, 1993, the Plaintiff (hereinafter referred to as "On-Point") entered into an Agreement for Instant Lottery Games Services (hereinafter referred to as the "1993 Agreement") with the Commonwealth of Pennsylvania, Department of General Services. The operations of the Lottery is the administrative responsibility of the Department of Revenue and the Department of General Services serves

as the contracting arm for state agencies.

Under this Agreement, On-Point was to provide up to 1,000 ITVMs to the Lottery and to preventatively maintain these machines. As the name suggests, ITVMs are self-service vending machines that dispense instant winner lottery tickets. The 1993 Agreement also provided a measure of damages in the event On-Point failed to meet its installation, maintenance or training obligations.

The parties' obligations under the 1993 Agreement were essentially two-fold. On-Point was to supply 1,000 ITVMs, for which it would be paid per machine. On-Point was also to provide preventative maintenance services for the ITVMs which included monthly preventative maintenance services, maintaining a hot line to receive service calls, emergency repair services and vendor training. The Department of Revenue agreed to pay On-Point, in advance, an annual fee for these services of Thirty-Seven Dollars (\$37) per ITVM, per month, per machine.

The 1993 Agreement was for a three (3) year term, April 1, 1993 through March 31, 1996. The Department of Revenue could extend the Agreement for two (2) additional terms of one (1) year, upon terms and conditions mutually agreed upon by the Department of Revenue and On-Point, and could also order an additional 200 ITVMs. Under the Services Agreement, On-Point warranted ITVMs for the initial term of the contract except for the bill acceptors, which were warranted only for one (1) year. The contract did not address what On-Point would charge the Commonwealth for additional service calls made to repair either damaged machines or machines that suffered mechanical problems after the warranty period expired. The parties' partially addressed these issues when they executed an Amendment to the contract providing that the Commonwealth would pay On-Point a Five Dollar and Fifty Cent (\$5.50) per month fee, per machine, for each machine on which the warranty on the bill acceptor had expired to provide any

necessary repairs or replacement services.

On-Point began delivering machines in September 1993 and the Lottery was so pleased with On-Point's ITVMs that within months it had ordered all 1,000 machines specified in the contract and determined that it would be in the Commonwealth's best interest to expand the program. Initially, the Lottery sought to purchase another 1,200 ITVMs from On-Point. However, under State procurement requirements, it could not buy any more machines from On-Point than were specified in the 1993 contract without affording other competitors an opportunity to bid. Therefore, less than a year after executing its initial contract for ITVMs, the Lottery executed a First Amendment to the

1993 Agreement with On-Point to order the 200 additional ITVMs authorized under the Agreement. Simultaneously, the Lottery began the lengthy process of acquiring additional ITVMs through the RFP process.

The RFP was issued in August 1995, to, among others, On-Point and one of its competitors, Interlott. The RFP described in detail the standards to which responsive proposals must be prepared, set forth the procedure by which the Commonwealth would evaluate proposals, described how the RFP process would be conducted, and explained the objective of the RFP to purchase and maintain ITVMs.

On October 5, 1995, On-Point timely submitted its proposals to the Lottery, setting forth in detail the specific types of machines it proposed to sell to the Lottery, the number of machines, the prices it would charge, the warranties it would offer, the manner of delivery and the nature of the maintenance and service it would provide. Included in On-Point's proposals was a fee for maintenance and related services of Sixty-Seven Dollars and Fifty Cents (\$67.50) per month, per ITVM.

The Lottery received one other proposal in response to the RFP, which was submitted by Interlott. The RFP Committee conducted a detailed review and analysis of these proposals that included attending interviews with and presentations by the vendors and testing model machines. The RFP Committee used a sophisticated scoring procedure to analyze the terms of the proposals in an effort to identify which was most responsive to the Commonwealth's needs as set forth in the RFP. The proposal garnering the highest score was deemed the most responsive.

Based on the objective scoring mechanism, the RFP Committee selected one of On-Point's proposals as the most responsive. The Secretary of Revenue, Robert Judge, reviewed and approved the selection of On-Point, and recommended to the Department of General Services that a contract be awarded to On-Point. George C. Fields, Deputy Secretary for Procurement, accepted this recommendation and approved the selection of On-Point. Specifically, Mr. Fields advised Secretary Judge that the "Department of General Services acknowledges and approves the selection of [On-Point] for the award of the Instant Ticket Vending Machines." (Exhibit P-51) Accordingly, on December 13, 1995, Secretary Judge sent a letter to On-Point informing it that its proposal was the most responsive to the Commonwealth's RFP.

Based upon past practice and through constant contact with Commonwealth officials, On-Point commenced inventory build-up so it could deliver 75 machines, per month. Additionally, the Lottery employees were meeting with On-Point and were making plans for mobilizing and administering the On-Point ITVMs under the 1995 contract.

Inexplicably, even before On-Point was informed that the contract was to be awarded to it, representatives of Interlott learned of the Commonwealth's selection of On-Point's proposal as the most

responsive. In response, it engaged William Warren, a lobbyist who previously served as the Chief Counsel of the Department of General Services (1987-1989) and Chief of Litigation, Office of General Services (1989-1991) of the Commonwealth to complain to the Commonwealth about the designation of On-Point as the most responsive proposer.

In a series of letters to and meeting with the Commonwealth, Mr. Warren falsely alleged that On-Point did not have the financial ability to perform under the new ITVM contract. The Commonwealth yielded to Interlott's pressure and, although prohibited by the RFP, met with Mr. Warren and a representative from Interlott, to discuss the baseless allegations Interlott had made.

As a result of continued communications between the Commonwealth and Interlott, the Commonwealth suspended contract negotiations with On-Point before they had even begun.

The Commonwealth did not tell On-Point that the negotiations were on hold, and, when On-Point, puzzled by the Commonwealth's lack of responsiveness, asked when it would proceed forward, the Lottery officials assured On-Point that nothing was wrong, gave excuses for delay and assured On-Point it was only administrative in nature.

As Lottery employees were proceeding forward, this reinforced On-Point's understanding that the Commonwealth's orders for new machines were delayed due to some administrative matters that would be quickly resolved and reinforced On-Point's belief that it must be prepared to deliver a substantial number of ITVMs in a short amount of time.

Therefore, On-Point continued its inventory build-up during the entire time it was being misled as to the reasons why the Commonwealth had stalled in executing the contract documentation. To ensure it would perform on the contract, On-Point built-up Nine Hundred Thirty-Two Thousand Five Hundred

Seven Dollars (\$932,507) in inventory, which it was not able to use after the Commonwealth breached its contractual obligations.

In March of 1996, the Commonwealth finally told On-Point that it was delaying the implementation of the new ITVM contract because of allegations raised by Interlott, and asked On-Point to respond to those allegations. On-Point promptly responded and presented detailed factual information of its financial stability, including the recent investment of over Six Million Dollars (\$6,000,000) into the company. Senior Lottery officials also met with On-Point representatives and were ultimately satisfied that On-Point was financially stable, able to perform its obligations under the new contract and would provide the Commonwealth additional performance assurance, such as a bond or transfer of repair parts. At the conclusion of its investigation, the Commonwealth assured On-Point that it would proceed with finalizing the contract documents.

The Department of Revenue notified On-Point that it intended to extend the 1993 Services Agreement for one (1) year and asked On-Point to agree that the extension would be under the same terms and conditions as in the original 1993 Agreement. The Department of Revenue represented to On-Point that this extension was necessary because of the delay in ordering machines under the new contract, and that the Amendment would essentially be an interim agreement to bridge the gap between the 1993 Agreement and the new contract. These representations reinforced On-Point's understanding that the formal contract documents would soon be completed.

Therefore, On-Point agreed to extend the 1993 Agreement. However, recognizing that the warranty provided under the 1993 Services Agreement was set to expire, On-Point prepared a letter of interpretation through which it advised the Commonwealth that On-Point interpreted its warranty as only

extending through the initial term of the 1993 Agreement and that it would begin charging for necessary repair parts for ITVMs no longer under warranty. At no time prior to accepting On-Point's services, did the Commonwealth dispute On-Point's interpretation.

Shortly after On-Point executed the Third Amendment to the 1993 Agreement, the Commonwealth refused to proceed with ordering ITVMs under the 1995 Agreement. In June of 1996, the Commonwealth decided to terminate the 1995 RFP and began to prepare an Invitation to Bid to acquire the needed ITVMs. However, intending to lock On-Point into providing maintenance services under the 1993 rates instead of the more equitable terms of the new contract, the Commonwealth executed the Third Amendment before publicly announcing its termination of the RFP and before On-Point knew the Commonwealth would not proceed under the new contract.

On July 25, 1995, the Commonwealth finally advised On-Point that the RFP was canceled and even though On-Point requested a debriefing conference, the Department of Revenue refused this request. The Commonwealth began interpreting the 1993 Agreement different than it had in the past and disputes began to arise between On-Point and the Commonwealth.

Beginning in September, 1996, the Department of Revenue began reducing payments due On-Point under the extended 1993 Agreement for "missed preventative maintenance." The "penalties" were calculated by the Department of Revenue based upon a formula it alone created and implemented. Nothing in the 1993 Agreement permitted the Commonwealth to unilaterally withhold payments in the form of such "penalties." The Department of Revenue also withheld amounts it represented as "lost ticket sales" for machines that the Department believed were not serviced, regardless of whether the machine's ability to dispense tickets was impaired or whether actual sales were lost due to delayed repairs. Additionally, the

Commonwealth refused to pay On-Point for the parts used or service calls specifically made to repair malfunctioning machines on which the warranties had expired.

Although denied by the Commonwealth, it is the opinion of this Board that the Commonwealth's reversal of attitude was caused by the lobbying activity of Interlott. Not only did the Commonwealth make one excuse after another to not signing the contract, it at all times was talking and dealing with Interlott. The Commonwealth refused to pay advanced fees pursuant to contract requirements of the 1993 Agreement even though clearly required to do so. Because of the timing, this Board concludes that it is because of the Interlott activity. Further, the Commonwealth did not seek bids for the ITVM's as represented. Bids were requested for on-line lottery game services and awarded to Automated Wagering, Inc. (hereinafter referred to as "AWI") in 1998. On December 16, 1999, AWI and the Commonwealth entered into a Second Amendment to its 1998 contract to furnish 2,400 ITVMs for a monthly fee, per machine. Interestingly, the ITVMs are supplied to AWI by Interlott.

When the Commonwealth sent On-Point its letter of December 13, 1995, notifying On-Point that it was the successful proposer, the Commonwealth bound itself to deal with On-Point, as opposed to any other vendors, and to do so in good faith.

The Commonwealth contends these obligations did not exist as there was no contract. This Board is of the contrary opinion. After hearing the witnesses, seeing the evidence and assessing the creditability of the witnesses, this Board is of the opinion that not only did the Commonwealth violate its duty of good faith and fair dealing with On-Point, it did in fact breach a contract that the parties had reached.

Under Pennsylvania law, "to form an enforceable contract, there must be an offer, acceptance, consideration and mutual meeting of the minds." Schreiber v. Olan Mills, 426 Pa. Super. 537, 541-542,

627 A.2d 806, 808 (1993) The terms of any contract must be certain and explicit, not vague or indefinite. Potter v. Leitenberger Mach. Co., 166 Pa. Super. 31, 34, 70 A.2d 390, 392 (1967); see also Stumpp v. Stroudsburg Mun. Auth., 540 Pa. 391, 396, 658 A.2d 333, 335 (1995)

Neither the offer nor the acceptance need be set forth in a formal written document, and parties may create a contract orally or even by their conduct. Under Pennsylvania law, “so long as the parties agree on essential terms which they intend to be binding, a contract is formed even though they intend to adopt a formal document with additional terms at a later date.” Courier Times, Inc. v. United Feature Syndicate, Inc., 300 Pa. Super. 40, 54, 445 A.2d 1288, 1295 (1982). See also Field v. Golden Triangle Broadcasting, Inc., 451 Pa. 410, 418, 305 A.2d 689, 693 (1973). All that is necessary for formation of a contract is “a meeting of the parties’ minds on the essential elements of their agreement.” Courier Times, 300 Pa. Super. at 54, 445 A.2d at 1295. “The intent of the parties is a question of fact which must be determined by the fact finder.” Johnston v. Johnston, 346 Pa. Super. 427, 430, 499 A.2d 1074, 1076 (1985)

The RFP sets forth a procedure for the acquisition of ITVMs and establishes various milestones in the process. The RFP provides that proposals will be reviewed by the RFP Committee and the Committee “will recommend for selection the proposal which best meets the needs of the Commonwealth in terms of the requirements of this RFP and price.” (RFP, “Review and Evaluation of Proposals,” § IV-1) In the evaluation Method section of the RFP, again it is confirmed as follows: “When all the responses are evaluated and the points awarded for each, the proposal with the highest number of points will be recommended for selection by the Commonwealth.” (RFP, § IV-3) In the opinion of the Board, it is clear that, when the RFP Committee found On-Point’s proposal to be the most responsive, its recommendation

to Lottery Executive Director Kline and then to Secretary Judge was that this proposal be selected. When Secretary Judge approved this recommendation, he selected On-Point and its proposal and communicated this selection to On-Point when he advised that its proposal had been designated the most responsive.

The binding effect of this selection is further evidenced in Section I-5 of the RFP, which provides that:

Negotiations will be undertaken with the responsible Vendor whose responsive proposal best meets the needs of the Commonwealth in terms of the requirements of this RFP. These negotiations with the Commonwealth will result in a formal contract between the parties. (Emphasis added)

The use of the mandatory word “will” with respect to negotiations and the execution of a formal contract in the 1995 RFP demonstrates that by designating a proposal as the most responsive, the Commonwealth intended to accept the proposer as the contract vendor under the essential terms set forth in the RFP and proposal. The Commonwealth never expressed any disagreement with or rejection of these essential terms.

The meeting of the minds in this case is reflected in the memorandum from the Department of General Services approving the selection of On-Point for the award. (Exhibit P-51) Secretary Judge himself testified that the Commonwealth had agreed to purchase ITVMs from On-Point and all that remained was to “work out. . .using their equipment for sale of lottery tickets. . . .” (N.T. Judge at 913) The only items that needed to be completed were a delivery schedule and the number of machines. Further, drafts of the Agreement were supplied to On-Point and after On-Point clarified some financial questions officials requested execution of the contract by Secretary Judge. It is further observed by the Board that the draft contract was essentially completed, attached to the RFP and later, after some

refinement, given to On-Point.

In the opinion of this Board, it was intended by the parties that the contract process had essentially ended and all that remained was the formal execution by the parties. The failure of the Commonwealth to finish the contract by execution was not in good faith and was itself a breach of the contract between the parties.

The parties agreed that On-Point was the successful proposer and that some items needed to be negotiated and placed in a formal Agreement to be executed. This, in itself, was a contract to negotiate in good faith between the parties and each party intended to be bound thereby. Jenkins v. County of Schuylkill, 441 Pa. Super. 642, 658 A.2d 380, appeal denied 542 Pa. 647, 666 A.2d

1056 (1995); Philman Mid-Atlantic, Inc. v. York Street Associates, 389 Pa. Super 297, 566 A.2d 1253 (1989)

In this action, On-Point has demonstrated, by the preponderance of the evidence, that the Commonwealth's notification to On-Point that it had been selected as submitting the most responsive proposal served to confirm the parties' agreement on the essential terms of an award of the contract to On-Point and an intention to be bound to purchase and sell ITVMs even though it was expected that there would be negotiation of additional terms and the execution of a formal document. Simply stated, the December letter notification served to award the contract to On-Point regardless of the fact that they intended to negotiate further and to execute a written contract. Further, the December letter resulted in a contract to carry out those negotiations in good faith.

The Commonwealth's actions in not negotiating while at the same time meeting with a competing

vendor without notifying On-Point, in stalling On-Point with intentional made-up excuses, in failing to appoint a negotiation Committee, in representing that an extension of the 1993 contract would act as a bridge to the 1995 contract while knowing it was going to terminate the 1995 RFP all were evidence that leads this Board to the conclusion that the Commonwealth breached its obligations to negotiate in good faith. This breach itself entitled On-Point to damages.

As there was nothing left to do but execute the formal contract, the parties in fact had an Agreement and the letter of July 26, 1996, that the RFP had been terminated was a breach of that contract.

The Commonwealth asserts that it was not bound to perform under the contract with On-Point merely because there was no formal written document. This Board was of that opinion until this subject was discussed by the Pennsylvania Supreme Court. In Shovel Transfer and Storage, Inc. v. Pennsylvania Liquor Control Board, 559 Pa. 56, 739 A.2d 133 (1999), the Commonwealth argued that its contract with a liquor warehousing company was not enforceable because signature lines were provided on the contract for the Budget Secretary and Comptroller and neither had signed the contract. This Board held that the absence of these signatures rendered the contract unenforceable and the Commonwealth Court affirmed. The Supreme Court reversed the Commonwealth Court and this Board, holding that:

[t]he lower tribunals held that the signatures were a condition to the formation of an enforceable contract, and therefore, in the absence of the signatures, a condition remained unfulfilled and a contract was not formed. However, our review of the law makes clear that an unfulfilled condition does not impede the formation of a valid contract.

Id. at 368, 739 A.2d at 139

The Pennsylvania Supreme Court rejected the argument the Commonwealth asserts here that there

are special requirements for the formation of a contract with the Commonwealth. In Shovel, Pennsylvania Supreme Court further provided that:

Notwithstanding general principles of contract law, in determining the validity of a state agency contract three matters must be considered. First, had the state agency the power to enter the contract, and if so, whether it was entered into by the proper entity, i.e., department, board, committee, officer or agent. Second, was the contract entered into by proper mode, i.e., does a statute govern contract formation. Third, whether it is evident that a contract was formed, and if so, whether it must be in writing, and if so whether the writing is contingent upon other conditions, such as, signatures or approvals.

Id. The Court added: “If the mode of contracting is not prescribed by statute, a state agency may make a contract in the same manner as other corporations or partnerships or individuals.” Id.

In Shovel, the Supreme Court analyzed the applicable statutory provisions to determine whether the signatures at issue were required by statute. Finding that they were not, the Court went on to analyze the contract formation applying standard Pennsylvania contract analysis. Moreover, the Court cited with approval case law holding that “If the parties agree upon essential terms and intend them to be binding, a contract is formed even though they intend to adopt a formal document with additional terms at a later date.” Id.

This Board can find no discernable difference between this case and Shovel. Shovel is applicable to this case and in fact, supports On-Point’s position and compels this Board to award damages to On-Point because of the various breaches of contract by the Commonwealth.

Here, the proper state agencies and officers approved the 1995 RFP contract. In fact, drafts of the contract had been submitted to On-Point for approval. The procedure followed was that set forth in

the RFP prepared by the Commonwealth, which, On-Point followed and completed everything required of it. It is evident to this Board that it was the intent of all parties that a contract was reached and entered into and that the signatures were a mere formality. In fact, On-Point was encouraged by the Commonwealth to place itself in a position to immediately supply vending machines and, On-Point, in reliance thereon, did exactly what the Commonwealth encouraged. There is no doubt in the minds of this Board that the parties had reached a contract.

To prevail upon a claim for breach of contract, a plaintiff must establish: (i) that the parties entered into an enforceable agreement; (ii) the terms of the agreement; (iii) the performance by the plaintiff; (iv) the defendant's breach of his obligations under the contract; and (v) damages or the right to another remedy.

General State Authority v. Coleman Cable & Wire Co., 27 Pa. Cmwlth.

385, 365 A.2d 1347 (1976) On-Point has established all these items in the 1993 breaches and the 1995 contract breaches.

Where the terms of the contract are unambiguous, the parties' intent should be ascertained from the language of the written agreement. Gallagher v. Fidelcor, Inc., 441 Pa. Super. 223, 657 A.2d 31, 33, *app. denied*, 544 Pa. 675, 678 A.2d 365 (1995) "In the absence of technical terms, we give the words used in the agreement their plain and ordinary meaning." Warren v. Greenfield, 407 Pa. Super. 600, 605-607, 595 A.2d 1308, 1311 (1991)

With respect to the 1993 Agreement, On-Point seeks to recover reimbursement for the Commonwealth's refusal to make payments which the Commonwealth concedes would be admittedly due and owing under the contract.

The Commonwealth bases its failure to pay On-Point for all of the amounts that would otherwise be due under the 1993 Agreement upon the assertion that On-Point failed to discharge its preventative maintenance and service obligations in a timely and workmanlike manner. On its face, however, this assertion does not justify the Commonwealth's failure to submit advance payment of the preventative maintenance fees. Under the terms of the 1993 Agreement, the preventative maintenance fees were due before On-Point began providing services for the next contract year. The Commonwealth cannot justify its failure to pay in advance for services on the contention that those services, which had yet to be performed, were not adequately performed. The Commonwealth did not provide notice to On-Point prior to the time the 1993 Agreement was extended of any perceived deficiencies in its preventative maintenance service. The Commonwealth can not be permitted to induce On-Point to extend the 1993 Agreement on terms that would require it to make advance

payments and then immediately refuse to provide those payments on the ground of previously undisclosed purported failures to adequately provide preventative maintenance during the term of the Agreement.

Furthermore, the 1993 Agreement did not provide for the Commonwealth to withhold "penalties" from the amounts due On-Point. The only damages the contract permitted the Commonwealth to seek from On-Point were for actual lost ticket sales as a result of delayed or missed service. (P-33 at para. 20) The damages provision of the Services Agreement is not open to interpretation nor did it require that the Commonwealth devise some calculation to "estimate" lost ticket sales, no matter how fair the Commonwealth believed its method was. This is particularly so where the Commonwealth admits that it was possible to calculate actual lost ticket sales, as required by the contract. The Commonwealth

concedes that it has no evidence that any purported deficiencies in On-Point's service caused lost ticket sales. There were many instances in which a service call was made to address a malfunction which did not render the ITVM completely inoperable or in any manner affect the operation of the ITVM. However, the Commonwealth would assess a penalty against On-Point based on the mere fact of a delay, not on actual ticket sales, and even when there was "no problem found."

Accordingly, this Board has found that there was no contract authority for the Commonwealth to assess penalties or withhold payments as it did; repayment of Twenty-One Thousand Six Hundred Forty-Five Dollars (\$21,645) and Thirty-Seven Thousand Six Hundred Ninety-Five Dollars (\$37,695), will be ordered.

The Commonwealth has also failed to pay On-Point the bills for parts and service to machines not covered by warranty in the amount of Seventy Thousand Two Hundred Two Dollars (\$70,202).

The Commonwealth justifies its failure to pay for the replacement parts On-Point provided and the service (as opposed to preventative maintenance) calls it made by contending that the equipment was still under warranty. But, under the express terms of the 1993 Services Agreement, the warranty applied only during the terms of the original Agreement, not any extensions thereof. When the extension was executed, On-Point confirmed this understanding in writing, and the Commonwealth executed the extension without ever advising On-Point that it disagreed with its interpretation. Moreover, the Commonwealth essentially concedes that the warranty on the ITVMs had expired when, forced to negotiate a fair extension to the

term of the contract, it agreed to pay an Eighteen Dollar and Seventy-Five Cent (\$18.75) per month, per machine, extended warranty fee.

Accordingly, the amount of \$70,202 will be awarded for those services and parts.

As to the 1995 contract, the Board has found that the Commonwealth breached its duty to negotiate in good faith and in terminating the 1995 Agreement on July 26, 1996.

It is a fundamental principle of contract law that a party is entitled to recover as damages those monies and other relief sufficient to place it in as good a position as if the contract had been performed. Trosky v. Civil Service Commission, 539 Pa. 356, 363, 652 A.2d 813, 817 (1995); Douglass v. Licciardi Construction Company, Inc., 386 Pa. Super 292, 295, 562 A.2d 913, 195 (1989) The Courts have generally recognized that benefit of the bargain damages are one of the appropriate remedies in a breach of contract action. Here, On-Point's lost profits are the benefit of its bargain. On-Point need not prove its damages with mathematical certainty, but only with a reasonable certainty and evidence of damages may consist of probabilities and inferences. Delahanty v. First Pennsylvania Bank, N.A., ___ Pa. Super. ___, 464 A.2d 1243, 1257 (1983). See also Aircraft Guar. Corp. v. Stratolift, Inc., 991 F. Supp. 735 (E.D. Pa. 1998); Blanche Road Corp. v. Bensalem Tp., 57 F.3d 253 (3d Cir. 1995); Molag, Inc. v. Climax Molybdenum Co., ___ Pa. Super. ___, 637 A.2d 322, 324 (Pa. Super 1994). Where the amount of damage can be fairly estimated from the evidence, the recovery will be sustained even though the amount cannot be determined with entire accuracy. Delahanty at 1258. It is only required that the proof afford a reasonable basis from which the fact finder can calculate the plaintiff's loss. Id.

On-Point sustained its greatest damages as a result of the Commonwealth's broken promise in regard to the award of the 1995 RFP. On-Point asserts lost profits on the anticipated sale of 2,400

ITVMs in the amount of Five Million Four Hundred Forty-One Thousand Seven Hundred Fifty-Seven Dollars (\$5,441,757) and lost profits on the maintenance and servicing of the new ITVMs in the amount of Four Million Four Hundred Three Thousand Eight Hundred Sixteen Dollars (\$4,403,816). In support of its lost profits claims, On-Point demonstrated that its calculations were made in a manner commonly used in its business. In calculating its lost profits on the lost sale of ITVMs, On-Point determined its cost per machine were Three Thousand Forty-Nine Dollars (\$3,049) and its sales prices per machine were Four Thousand Nine Hundred Dollars (\$4,900) to arrive at a lost profit of One Thousand Eight Hundred Fifty-One Dollars (\$1,851) per machine. On-Point calculated its lost profits based on the amount of machines ultimately obtained by the Commonwealth 2,400.

Additionally, the previous 1,200 machines sold by On-Point would need replacement and it could be argued that it was entirely foreseeable that those machines could have been replaced during the 1995 Agreement thereby increasing the claim of On-Point by another 1,200 machines. This is supported by the fact that Automatic Wagering did in fact replace the 1,200 On-Point machines.

On-Point has a strong argument that, as the Commonwealth knew that at least 2,400 machines would be ordered and that replacement of the 1,200 machines would occur when the Commonwealth engaged in conduct which violated the duties owed to On-Point, it was easily foreseeable that On-Point would be severely damaged as a result of the Commonwealth's breaches and that full damages should be awarded for loss of profit of the total sales of all machines sold or leased by Automatic Wagering to the Commonwealth.

Although this Board is of the opinion that On-Point is entitled to lost profit on sales, that loss should be restricted to 1,000 machines as that is the amount On-Point was entitled to sell under the contract.

Machines in excess of 1,000 would be under the options provisions of the contract and the Commonwealth was under no obligation to exercise these optionable provisions. Accordingly, the lost profits will be \$1,851 per machine on 1,000 machines for a total amount of One Million Eight Hundred Fifty-One Thousand (\$1,851,000).

In calculating its lost profits from loss of maintenance on the 1995 ITVM machines, On-Point determined that its gross profit per machine based on \$67.50 per machine, per month was Eight Hundred Ten Dollars (\$810) annually, per machine with a net profit of Three Hundred Twenty-Three Dollars (\$323) per machine annually. Using 1,000 machines for the reason above explained, On-Point would be entitled to Three Hundred Twenty-Three Thousand Dollars (\$323,000) a year for five years for a total of One Million Six Hundred Fifteen Thousand Dollars (\$1,615,000).

The Commonwealth contends that these expectancy damages can not be recovered against it as a state entity. This contention has been rejected by our courts in Department of Municipalities v. Herbert R. Imbt, Inc., 157 Pa. Cmwlth. 573, 630 A.2d 550 (1993); Commonwealth of Pennsylvania v. Craftech International, Ltd., 72 Pa. Cmwlth. 162, 456 A.2d 247 (1983). Accordingly, the above damages for loss of profits will be awarded.

Lastly, the \$932,507.52 spent by On-Point in reliance upon the Commonwealth's actions encouraging On-Point to prepare for performance under the 1995 contract, should be reimbursed to On-Point. Where a party breaches a contract, the non-breaching party is entitled to be made whole. On-Point can not be made whole until the \$932,507.52 preparation cost it spent is recovered as these monies were spent for inventory that was only usable on the Pennsylvania ITVM machines. As this Board has found that these expenses were reasonable and were incurred upon the reasonable expectation that the contract

was being given to On-Point and that the preparations were not unreasonable, the sum of \$932,507.52 will be awarded to On-Point so that it is whole and held harmless by the breaches of the Commonwealth.

As to interest, the Board has awarded interest on each item of damage as the same was due under the contract or when the Commonwealth's duty to pay arose in accordance with Department of Transportation v. Anjo Construction Co., Pa. Cmwlth, 666 A.2d 753 (1995)

ORDER

AND NOW, this day of March, 2002, an award is hereby entered in favor of the Plaintiff, On-Point Technology Systems, Inc. and against the Defendants, Commonwealth of Pennsylvania, Department of Revenue and Department of General Services as follows:

- | | | |
|----|---|--------------|
| a. | Reduced payment withheld on
on the 1993 contract. | \$ 21,645.00 |
| b. | Improper penalty assessment
under the 1993 contract. | \$ 37,695.00 |
| c. | Repair and service upon
expired warranty items. | \$ 70,202.00 |

d.	Loss of profits, 1995 contract upon sales.	\$1,851,000.00
e.	Loss of profits, 1995 contract upon annual service.	\$1,615,000.00
f.	Reliance damages for advance money spent.	\$ 932,507.52
	TOTAL PRINCIPAL DAMAGE	<u>\$4,528,049.52</u>

Further, it is hereby **ORDERED** that interest is awarded upon the award herein at six percent (6%) per annum as follows:

- a. On \$21,645.00 from April 1, 1996, the payment due date.
- b. On \$37,695.00 from April 1, 1996, the payment due date.
- c. On \$70,202.00 from March 15, 1997, the date of the last shipment date.
- d. On \$1,851,000.00 from December 31, 1996, the estimated completion delivery date.
- e. On \$1,615,000.00 upon annual due payments as follows:
 - (1) \$323,000.00 commencing December 31, 1996.
 - (2) \$323,000.00 commencing December 31, 1997.
 - (3) \$323,000.00 commencing December 31, 1998.
 - (4) \$323,000.00 commencing December 31, 1999.
 - (5) \$323,000.00 commencing December 31, 2000.
- f. On \$932,507.52 from July 25, 1996, the date of the Commonwealth's breach.

BOARD OF CLAIMS

David C. Clipper
Chief Administrative Judge

Louis G. O'Brien
Engineer Member

John R. McCarty
Citizen Member