COMMONWEALTH OF PENNSYLVANIA

PAMELA P. KRAMER d/b/a PPK ENTERPRISES	:	BEFORE THE BOARD OF CLAIMS
VS.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF GENERAL SERVICES	:	DOCKET NO. 3282

FINDINGS OF FACT

1. Plaintiff, Pamela P. Kramer, d/b/a PPK Enterprises, is a sole proprietor with an address at P.O. Box 358, Hereford, Pennsylvania 18056. Defendant, Commonwealth of Pennsylvania, Department of General Services, is a Commonwealth agency with an address at Room 414, North Office Building, P.O. Box 8365, Harrisburg, Pennsylvania 17105. (Stipulation of Facts submitted by and agreed to by the parties ((hereinafter "Stipulation"), Stipulation No. 1)

2. PPK Enterprises is certified with the Commonwealth of Pennsylvania as a Small Disadvantaged Woman Enterprise, which qualifies as a Small Business Concern. (Stipulation No. 2)

3. Plaintiff operated a business known as PPK Enterprises, which she formed for the purpose of selling pager and cellular telephone services to the Commonwealth of Pennsylvania. (N.T. 264-67)

4. In May 1999, Plaintiff received notice that there was a Commonwealth Contract for wireless communication services that would be open for bidding in June 1999. Plaintiff turned in a bid package to Defendant on June 11, 1999. Plaintiff was notified that Plaintiff was an awardee of the Contract with the Commonwealth of Pennsylvania on August 17, 1999. The Contract is "Wireless Communication Service Contract 9985-03", (hereinafter the "Contract"). (Stipulation No. 3)

5. Plaintiff properly bid for the Contract and the Contract became effective on August 30, 1999. (Stipulation No. 10)

6. Supplement No. 1 to the Contract (hereinafter the "Supplement") became effective on June 29, 2000. (Stipulation No. 11)

7. Plaintiff was capable of selling and servicing in excess of 7,000 pagers to and for the Commonwealth. (N.T. 390-95)

8. The Contract is a Multiple Award Contract, which Plaintiff knew at the time she entered into the Contract, and all awardees under the Contract had the same rights to provide wireless communication to Commonwealth agencies as Plaintiff had. (Stipulation Nos. 3 and 22)

9. All Supplement awardees had the same rights to provide wireless communications to Commonwealth agencies as Plaintiff did after June 29, 2000, under Supplement No. 1 to Wireless Communication Service Contract 9985-03. (Stipulation No. 11)

10. The only reasons for which a Commonwealth agency could avoid using the Contract to purchase pagers were the following:

a. To transition from an existing Service Purchase Contract; or

b. If the purchase was under the "Small No-Bid Procurement of Services" limit set by the Department of General Services.

(Stipulation Nos. 5 and 6)

11. What has been described in the testimony as State Contract No. 9999-01 was not a contract at all. It has been described as a "mechanism" for agencies to purchase wireless services prior to implementation of the Contract. (Stipulation No. 9; Plaintiff's Exhibit 49 – Peter Good Letter of June 5, 2001) Number 9999-01 was not a written document and did not have a termination date. (N.T. 122) It was recognized by the Department of General Services as a loophole that agencies could use to avoid using the Contract. (N.T. 594-95)

12. From the end of October 1999 to June 2000 Plaintiff was the only awardee for the sale and servicing of pagers under the Contract because the other original awardee, 360 Communications, stopped selling pagers under the Contract by the end of October, 1999. (Stipulation No. 33; N.T. 161-62)

13. During fiscal year 1999/2000, the Commonwealth leased or owned 7,054 pagers under agreements that exceeded the no-bid maximum. (Stipulation No. 35)

14. When Supplement #1 was awarded and more vendors were placed on the Statewide Contract because of the Supplement, the Department of General Services instructed Commonwealth agencies that 9999-01 could no longer be used for the purchasing and servicing of pagers after June 30, 2000. (N.T. 119-25; Plaintiff's Exhibit 36)

15. There is no valid reason or explanation in the record for why the instruction referenced in paragraph 14 above was not given by the Department of General Services when the original Contract was issued. (Board Finding)

16. The vast majority (93.1%) of pager contracts entered into by Commonwealth agencies during fiscal year 1999/2000, as represented in Defendant's Exhibit No. 4, were field purchase orders that listed 9999-01 as the "Contract Number." (Defendant's Exhibit 4)

17. Although Plaintiff proved that 93.1% of the Commonwealth's pager business should have been conducted with awardees under the Contract during fiscal 1999/2000, Plaintiff did not credibly demonstrate that Contract awardees were entitled to the other 6.9% of Commonwealth business, especially in light of the Commonwealth's testimony that service purchase orders are often entered into for the entire fiscal year. (N.T. 438; Board Finding)

18. Plaintiff's gross revenue per pager that she would have received under the Contract was $20.85 per month. (N.T. 483-91, 634)

19. From August 1999 to June 29, 2000, awardees under the Contract should have been given the opportunity to sell and service 6,568 pagers (7,054 x 93.1%). (Board Finding)

20. During September and October 1999, there were two active vendors under the Contract with the Commonwealth. However, no evidence was presented to substantiate the distribution of pagers between the two vendors. Thus, the Board cannot determine Ms. Kramer's share with reasonable certainty for September and October 1999. (N.T. 161-62; Board Finding)

21. The Commonwealth's fiscal year ends on June 30, and since the Commonwealth's Supplemental Agreement became effective on June 30, 2000, the Board determines that the period of time when Plaintiff was the exclusive vendor, and for which damages may be calculated with reasonable certainty, extended from November 1999 through June 2000, a period of eight months. (N.T. 161-62; Board Finding)

22. Applying Plaintiff's expert witness Herbein's ramping-up and ramping-down adjustment for determining the actual number of pagers to which Plaintiff should be entitled for the eight month period and multiplying this number by the gross revenue per pager of $20.85 per month, the Board determines that number to be as follows:

> Total Gross Revenue = 6,568 pagers x $20.85 per pager/month x 8 months = $1,095,542

(N.T. 492-93, 514-19; Plaintiff's Exhibit 65, Ex. 1; Board Finding)

23. Plaintiff would have experienced costs of sales associated with doing this business under the Contract of 63.92% of gross revenues. Plaintiff's expert testified that the cost of sales on the pager business would have been 52% (N.T. 555) and that there would have been an additional variable cost of 5% attributed to the sales volume increase up to the 6,568 pagers. (N.T. 542-43). Defendant's expert testified persuasively that these costs were understated because they did not include the cost of goods sold, and undervalued the variable costs. (N.T. 634-40). Unfortunately, Defendant's expert did not testify with specificity about how these under valuations of Plaintiff's costs of doing business affected the bottom line calculations. The Board is persuaded, however, that Plaintiff's original figures are too low and that a more credible cost of sales figure is 63.92%, the figure used in Exhibit B of Plaintiff's Proposed Findings, Conclusions and Brief discussed at Page 57. (N.T. 542-43, 634-40; Board Finding)

24. In order to properly calculate Plaintiff's net profits from the Contract for the period November 1999 through June 2000, it is necessary to deduct an appropriate amount for overhead expense that would have been incurred by Plaintiff. These overhead expenses were accounted for, at least in part, by Plaintiff's expert and referred to as variable expenses. (N.T. 542-43; Plaintiff's Exhibit 58; Board Finding)

25. Plaintiff's expert at one point testified he derived these variable expenses from Plaintiff's actual accounting records (N.T. 488) and later that he derived these variable expenses from Plaintiff's tax returns for 1999 and 2000. In any event, Plaintiff's expert did not adequately explain the elements, methodology or logic of his 5% calculation for variable costs. (N.T. 542-43, 639-40; Plaintiff's Exhibit 58; Board Finding)

26. The Board finds that, given the evidence presented, the fairest method to calculate Plaintiff's overhead costs for the eight month contract period November 1999 through June 2000 is to average the ratio of Plaintiff's Schedule C, Part II Expenses to Plaintiff's Schedule C Gross Revenues for 1999 and 2000. (N.T. 542-43; Plaintiff's Exhibit 58; Board Finding)

27. The appropriate overhead costs to be deducted in order to arrive at a correct net profit amount for Plaintiff is 12.5% of Gross Revenue calculated as follows:

	1999		2000		TOTAL
Gross Receipts	$53,714	+	$41,760	=	$95,474
Part II Expenses	$10,144	+	$ 1,752	=	$11,896

Part II Expenses	=	$11,896		
Gross Receipts	=	$95,474	=	12.5%

(N.T. 18; Plaintiff's Exhibit 58; Board Finding)

28. The net profit Plaintiff would have received under the Contract from November 1999 through June 2000 is calculated as follows:

Total Gross Revenue for 1999-2000	$1,095,542
Less Cost of Sales (63.92 %)	(700,270)
Gross Profit	$ 395,272
Less Overhead Costs of 12.5% of Gross Revenue	(136,943)
Lost Profit for 1999-2000	$ 258,329

(Board Finding)

29. Although Plaintiff may have retained some Commonwealth business after the Contract was supplemented with more vendors on June 30, 2000, the credible evidence presented by Defendant suggests that Plaintiff's profits would have dropped substantially. Plaintiff did not

present sufficient credible evidence to guide the Board in calculating those profits with any degree of reasonable certainty. Plaintiff has the burden of proving her damages, and she did not do so regarding damages she claims to have suffered after the Contract was supplemented on June 30, 2000. (Defendant's Proposed Findings of Fact 12-13; Citations to the record there, including N.T. 632-46)

30. Plaintiff is entitled to additional damages in the amount of $558 plus interest in full settlement of Count II. (Stipulation No. 2)

31. Plaintiff profited on sales under the Contract in the amount of $9,489 for which Defendant should be credited. (N.T. 507; Plaintiff's Exhibit 65, Ex. 4; Board Finding)

CONCLUSIONS OF LAW

1. The Board of Claims has exclusive jurisdiction to hear and determine this matter as a claim against the Commonwealth of Pennsylvania, arising from contracts entered into with the Commonwealth. (72 P.S. §4651-4)

2. The Board of Claims has jurisdiction over the parties as well as subject-matter jurisdiction asserted by the Plaintiff. (72 P.S. §4651-1, et seq.)

3. The Department of General Services and the Commonwealth agencies breached the Statewide Contract when they failed to require Commonwealth agencies to purchase pagers and/or failed to purchase pagers according to the Statewide Contract.

4. The Statewide Contract entered into with Plaintiff was not a "requirements" contract and there was no minimum number of units or services to be purchased from Plaintiff.

5. PPK Enterprises met all of the requirements of being a vendor on the Statewide Contract and is entitled to damages for the Commonwealth's breach of that Contract.

6. Procurement requirements for pager services cannot be artificially divided so as to constitute a small procurement or a minimum purchase of less than the $3,001 amount set forth in the Contract. 62 Pa. C.S.A. Sec. 514.

7. "9999-01" is not a Contract and does not constitute a "Service Purchase Contract" for the purposes of the "transition from existing Service Purchase Contracts" provision of the Statewide Contract. 62 Pa. C.S.A. Sec. 103.

8. Field purchase orders and invoices also do not constitute "Service Purchase Contracts" for the purpose of the "transition from existing Service Purchase Contracts" provision of the Statewide Contract. (Board Finding)

OPINION

This matter concerns a Statewide Multiple Award Contract for Wireless Communication Services, of which the Plaintiff was an awardee and was to provide pager and cellular phone services. The Plaintiff received very little business during the first year of the Contract despite the fact that she was the only awardee providing pager services for eight of the ten months, and the Commonwealth was purchasing service for more than seven thousand subject pagers during this time.

The Plaintiff's testimony emphasized her company's efforts to solicit business from Commonwealth agencies, and her discovery early on that purchasing agents were circumventing the use of the Statewide Contract. The Defendant's testimony focused on the other processes that agencies were using to order pagers and service and the Defendant's decision to supplement the Contract with additional vendors. This was accomplished for the second and subsequent years of the Contract.

The Plaintiff, Pamela P. Kramer d/b/a PPK Enterprises, is the sole proprietor of her business. PPK Enterprises is certified as a Small Disadvantaged Woman Enterprise, which qualifies as a Small Business Concern.

The Contract contained a transition clause, which allowed existing service purchase contract agreements for wireless communication services to continue until they expired. At that point, Commonwealth agencies would be required to order services pursuant to the Contract. The only other exception to the application of the Contract was under the "Small No-Bid Procurement of Services" limit set by the Department of General Services. This was reflected in the Minimum Order Clause in the Contract and was established in the amount of Three Thousand One Dollars ($3,001), as provided by Regulation 4 Pa. Code Sec. 69.9.

The Contract period was July 1, 1999 to June 30, 2000, with a provision for subsequent renewals for four additional years. Plaintiff was notified that she was an awardee on August 17, 1999, and the effective date of the Contract then became August 30, 1999, after all required reviews and signatures for the Commonwealth had been completed. Plaintiff then made preparations to advertise her services and solicit business from Commonwealth agencies.

One of the first things that she did in that regard was to attend in September 1999 the Pennsylvania Partnership 99' Convention, which was designed to bring together vendors and purchasing agents for Commonwealth agencies in order to make the purchasing agents aware of what services were available to them. At the Convention, Ms. Kramer learned from some purchasing agents that agencies separated their orders to stay under the $3,001 limit. They also broke apart their bids to accomplish this. Ms. Kramer contacted Larry Eslinger, the DGS buyer in charge of the Statewide Contract on a number of occasions. She also wrote to other elected public officials about her concerns, and they in turn contacted DGS. Thus, Ms. Kramer alerted the Department of General Services to immediate problems with the implementation of the Contract and to the continuing and on-going issues.

The Plaintiff was persistent in contacting DGS about her concerns. In February 2000, a survey for pager information was initiated by DGS. Then, by memorandum dated June 28, 2000, Joseph Nugent, Director of Purchases for DGS, requested information from all purchasing agents regarding the pager services purchased for fiscal years 1997/1998, 1998/1999, and 1999/2000. In this memorandum, Mr. Nugent stated that "the Secretary of General Services has received a vendor complaint and a legislative inquiry regarding the purchases of pager services" and "the Department is responsible for addressing such matters."

During the first year of the Statewide Contract, DGS became aware of several things: 1) DGS learned of the existence of "9999-01"; 2) DGS learned that Commonwealth agencies were continuing to purchase pagers from vendors which were not on the Statewide Contract; and 3) DGS learned that PPK Enterprises was selling very few pagers to Commonwealth agencies.

One of the ways the Commonwealth agencies purchased pagers prior to the effective date of the Statewide Contract was through the "mechanism" known as "9999-01." Essentially this was a number that Commonwealth agencies could enter into the ICS System, which is an order entry system, for the purpose of purchasing pagers. There was much testimony and evidence presented during the hearing related to what the exact nature of "9999-01" really was. Several purchase orders or field purchase orders reference "9999-01" as being a Contract number; however, Commonwealth employees who were putting together the bid information for the Statewide Contract testified that they were not even aware of this so-called "Contract" at that time. Thus, they did not consider the effect it may have on the Statewide Contract when they put out bids for the Contract in the Summer of 1999. The search for pager contracts performed by the Small Business Development Center through the Bureau of Contracts and Public Records, did not turn up anything related to "9999-01". Mr. Nugent, Director, Bureau of Purchases for DGS, first became aware of "9999-01" sometime in 2000. (N.T. 119-20)

Prior to Act 57, which required DGS to provide Statewide Service Contracts for the first time, agencies had used "9999-01" to order wireless communication services. However, Mr. Nugent testified that he recognized "9999-01" as a loophole in the Contract that the Commonwealth agencies could use to purchase pagers without using the Statewide Contract. (N.T. 594) In the Spring of 2000, DGS made the decision to supplement the Statewide Contract and solicited additional vendors.

Then, on April 3, 2000, Mr. Nugent sent out a memorandum to all Commonwealth agencies in which he terminated the use of "9999-01". That memorandum was issued to the Deputy Secretaries of Administration, Telecommunications Management Officers, Comptrollers, and Purchasing Agents. In this memorandum, Mr. Nugent stated that all paging services purchased under "9999-01" will be deleted as of the effective date of Supplement No. 1 to the Statewide Contract. He stated that "the period of performance under existing purchasing documents may be continued until the specified terms expire . . . at the expiration of existing purchasing documents, a field purchase order must be issued to a vendor providing pager service on Contract 9985-03 or 9985-03 Supplement No. 1 (the "Contract")." The memorandum goes on to state "Any document on Contract 9999-01 that expires between now and June 30, 2000, can be extended until June 30, 2000." This memorandum was issued more than seven months after the Statewide Contract went into effect, and it allowed the subject practices to continue for almost three more months.

By reviewing documents produced in discovery, as well as documents received pursuant to subpoenas issued to ten Commonwealth agencies, it was determined that a good estimate of the number of pagers purchased by Commonwealth agencies in fiscal year 1999/2000 other than through the small no-bid procurement of services exception was 7,054. The parties have stipulated that, in fiscal year 1999/2000, the Commonwealth leased or owned 7,054 pagers under agreements that exceeded $3,00l for that fiscal year. Commonwealth agency annual purchases under the $3,001 minimum order amount are not included in the damage calculations in this case.

One of the two exceptions to obtaining pager service from the Statewide Contract, as mentioned above, was the transition clause. This clause allowed existing service purchase

contracts to continue until their expiration, after which they could not be renewed. However, DGS learned that many agencies were using field purchase orders to purchase pagers and paging service. Field purchase orders are issued against a contract and constitute the contractor's authority to make delivery, as provided on Sheet A of Plaintiff's Exhibit 2, The Contract. Many field purchase orders issued by Commonwealth agencies referenced a "number" or "contract number" of 9999-01.

The parties have stipulated and testimony indicated that there was no written agreement related to this number, 9999-01, and that it was merely a "mechanism" for agencies to purchase wireless services prior to implementation of the Contract. The Procurement Code defines "contract" as a type of written agreement, regardless of what it may be called, for the procurement or disposal of supplies, services, or construction and executed by all parties in accordance with the Act of October 15, 1980 (P.L. 950, No. 164), known as the "Commonwealth Attorneys Act." 62 Pa. C.S.A. Sec. 103. Thus, since it is not a written document, 9999-01 cannot be a contract for procurement purposes, and after the award of the subject Contract, field purchase orders should have been written against the Contract, not 9999-01.

Defendant argues that field purchase orders should be viewed the same as service purchase orders and would also fall under the Transition Clause of the Contract. However, there was testimony that the Transition Clause was given careful consideration and its drafting was submitted for approval. Douglas Tinkey, who was a buyer with the Department of General Services, testified about the Transition Clause at the hearing:

> Well, Larry and I made this clause up with the intent to the transitioning. We understood before we even released the bid document that this would be an issue; hence, we prepared the clause and got approval to use the clause for the sole purpose of trying to make the transition easier, to address the possibility that people would need the transition from current service purchase contracts into using this contract.

> They could not indefinitely continue using the service purchase contracts out there; otherwise, it defeats the purpose of even creating the contract in the first place.

(N.T. 84)

The drafters at DGS, along with others who reviewed the clause, including Commonwealth attorneys who reviewed the Contract, are familiar with the different terms and their meaning. Thus, if they had wanted to include field purchase orders, they would have specified them as they did on Sheet A of the Contract. (Plaintiff's Exhibit 2) Furthermore, Chapter 10 of The Field Procurement Handbook, which is issued under the direction of the Secretary of General Services and which serves as a reference guide to agencies, provides separate and distinct definitions for service purchase contracts and for field purchase orders and for contract purchase orders.

> Service Purchase Contract (SPC), Form STD-278P. This form may be used for sole source procurements or in situations where the agency needs to negotiate terms and conditions with the contractor.
>
> Field Purchase Order, Form STD-182. This document may be used to purchase services which do not exceed $10,000 in total cost. If the electronic version of the Field Purchase Order is used, agencies must include the language found in paragraphs 4 and 5 on the face of the Field Purchase Order.…
>
> Contract Purchase Order, Form STD-183. This form is used by agencies to purchase items from statewide requirements contracts.

(Field Procurement Handbook, Chapter 10 (1)d, f, & g)

Finally, it is a well-established rule of construction that meaning is generally preferred which operates against the party who supplies the words. Any ambiguity is construed against the drafter. Restatement Second of Contracts Section 206, In re: Estate of Breyer, 379 A.2d 1305, (1977).

In this Contract, the drafters specifically selected the term "Service Purchase Contract" as they attempted to address the issue of transition from existing service. Therefore, the exception to using the Statewide Contract under the Transition Clause applies only to service previously obtained through service purchase contracts, not through field purchase orders or other contracts.

The $3,001 minimum order amount is the second exception to ordering from the Statewide Contract. The Procurement Act gave DGS the authority to establish this minimum if the procurement is not the subject of a statewide requirements contract. (The instant Contract here is not a requirements contract.). 62 Pa. C.S.A. Sec. 514, 4 Pa. Code Sec. 69.9. (Note: This section was later amended in December 2002 to authorize the head of the purchasing agency to establish this limit rather than DGS.)

The above Small Procurements Section of the Act also states, "Procurement requirements shall not be artificially divided so as to constitute a small procurement under this section." The Plaintiff testified that purchasing agents told her that this was being done, and many documents in evidence reflect this practice. The field purchase orders are here again problematic. Many are for individual pagers, even though a department or agency may have many pagers. They are also frequently for short periods, such as month to month.

The issue then is what exactly constitutes a procurement. There is no numerical guidance in the law or in the Field Procurement Handbook. Although this Board does not accept, as a general proposition, that minimum purchase units must be cumulated on an annualized basis, Plaintiff has here asserted the procurement of pagers by each agency should be so viewed. Defendant appears to question this, but offers the Board no other alternative in the instant case. In this case, the Board will accept Plaintiff's approach of grouping all pagers for an agency together in determining the "procurement". It would also be reasonable to consider the time

frame for which service is needed. This might vary from product to product, but in this case, it would be reasonable to expect agencies to subscribe for service in terms of annual contracts or for the remainder of a fiscal year. There is evidence in some of the documents, including recent purchases from the Plaintiff, that the term for service was for a year or the balance of the year.

Conversely, the Board is not persuaded that an agency or a vendor would routinely go through the process of contracting for single pager service for only a one month period, even though billing may occur on a monthly basis. Therefore, the use of monthly field purchase orders for individual pagers for service for a term of one month or some similar order would not appear to fit within the small procurement exception to the Statewide Contract here at issue. To summarize, although there may be some alternative way of looking at the "procurement" of pagers at issue here, Defendant has not offered us one, and we find the agency by agency annualized method proffered by Plaintiff to be reasonable in this case. As per this finding and stipulation of the parties, the Board accepts that there were 7,054 pagers leased or owned by the Commonwealth under agreements in fiscal year of 1999/2000 that were not excepted from the Statewide Contract by way of the small procurement exception. (Stipulation No. 35)

Under Pennsylvania law, whether a defendant's performance is sufficient to overcome a breach of contract suit depends on the surrounding circumstances and the construction given to the agreement. Miller v. Group Voyagers, Inc., 912 F. Supp. 164 (E.D. Pa. 1996), *citing* Biddle v. Johnsonbaugh, 444 Pa. Super. 450, 664 A.2d 159, 163 (1995). The Commonwealth's use of other means to purchase pagers outside of the listed exceptions to the Statewide Contract was a breach of that agreement.

DAMAGES

With the decision that the Commonwealth did breach the Statewide Contract, the discussion now turns toward damages. In the law of contracts, remedies for breach are designed to protect either a party's expectation interest "by attempting to put him in as good a position as he would have been had the contract been performed, that is, had there been no breach;" or his reliance interest or his restitution interest. Ferrer v. Trustees of University of Pa., 825 A.2d 591 (Pa. 2002), *citing* Trosky v. Civil Serv. Comm'n, 539 Pa. 356, 652 A.2d 813, 817 (1995) *citing* Restatement (Second) of Contracts, Section 344, comment a.

The official comments to Sections 344 address "expectation interest" as follows:

> a. *Three interests*. The law of contract remedies implements the policy in favor of allowing individuals to order their own affairs by making legally enforceable promises. Ordinarily when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract. It does this by attempting to put him in as good a position as he would have been had the contract been performed, that is, had there been no breach. The interest protected in this way is called the "expectation interest." It is sometimes said to give the injured party the "benefit of the bargain."

(Restatement (Second) of Contracts, Section 344, comment a)

Here the Plaintiff seeks only expectation damages while the Defendant focuses much of its argument against damages on whether the Plaintiff has a right to lost profits and the ability of a "new business" to establish future profits. DGS also attempts to discredit the Plaintiff's business acumen and plan.

The Board notes initially, that in making the award to PPK Enterprises, DGS found the Plaintiff to be a "responsible and responsive bidder." In discussing methods of awarding contracts, the Pennsylvania Code defines "*Responsible Bidder* - A person who has the capability to perform the contract requirements, and the integrity and reliability which will assure good

faith performance." and "*Responsive Bid* – A bid which conforms in all material aspects with the invitation to bid." 4 Pa. Code Sec. 69.1. The Board is not persuaded by Defendant's attacks on Plaintiff's ability to perform the Contract.

As to proof of damages, under Pennsylvania law, mathematical certainty is not required. However, proof with reasonable certainty is required. Evidence of damages may consist of probabilities and inferences, but sufficient facts must be introduced so that an intelligent estimate can be made without conjecture. Delahanty v. First Pennsylvania Bank, N.A., 464 A.2d 1243, 1257-58 (Pa. Super. 1983). Accordingly, a detailed discussion of damages is in order in this case.

The first issue to be established is the actual amount of pager business that would have been available to the Plaintiff. The parties have stipulated that in fiscal year 1999/2000, the Commonwealth leased or owned 7,054 pagers under agreements that exceeded a $3,001 minimum for that fiscal year. As discussed above, existing service purchase contracts ("SPC's") would continue for their specified terms. Neither party has identified exactly how many SPC's were in existence during this fiscal year. DGS argues that a review of the many purchasing documents shows that there were pre-existing agreements, but doesn't quantify them or specify the number of SPC's.

Defendant's Exhibit 4 contains approximately 87 documents that were culled from Plaintiff's Exhibits 102 to 106. (N.T. 680-81) Six of the documents were SPC's or approximately 6.9%. Recognizing that valid SPC's existed at this time and continued under the Transition Clause, the Board finds that the stipulated number of pagers available for the Statewide Contract should be reduced from 7,054 to 6,568 (7,054 – 6.9% or 487 = 6,568), to allow for existing SPC's.

Having established the number of pagers to be serviced under the Statewide Contract, the Board moves on to establish the number the Plaintiff itself could have expected to service. The Contract went into effect on August 30, 1999, and during September and October, there was one other active provider under the Contract – 360 Communications. The exact date that 360 Communications withdrew as a vendor is not provided, only that it left in October. Plaintiff's expert, Paul D. Herbein, stated that he did not take into consideration this other vendor when he did his calculations. (N.T. 545) Defendant questioned Mr. Herbein about this, but neither party offered any factual evidence on the proportion of business which Plaintiff would have received during these two months taking into account 360 Communications.

Plaintiff has the burden of proving her damages by a preponderance of the evidence. Delahanty at 1257, *citing* Greenberg v. McCabe, 454 F. Supp. 765 (E.D. Pa. 1978). Although, she need not prove her damages with absolute certainty, it is required that the proof provides a reasonable basis from which the fact-finder can calculate the Plaintiff's loss. Id. at 1258. She must provide a reasonable amount of information to enable the Board, in this case, to estimate damages without engaging in speculation. Bolus v. United Penn Bank, 525 A.2d 1215, 1226 (Pa. Super. 1987).

Since no evidence was offered as to what share of the business the Plaintiff would have received during these two months when there was another vendor on the Contract, the Board cannot determine Plaintiff's share with reasonable certainty. A mere assumption that Plaintiff would have received half of the available business does not persuade this Board to find so as a matter of fact. Plaintiff failed to meet her burden of proof regarding her damages for the months of September and October 1999.

For the remaining eight months of the Contract, the Board notes initially that Plaintiff's expert discussed a "ramping-up and ramping-down" process that would typically be used in an economic valuation such as this one involving contracts and purchase orders. This "ramp-up/ramp-down" adjustment recognizes that 100% of all service purchase orders will not be effective from day one of a contract period and that not all service purchase orders entered into during the period will expire on the last day of the effective contract period. Accordingly, the Board finds that use of the stipulated number of pagers (as adjusted for SPC exclusions) for the eight month period is reasonable and supported.

Plaintiff's expert also determined an average revenue per pager to be $20.85 per month by averaging all the different types of services, including special features such as voice mail. (N.T. 485-86) Defendant's expert, Louis Rubino, testified that he came very close to the same number when he reviewed the same documents and learned Mr. Herbein's method of calculation, but he also noted that this average is for all services procured and includes both the sale and/or lease of pagers. (N.T. 634) Plaintiff's gross revenues that she should have earned under the Contract for the eight month period from November 1999 through June 2000 are as follows:

6,568 pagers x $20.85 per pager per month x 8 months = $1,095,542

Plaintiff would have incurred costs associated with doing this business. Plaintiff's expert corrected his original calculations and presented a cost of sales percentage of 51.78% based on information provided to him by Plaintiff on her costs (supplier charges) and her charges to her customers. (Plaintiff's Exhibit 64). He also applied a 5% variable cost factor to account for variable expenses that PPK Enterprises would incur with an increase in sales volume. Mr. Herbein testified at one time that he considered PPK's actual accounting records and expenses in

calculating that variable cost factor of 5% (N.T. 488) and later that he utilized PPK's tax returns for 1999 and 2000. (N.T. 542-43)

Defendant's expert, Louis Rubino, testified persuasively that these costs were understated because they did not include the cost of goods sold (the pagers themselves) and undervalued the variable costs. (N.T. 634-40). Unfortunately, he did not testify with specificity about how these undervaluations of Plaintiff's costs of doing business affected the bottom line calculations, nor did he propose an alternative number for variable costs.

Because the Board raised the question at the hearing regarding the impact of including the cost of pagers in the damage calculations, counsel for Plaintiff recalculated the damages including all items listed on Plaintiff's Exhibit 64, including the pagers, in Plaintiff's Proposed Findings of Fact. Costs and charges for thirty-six items, such as voice mail, 800 numbers, rental of pagers, and sale of pagers were included. This yielded an overall cost of sales of 63.92%. The Board is persuaded that the original figure of 51.78% was too low and that the cost of sales (including the cost of pagers) figure of 63.92% is more accurate. (Plaintiff's Proposed Findings and Conclusions and Brief pp. 53, 57 and Exhibit B, thereto)

Additionally, the Board does not find Mr. Herbein's adjustment for "variable expenses" of 5% to be persuasive. He testified as to two different sources for the underlying data and did not explain clearly the data, items or method used to arrive at this percentage.

In light of this, and the need to account for overhead expenses in arriving at an appropriate net profit amount for the contract period in question, the Board views the Schedule C's of Plaintiff's 1999 and 2000 tax returns as the most reliable source of overhead expense data. Specifically, the Board will average the ratio of Plaintiff's Schedule C, Part II Expenses to Plaintiff's Schedule C Gross Receipts for 1999 and 2000 to determine the percentage of Gross

Receipts expended on overhead because the eight month Contract period at issue spans both years. Utilizing this methodology, the Board finds that the appropriate overhead deduction is 12.5% of gross revenue for the eight month Contract period, or $136,943.

Plaintiff's lost profits would be calculated as follows:

Total Gross Revenue for 1999-2000	$1,095,542
Less Cost of Sales (63.92 %)	(700,270)
Gross Profit	$ 395,272
Less Overhead Costs of	
12.5% of Gross Revenue	(136,943)
Lost Profit for 1999-2000	$ 258,329

In subsequent years under the Contract, the Plaintiff asserts it would have retained some of the Commonwealth business even though sixteen additional vendors were added, many of whom were Plaintiff's suppliers and would then have been in direct competition with her. (N.T. 394-400) There were also other factors that came into play. Plaintiff's distributors were also taking actions to harm her business. (Stipulations Nos. 112-17). Wireless technology was changing and some agencies were also switching from pagers to cell phones. (Plaintiff's Exhibit 99, p. 12) Credible evidence presented by Defendant suggests that Plaintiff's profits would have dropped substantially.

Plaintiff's expert testified that there would be some loss of business and offered a retention rate of 78%. He had not independently verified that number, which was simply asserted to him by the Plaintiff. Defendant's expert was critical of this retention rate, but he did not provide an alternative number. However, he raised the above factors and issues that Plaintiff's expert did not address in his calculations.

Although after June 30, 2000, Plaintiff may have earned some profits under the Contract, Plaintiff did not present sufficient credible evidence to guide the Board in calculating those profits with any degree of reasonable certainty. Moreover, after spending substantial effort to

persuade the Board of the lengths to which the Commonwealth agencies went to avoid using Plaintiff, the Board is not now persuaded that these agencies would, in any significant number, choose to utilize Plaintiff when given an opportunity to utilize Plaintiff's suppliers and cut out the "middleman." Accordingly, Plaintiff has failed to meet her burden of proof regarding damages that she claims to have suffered after the Contract was supplemented with additional vendors on June 30, 2000.

Plaintiff is entitled to additional damages in the amount of $558 plus interest in full settlement of Count II. (Stipulation No. 2)

Plaintiff did earn income on sales under the Contract and a profit for which Defendant should be credited. Plaintiff's expert, Mr. Herbein, calculated this profit to be $18,824. (N.T. 507; Plaintiff's Exhibit 65, Ex. 4) However, the Board finds it to be more appropriate to use Mr. Herbein's method of calculation but with the cost of sales percentage of 63.92% and overhead deduction of 12.5%. Plaintiff's profit already earned is calculated as follows:

193 pagers x $20.85 per month	$ 4,024
	x 10 months
Gross Revenue	$40,240
Less Cost of Sales (63.92 %)	(25,721)
Gross Profit	14,519
Less Overhead Costs (12.5% of Gross Revenue)	(5,030)
Profit	$ 9,489

Plaintiff is entitled to damages for lost profits on her Claim in the amount of $258,329 plus $558 as stipulated in full settlement of Count II, with a reduction (or credit to the Defendant) of $9,489 for profit already earned. Therefore, a total award of $249,398 will be made to the Plaintiff with interest at the statutory rate from July 1, 2000.

ORDER

AND NOW, this 20th day of April, 2004, the Board of Claims hereby finds in favor of the Plaintiff, Pamela P. Kramer d/b/a PPK Enterprises and against the Defendant, Commonwealth of Pennsylvania, Department of General Services, in the amount of Two Hundred Forty-Nine Thousand Three Hundred and Ninety-Eight Dollars ($249,398.00), with interest thereon at the legal rate of six percent (6%) per annum from July 1, 2000.

BOARD OF CLAIMS

_____
Jeffrey F. Smith
Chief Administrative Judge

_____
Ronald L. Soder, P.E.
Engineer Member

Judge McCarty did not participate in this decision.

OPINION SIGNED