

COMMONWEALTH OF PENNSYLVANIA

STANLEY G. MAKOROFF, TRUSTEE FOR : BEFORE THE BOARD OF CLAIMS  
AUTOMATIVE TELEPHONE, INC. :  
 :  
VS. :  
 :  
COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF TRANSPORTATION : DOCKET NO. 3426

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**FINDINGS OF FACT**

**PARTIES**

1. Plaintiff, Automative Telephone, Inc. (“ATI”), was incorporated in the Commonwealth of Pennsylvania in 1993 by Joseph Hersperger and was in the business of providing vending machine services to the public. (ATI Exhibit 26; Notes of Transcript (“N.T.”) vol. 1 at 59-60, 63-67 (Hersperger)).

2. Joseph Hersperger was the president and sole shareholder of ATI. (N.T. vol. 1 at 176 (Hersperger)).

3. ATI filed its corporation tax registration with the Commonwealth of Pennsylvania on March 8, 1993. (N.T. vol. 1 at 59-60 (Hersperger)).

4. In May 1998, ATI purchased certain assets from HSS Vending Distributor (“HSS”), a company owned by Joseph’s brother, Richard Hersperger. These assets included some 300 vending machine customers and 2000 vending machines. (ATI Exhibit 40; N.T. vol. 1 at 59-60 (Hersperger)).

5. Joseph Hersperger purchased the assets of HSS Vending Distributor for \$2,300,000. The Agreement of Sale of Assets stated that \$300,000 was to be applied towards commissions owed to Joseph for services rendered to Richard Hersperger, with the remaining \$2,000,000 to be paid in 240 monthly installments of \$8,333.33. Payments were not to commence until 12 months from the date of the agreement. (ATI Exhibit 40; N.T. vol. 1 at 106 (Hersperger)).

6. At around the same time, ATI hired James Hersperger, Joseph’s brother, to operate the vending operation, which ran under the name “Prism Food Services.” James handled day-to-day operations, including purchasing, dealing with customers and bids for new accounts. (N.T. vol. 1 at 63, 174-75 (Hersperger)).

7. ATI had customers in Allegheny, Butler, Armstrong, Westmoreland and Fayette Counties, and also serviced customers in Ohio and West Virginia. (N.T. vol. 1 at 69, 274 (Hersperger)).

8. ATI sold a line of products in its vending machines that included soda, juice, water, coffee, chips, candy and pastries. (N.T. vol. 1 at 182 (Hersperger)).

9. ATI did not service customers on a statewide basis in Pennsylvania. However, ATI did have accounts with the Pittsburgh Zoo, the state welfare office in Pittsburgh, the morgue in Allegheny County, and the Attorney General's office in Pittsburgh. (N.T. vol. 1 at 66-67, 181-82 (Hersperger)).

10. Defendant, Commonwealth of Pennsylvania Department of Transportation ("PennDOT"), is a Commonwealth agency with its main offices located in Harrisburg, Pennsylvania. (Board Finding).

### **THE SOLICITATION FOR BIDS**

11. In early 1999, James Hersperger requested that PennDOT place ATI on its bid list for the vending areas located on highways throughout Pennsylvania. (N.T. vol. 1 at 184 (Hersperger)).

12. On July 10, 1999, PennDOT issued a notice in the Pennsylvania Bulletin stating that it was seeking bids for the installation, maintenance and operation of vending machines at 46 highway rest areas throughout Pennsylvania. (N.T. vol. 2 at 306 (Shadle)).

13. LuAnn Shadle was a PennDOT employee in the Bureau of Maintenance and Operations. She was the vending coordinator for PennDOT from 1995 through 2004, and oversaw the vending machine bid process for PennDOT in 1999 that is the subject of this litigation. (N.T. vol. 2 at 305-06 (Shadle); Board Finding).

14. On or about July 10, 1999, a bid package was mailed to ATI and other companies on a PennDOT mailing list who had expressed interest in the bid or who had bid on previous projects. (PennDOT Exhibit 5; N.T. vol. 2 at 305-07 (Shadle)).

15. In the bid package, the "Instructions to Complete Bid Package" states, inter alia, that, "Awards will be based on the highest monthly fee bid for each site." (ATI Exhibit 5 at 3 (par. 2)).

16. Paragraph 5 of the Instructions to Complete Bid Package states:

If you are selected for an award, a Special Purchase Contract (SPC) in the form of, and containing the terms and provisions of the Exhibits will be prepared and sent to you for your signature and execution. You are to sign, date and return it intact for the Department's execution. After the SPC has been fully executed by

the Department's legal and fiscal officials, a copy of the contract will be returned to you for your records.  
(ATI Exhibit 5 at 3).

17. Paragraph 6 of the Instructions to Complete Bid Package states: "This contract will be in effect for three years from the established effective date. A contractor may not begin work until a contract has been fully executed and a notice-to-proceed has been given by the Department." (ATI Exhibit 5 at 3).

18. Paragraph 8 of the Instructions to Complete Bid Package states: "The Department reserves the right to disallow any bid it considers unacceptable or not in the best interest of the Commonwealth. If this occurs, the location(s) may be re-bid on a site by site basis." (ATI Exhibit 5 at 4).

19. The bid package also included a form entitled "Contractor Responsibility Provisions." In paragraph 2, the form stated: "The contractor must also certify, in writing, that as of the date of execution, of any Commonwealth contract it has no tax liabilities or other Commonwealth obligations." (ATI Exhibit 5 (Exhibit A)).

20. The bid package also included a sample service purchase contract, which contained signature lines for the purchasing agency head, the purchasing agency comptroller, the purchasing agency attorney, the president of the bidder's company, the secretary of the bidder's company and, if required, the Office of General Counsel and the Office of Attorney General. (ATI Exhibit 5 (Exhibit E)).

21. ATI's bid was signed by Joseph and James Hersperger and was returned to PennDOT. (N.T. vol. 1 at 187 (Hersperger)).

22. The bids were opened on July 23, 1999. ATI was the high bidder for all of the 46 sites. (PennDOT Exhibit 18; N.T. vol. 2 at 307 (Shadle)).

### **ALLEGATIONS BY CRH CATERING COMPANY**

23. CRH Catering Company ("CRH") was a competitor with ATI in the vending business. (N.T. vol. 2 at 262 (Hersperger)).

24. On July 23, 1999, the date of the bid opening, Derwood Bollinger, an employee of CRH, sent two facsimiles to LuAnn Shadle of PennDOT. (ATI Exhibits 6-7).

25. The first facsimile consisted of an article from the Pittsburgh Business Times dated March 29, 1998, which described Richard Hersperger's failed appeal to Commonwealth Court of a Pennsylvania Public Utility Commission decision that levied a One Million Dollar fine against Mr. Hersperger. In addition, the facsimile included a report of the Better Business Bureau that stated that Richard Hersperger had been sued by the Pennsylvania Attorney General's Office, the Attorney General's Office in Illinois, and the Pennsylvania Public Utility Commission. (ATI Exhibit 6).

26. The second facsimile consisted of an article from the internet's "Phonecards Online Issue #96," describing a lawsuit filed by the Pennsylvania Attorney General's office against Richard Hersperger and HSS Telecommunications for violations of the Unfair Trade Practices and Consumer Protection Law and the Solicitation of Funds for Charitable Purposes Act. (ATI Exhibit 7).

27. Mr. Bollinger also called Ms. Shadle on the day of the bid opening and told her that Prism Food Services was "the same as" HSS Vending Distributor. (N.T. vol. 2 at 308-11 (Shadle)).

28. On July 26, 1999, Mr. Bollinger sent a letter to Ms. Shadle repeating some of the allegations made against Richard Hersperger and HSS Telecommunications, and further opining that ATI's bid should be declared null and void and that the contracts should be re-bid on a site-by-site basis. (ATI Exhibit 8).

29. Ms. Shadle forwarded the information she had received to Michael Kline, Assistant Counsel in charge of the Contract Legal Services Section for PennDOT. Mr. Kline is employed by the Governor's Office of General Counsel. The Contract Legal Services Section drafts, reviews and, according to Mr. Kline's testimony, approves most of the contracts entered into by PennDOT. Mr. Kline was personally involved in the review process of the contract for vending services in this case. (N.T. vol. 2 at 316 (Shadle), vol. 4 at 534, 588-89 (Kline)).

30. By memorandum dated August 2, 1999, Mr. Kline wrote to David DeVries, Chief Deputy Attorney General for the Review and Advice Section of the Office of Attorney General, and requested that he perform a "contract match" on "Automatic [sic] Telephone, Inc. d/b/a/ Prism Food Service." Mr. Kline repeated several of the charges made against Richard Hersperger and HSS Telecommunications, and stated that "before proceeding to a contract, we want to be absolutely sure that the claims surrounding HSS and Richard Hersperger do not extend to Prism as well." (ATI Exhibit 13).

31. A "contract match" is a system whereby the Office of Attorney General checks the names of contractors identified in contracts sent to its office for review for a match with names that have otherwise come to the attention of the Attorney General's several bureaus and divisions. If there are any matches to information in the Attorney General's files, this is brought to the attention of the requesting agency. (N.T. vol. 3 at 505-08 (DeVries)).

32. Additionally, by memorandum dated August 4, 1999, Mr. Kline sent information to Gary Ankabrandt, Assistant Counsel for the Department of General Services, so that he could determine whether the Pennsylvania Industries for the Blind and Handicapped ("PIBH") would be interested in obtaining some of the contracts for the vending machine sites in accordance with Section 520 of the Commonwealth Procurement Code. (ATI Exhibit 15).

33. 62 Pa.C.S.A § 520 provides that a contract for supplies manufactured or services performed by persons with disabilities may be entered into without the requirement for competitive bidding. Section 520 provides that the Department of General Services will

determine the “fair market value” for any supplies manufactured by or services performed by persons with disabilities. (ATI Exhibit 15; N.T. vol. 4 at 590-95 (Kline)).

34. Because PIBH expressed interest in obtaining contracts for some of the vending sites put out for bid, Mr. Kline believed the deadline for awarding the contract was extended from 60 days to 120 days. The Board has not found statutory authority for Mr. Kline’s assertion. (N.T. vol. 4 at 560, 594 (Kline); 62 Pa.C.S.A. § 512(g)).

35. By memorandum dated September 20, 1999, Mr. Ankabrandt sent Mr. Kline information on the fair market values for the 46 vending contracts, including business plans submitted to PIBH by the Keystone Blind Association and the York County Blind Center. Ultimately, PIBH decided to take 11 of the 46 available contracts. (ATI Exhibit 21; N.T. vol. 4 at 537, 594-595 (Kline)).

36. Near the end of September 1999, Mr. DeVries told Mr. Kline that he had spoken to the Bureau of Consumer Protection and the tax people in the Attorney General’s office, and that he had no reason to deny ATI the vending contracts. (N.T. vol. 4 at 535-36 (Kline)).

37. By letter dated October 22, 1999, Robert Peda, Director of PennDOT’s Bureau of Maintenance and Operations, notified ATI that it had been awarded the vending contracts for 35 of the 46 sites in Pennsylvania. The letter requested that ATI officials sign, date and return the form service purchase contract along with certain insurance information. The letter stated:

This letter serves as notification that you have been awarded the vending contract for 35 sites in Pennsylvania.

Enclosed is the Service Purchase Contract No. 08-462635 that you must sign, date and return in its entirety. Also enclosed for your information is a copy of the bid proposal with the specifications and provisions. In addition to returning the contract, please provide a certificate of insurance and a copy of your refund policy and procedures with a sample of the refund card. Please note that 800 telephone numbers must be provided to this office as soon as the machines are installed.

The new contract will become effective after all approvals have been received from the administrative and fiscal personnel in Harrisburg. You are reminded that no activities may be performed until the contract is fully executed.

Please return the contract via overnight mail within five working days of receipt. If you have any questions, please call LuAnn Shadle, Vending Coordinator at 717-787-0188.

(ATI Exhibit 18).

38. Robert Peda was authorized to act for PennDOT in regard to the bidding and contracting for the vending machine sites here at issue. (N.T. vol. 3 at 413, 417-420 (Peda)).

39. The letter of October 22, 1999, together with the bid instructions, particularly at Paragraphs 5, 6 and 8, clearly indicate that PennDOT must make a further manifestation of assent to accept the bid offer by ATI. (ATI Exhibits 5, 18; N.T. vol. 2 at 387 (Shadle), vol. 3 at 418-423 (Peda); Board Finding).

40. The further manifestation of assent called for by the bid documents and the October 22, 1999, letter is for PennDOT to have the service purchase contract signed by all necessary PennDOT administrative and fiscal personnel and returned to ATI (or at the very least to have the service purchase contract fully executed and a notice to proceed issued to ATI). (ATI Exhibits 5, 18; N.T. vol. 2 at 387 (Shadle), vol. 3 at 418-423 (Peda); Board Finding).

### **EXECUTION OF THE CONTRACT**

41. PennDOT received the service purchase contract form back from ATI on November 3, 1999. However, by letter dated November 18, 1999, Mr. Peda explained that the contract form was being returned to ATI because the contract had not been properly signed and did not include the insurance information requested in the October 22 letter. (ATI Exhibit 17; N.T. vol. 2 at 385-86 (Shadle)).

42. By letter dated November 30, 1999, Mr. Peda again informed ATI that the contract had been returned for insufficient information. The letter requested that the contract be returned to PennDOT with the requested information by December 3, 1999. (ATI Exhibit 16).

43. The contract form, properly executed by ATI, was returned to PennDOT and was then signed by Mr. Peda on behalf of PennDOT on December 3, 1999. (ATI Exhibit 12).

44. Mr. Kline signed the contract on behalf of the Office of General Counsel on December 7, 1999. (ATI Exhibit 12).

45. Patrick Dowd, the agency's comptroller, signed the contract on behalf of PennDOT on December 9, 1999. (ATI Exhibit 12).

46. On or about December 9, 1999, PennDOT forwarded the contract to Mr. DeVries for review by the Office of Attorney General. (N.T. vol. 4 at 621 (Kline)).

### **TAX CHARGES FILED AGAINST JOSEPH HERSPERGER**

47. On December 21, 1999, the Office of Attorney General filed criminal tax charges against Joseph Hersperger. The charges against Joseph Hersperger included willful failure to file sales tax returns, theft by failure to make required disposition of funds (i.e. failure to pay sales tax due) and maintaining a place of business without a sales tax license while operating as Automative Telephone, Inc. d/b/a Prism Food Service for the period of July 1998 through April 1999. (ATI Exhibit 43).

48. According to the charges, Joseph Hersperger owed the Commonwealth of Pennsylvania \$36,136.48 in past due sales tax. (ATI Exhibit 43).

49. On December 22, 1999, Mr. Kline met with Mr. DeVries to discuss issues that had arisen in connection with ATI. At the meeting, Mr. DeVries stated that the Office of Attorney General would not sign the contract and explained to Mr. Kline the reasons for not signing the contract which were subsequently summarized by Mr. DeVries in his memorandum of December 28, 1999. Consequently, Mr. Kline asked Mr. DeVries to return the contract. (N.T. vol. 4 at 545-46 (Kline)).

50. On December 28, 1999, Mr. DeVries returned the contract to PennDOT “without action.” The accompanying memorandum stated:

Additional information or action is required as set forth below. The thirty day time limit for contract review is tolled.

We are returning this contract based on the contractor responsibility concerns which we have raised with the Department of Transportation, particularly the criminal charges filed against Joseph A. Hersperger, owner of Automated (Automotive) Telephone, Inc.

As you know, we are also concerned about the actions taken against this company and its principals by the PUC and the Bureau of Consumer Protection, by the lack of registration with the Department of State, and the issues related to the identity of the business entity.

(ATI Exhibit 30).

51. By returning the ATI contract form “without action,” as he did with his December 28, 1999, memorandum, Mr. DeVries meant that his office was neither approving nor disapproving the contract. (N.T. vol. 3 at 489 (DeVries)).

52. Mr. Kline relied on the representations and concerns expressed to him at the December 22, 1999, meeting and summarized in the December 28, 1999, memorandum to conclude that ATI was not a responsible contractor. He did not independently investigate any of the charges made against Joseph Hersperger or ATI. (N.T. vol. 4 at 546-47, 553 (Kline)).

53. PennDOT officials, particularly Mr. Peda, relied on the information and concerns expressed to him by Mr. Kline who largely reiterated to, and discussed with, Mr. Peda the same concerns as expressed by Mr. DeVries. These concerns were noted in Mr. Peda’s letter of December 29, 1999. (N.T. vol. 2 at 427-451 (Peda)).

54. By letter dated December 29, 1999, signed by Mr. Peda, PennDOT informed ATI that it would not be entering into a contract with ATI for vending services for the 35 roadside rest areas. The letter stated that in accordance with Management Directive 215.9, PennDOT can

award contracts only to “responsible” contractors and that PennDOT had concluded that ATI was not a responsible contractor. (ATI Exhibit 31).

55. PennDOT’s December 29, 1999, letter to ATI manifested a clear and express intent on the part of PennDOT to reject ATI’s offer to contract for the vending machine services at the roadside rest areas which are the subject of this claim. ATI received this December 29, 1999, letter on December 29, 1999 or December 31, 1999, but in no event later than December 31, 1999. (ATI Exhibit 31; N.T. vol. 1 at 243 (Hersperger); Board Finding).

56. Management Directive 215.9 (updated on April 16, 1999, and effective for the case at hand) contains guidelines for the Commonwealth contracting process. It contains the following relevant provisions:

- (A) Section 5(d) states: “Commonwealth liability. A liability exists when a contractor is not current in the payment of any taxes . . . or other obligations to the Commonwealth or any of its agencies.”
- (B) Section 5(y) states: “Tax liability. For purposes of this directive, a liability exists when a contractor is not current in the payment of any federal, state, or local taxes, or is not current with the filing of all returns or reports for these taxes.”
- (C) Section 7(a)(2)(A) states: “The methods used by agencies to make a determination of nonresponsibility shall include, but shall not be limited to: (i) Accessing the Commonwealth Contractor Responsibility File to ascertain the contractor’s current status; and either (ii) Collecting all available information that bears upon a responsibility determination; or (iii) Meeting with and discussing past unsatisfactory or deficient performance with the contractor prior to the award of the contract to determine if corrective actions have occurred.
- (D) Section 7(b)(1)(C) states: “In determining a contractor to be responsible, factors to be considered by the agency shall include, but shall not be limited to . . . (C) Liabilities owed to the Commonwealth, including tax liabilities.”
- (E) Section 7(b)(1)(H) states: “In determining a contractor to be responsible, factors to be considered by the agency shall include, but shall not be limited to . . . (H) The commission of any state or federal offense or criminal charges. [Emphasis added.]”
- (F) Section 7(b)(2) states: “If an agency determines that a contractor owes a Commonwealth liability or has a Commonwealth obligation, the agency shall provide the contractor an opportunity to resolve the liability or fulfill the obligation within a reasonable time as determined by the applicable agency.”

- (G) Section 7(b)(3) states: “A determination of responsibility shall be made by the agency in its sole discretion. If the agency declares a contractor to be nonresponsible, the contractor shall be ineligible for the contract and the Commonwealth Contractor Responsibility File shall be updated accordingly.”

(ATI Exhibit 38a).

57. The reasons stated in the December 29, 1999, letter for not considering ATI to be a responsible contractor and rejecting its bid offer were:

- (A) “the filing of criminal charges against you by the Office of Attorney General, relating to failure to file sales tax returns, failure to make required disposition of funds received and maintaining a place of business without a sales tax license”;
- (B) “the existence of outstanding tax liabilities owed to the Commonwealth by your company”;
- (C) “not being registered to do business in Pennsylvania with the Department of State and the actions taken against predecessor and/or affiliated companies and their principals by the Pennsylvania Public Utility Commission and the Bureau of Consumer Protection within the Office of Attorney General”; and
- (D) “your company may have provided false, misleading or incomplete information to the Commonwealth about its actual identity because of discrepancies in its name.”

The letter also cited the decision of the Office of Attorney General not to sign the contract as an additional basis for not proceeding to contract with ATI. (ATI Exhibit 31).

58. Regarding reason “(A)” for not awarding the contract to ATI; criminal charges were filed against Joseph Hersperger and ATI on December 21, 1999, and although the charges were later dismissed, the charges were active and pending on December 29, 1999 when PennDOT issued its rejection letter to ATI and on December 31, 1999, the latest date that ATI would have received the letter. (ATI Exhibits 43, 44, 45; N.T. vol. 1 at 131-32 (Hersperger)).

59. As of December 29, 1999, the date of Mr. Peda’s letter, PennDOT had no way of knowing that the criminal charges filed against Joseph Hersperger and ATI would eventually be dismissed on January 31, 2000. (N.T. vol. 4 at 610-11 (Kline); Board Finding).

60. Regarding reason “(B)” for not awarding the contract to ATI; as of December 29, 1999, ATI did owe the Commonwealth of Pennsylvania \$36,136.48 in past due sales taxes. (ATI Exhibit 43; N.T. vol. 1 at 133 (Hersperger)).

61. Regarding reason “(C)” for not awarding the contract to ATI; ATI had, in fact, properly registered to do business with the Department of State. Neither Joseph Hersperger nor ATI was the subject of an investigation by the Bureau of Consumer Protection or the Public Utility Commission. (N.T. vol. 1 at 88 (Hersperger); Board Finding).

62. Regarding reason “(D)” for not awarding the contract to ATI; ATI did, in fact, provide accurate information to the Commonwealth regarding its name and identity. The misnomers contained in the files of Mr. Kline and the Office of Attorney General were the result of PennDOT’s errors, not those of ATI. (N.T. vol. 4 at 582-83 (Kline); Board Finding).

63. Regarding PennDOT’s last reason for not awarding the contract to ATI; the Office of Attorney General did, in fact, decline to sign the proposed service purchase contract. However, the Office of Attorney General had reviewed the proposed service purchase contract and returned it to PennDOT without objection as to form and legality. (N.T. vol. 3 at 489 (DeVries), vol. 4 at 616 (Kline)).

64. Although Mr. DeVries raised the possibility of some unexplained deficiency with the service purchase contract in this case at hearing, this testimony contradicted his deposition testimony wherein he admitted that he found no deficiency as to form or legality with the proposed service purchase contract already signed in this case by ATI, Mr. Peda, Mr. Dowd and Mr. Kline. Further evidence established that identical service purchase contract forms were utilized by PennDOT to contract with other bidders for the 35 vending machine sites. This evidence, along with our own review of the proposed service purchase contract, establishes that there were no material deficiencies as to form or legality with the proposed service purchase contract here at issue. (N.T. vol. 3 at 489-92, 511-14 (DeVries), vol. 2 at 353-58 (Shadle); vol. 3 at 423-426 (Peda); ATI Exhibits 32, 33; Board Finding).

65. After PennDOT sent its December 29, 1999, letter to ATI informing it that PennDOT would not proceed with the contract, the roadside rest areas had been without vending services for some two months. PennDOT decided to award the contracts to the other bidders it found responsible who had already bid on the contracts in July 1999. PennDOT eventually contracted with other bidders to supply vending machine services to the 35 highway rest areas at issue. (ATI Exhibit 31, 32; N.T. vol. 2 at 353 (Shadle), vol. 3 at 423-426 (Peda), vol. 4 at 610-11 (Kline)).

66. After signing the service purchase contract submitted by ATI and obtaining signatures from the agency comptroller and agency legal counsel, PennDOT (acting through Mr. Peda) decided not to return the service purchase contract to ATI and not to advise ATI that the contract form was signed or provide ATI with notice to proceed. (N.T. vol. 1 at 116-17 (Hersperger), N.T. vol. 1 at 243 (Hersperger), vol. 2 at 339-40 and 387-88 (Shadle), vol. 3 at 427-428, 441-442 (Peda); Board Finding).

67. PennDOT never returned the service purchase contract signed by PennDOT to ATI, never provided a notice to proceed to ATI, and never communicated an acceptance of ATI’s offer to ATI. In fact, PennDOT did not allow the service purchase contract signed by PennDOT, a notice to proceed, or any other communication confirming acceptance of ATI’s bid offer to leave PennDOT’s possession for delivery to ATI. (N.T. vol. 1 at 116-17 (Hersperger), N.T. vol. 1 at 243 (Hersperger), vol. 2 at 339-40 and 387-88 (Shadle), vol. 3 at 427-428, 441-442 (Peda); Board Finding).

68. PennDOT never communicated (or attempted to communicate) to ATI the further manifestation of assent to ATI's offer that was contemplated by PennDOT's letter of October 22, 1999 and the bid documents. (N.T. vol. 1 at 116-17 (Hersperger), N.T. vol. 1 at 243 (Hersperger), vol. 2 at 339-40 and 387-88 (Shadle), vol. 3 at 427-428, 441-442 (Peda); Board Finding).

69. PennDOT's letter of December 29, 1999, which was received by ATI no later than December 31, 1999, stated a clear and unequivocal rejection of ATI's bid (offer). This rejection was delivered to ATI before any acceptance was issued by PennDOT. (ATI Exhibit 31, N.T. vol. 1 at 79 (Hersperger); Board Finding).

70. On December 31, 1999, Joseph Hersperger paid to the Pennsylvania Department of Revenue the full amount of the past due sales taxes. (ATI Exhibit 37; N.T. vol. 1 at 80, 87 (Hersperger)).

71. A preliminary hearing on the criminal tax charges was held on January 31, 2000, before District Judge Roy C. Bridges. At the hearing, District Judge Bridges dismissed all charges against Joseph Hersperger and ATI. (ATI Exhibit 42; N.T. vol. 1 at 80 (Hersperger)).

72. On or about January 4, 2000, ATI filed a Complaint in Mandamus and/or for Permanent Injunction and/or Other Equitable Relief in the Court of Common Pleas of Allegheny County, seeking to require PennDOT to implement the service purchase contract for the 35 vending machine locations and to prohibit PennDOT from awarding the service purchase contracts to any other bidders. By consent order dated February 4, 2000, the Court of Common Pleas of Allegheny County transferred the matter to Commonwealth Court. (Complaint in Mandamus and/or for a Permanent Injunction and/or Other Equitable Relief, Allegheny County C.C.P., No. GD-00-399 (January 3, 2000); Consent Order of Court, No. G.D. 00-399 (February 4, 2000); Board Docket No. 3426; (Board Finding)).

73. The Commonwealth re-filed the criminal tax charges and a hearing was held on November 3, 2000, before District Judge Joseph Lindsey. District Judge Lindsey dismissed all of the charges. (ATI Exhibit 44).

74. By order dated August 23, 2001, Commonwealth Court sustained PennDOT's preliminary objections to ATI's injunction seeking to enjoin performance of the contracts by the successful bidders. However, the court overruled the objection relating to the existence of a contract, stating that the Board of Claims' jurisdiction includes the power to determine whether a contract exists or not. The matter was transferred to the Board of Claims. (Memorandum and Order, No. 164 M.D. 2000 (August 23, 2001); Board Docket No. 3426 at 2).

75. On September 19, 2001, ATI filed with the Board of Claims the Complaint in Mandamus and/or for a Permanent Injunction and/or Other Equitable Relief and the Consent Order filed in the Allegheny County Court of Common Pleas, and the Commonwealth Court's Memorandum and Order of August 23, 2001, which documents set forth ATI's breach of contract claim against PennDOT. (Complaint in Mandamus and/or for a Permanent Injunction

and/or Other Equitable Relief, Allegheny County C.C.P., No. GD-00-399 (January 3, 2000); Consent Order of Court, No. G.D. 00-399 (February 4, 2000); Board Docket No. 3426; (Board Finding)).

76. Although there was some conflicting testimony on the issue between Ms. Shadle and Mr. Hersperger as to whether or not PennDOT gave ATI a verbal OK and instructions to commence work, we find Ms. Shadle's testimony more credible. Accordingly, we find that ATI was not advised of the execution of the contract by PennDOT officials and was not instructed to commence work prior to written notice to proceed or return of an executed contract. (ATI Exhibits 5, 18; N.T. vol. 1 at 239-40 (Hersperger), vol. 2 at 337-40 (Shadle), vol. 3 at 455 (Peda); Board Finding).

77. We further find that ATI's actions to prepare and install the vending machines prior to receipt of an executed contract (or notice to proceed), were not significant and could not have been done in reasonable reliance on any actions of PennDOT because of the express instructions to undertake no work until receipt of notice to proceed. (ATI Exhibits 5, 18; N.T. vol. 1 at 239-40 (Hersperger), vol. 2 at 337-40 (Shadle), vol. 3 at 455 (Peda); Board Finding).

78. ATI did not perform the vending machine services contemplated by the alleged contract. (Findings of Fact Paragraphs 54, 55, 57, 65-69, 72-77; Board Finding).

### **CONCLUSIONS OF LAW**

1. The Board has subject-matter jurisdiction over this claim pursuant to the Board of Claims Act, Section 4651-4. 72 P.S. § 4651-4.

2. The Board has personal jurisdiction over the parties.

3. A solicitation for bids for a public contract is not an "offer" to form a contract, but is only an invitation for contractors to submit bids in response to the solicitation. It is the bid itself which is the offer. National Construction Services v. Philadelphia Regional Port Authority, 789 A.2d 306, 309 (Pa. Cmwlth. 2001).

4. The statutory right of a high bidder to be awarded a contract does not by itself create a contract between the high bidder and the soliciting Commonwealth agency. National Construction Services v. Philadelphia Regional Port Authority, 789 A.2d 306, 309 (Pa. Cmwlth. 2001).

5. The "Instructions to Complete Bid Package" contained in the bid proposal documents issued by PennDOT, particularly paragraphs 5, 6 and 8, together with PennDOT's letter of October 22, 1999, required a further manifestation of assent by PennDOT before ATI's bid offer could be considered accepted and a contract formed between PennDOT and ATI. See e.g., Commonwealth v. On-Point, 821 A.2d 641, 649 (Pa. Cmwlth. 2003).

6. PennDOT's letter of October 22, 1999, notifying ATI that it was high bidder on 35 vending machine locations did not constitute an acceptance of ATI's bid offer. Id.

7. Even though the form of service purchase contract included in the bid documents was fully executed by ATI and further signed by an authorized representative of PennDOT, PennDOT's comptroller, and by Michael Kline as PennDOT's legal counsel and/or for the Office of General Counsel, PennDOT's decision not to return the signed service purchase contract to ATI or to provide ATI with notice to proceed and/or any other communication that the service purchase contract was fully executed constitutes a failure to deliver or communicate an acceptance of ATI's bid offer to ATI. See e.g., Groskin v. Bookmyer, 310 Pa. 588, 590-91, 166A.233, 233-34 (1933); Morganstern Electric Co. v. Borough of Coraopolis Borough, 326 Pa. 154, 156-158, 191 A. 603, 604-05 (1937).

8. PennDOT's decision not to return the signed service purchase contract, or to provide ATI with notice to proceed or otherwise communicate final execution of the service purchase contract also constitutes a failure of PennDOT to provide the further manifestation of assent required to accept ATI's bid offer. Id.

9. In order for an "acceptance" to be effective, it must be delivered to the offerer or, at the very least, be transmitted by the offeree beyond its control for delivery to the offerer. Id.

10. Because PennDOT never returned the signed service purchase contract to ATI, never advised ATI that the service purchase contract was fully executed or issued a notice to proceed to ATI and never otherwise communicated a further manifestation of assent to be bound by a contract with ATI, a contract was never formed between PennDOT and ATI. Id.

11. Instead of communicating an acceptance to ATI, PennDOT, by its December 29, 1999, letter (which was received by ATI no later than December 31, 1999) clearly and unequivocally rejected ATI's bid offer. This unequivocal rejection of the offer, before any manifestation of assent, terminated the offer and prevented the formation of a contract between PennDOT and ATI under the facts of this case. See e.g., Temple University Hospital, Inc. v. Healthcare Management Alternatives, Inc., 764 A.2d 587, 593 (Pa. Super. 2000); Leskle v. Haseltine, 155 Pa. 98, 25A.886 (1893); Smaligo v. Firemans Fund Insurance Co., 432 Pa. 133, 247 A.2d 577.

12. Management Directive 215.9 allowed PennDOT sole discretion to determine whether or not ATI was a responsible contractor, and the fact that Joseph Hersperger had criminal charges pending against him was a valid reason to determine ATI was not a responsible contractor. (Management Directive 215.9 §§ 7(b)(1)(H) and 7(b)3).

13. PennDOT acted within the terms of the bid documents (particularly Paragraph 8 of the "Instructions to Complete Bid Package") and Management Directive 215.9 in deciding to reject ATI's bid offer as unacceptable. ATI Exhibit 5 at 4 and Management Directive 215.9.

14. A contract with the Commonwealth will not be formed (i.e. a bid/offer will not be deemed accepted) unless and until the contract is executed by all persons whose signature is required by law. See e.g., Shovel Transfer and Storage, Inc. v. PLCB, 559 Pa. 56, 63, 739 A.2d 133, 136-37 (1999); See also, 62 Pa.C.S.A. Section 543(a) ("Irrespective of the type of contract,

no contract shall be effective until executed by all necessary Commonwealth officials as provided by law.”).

15. Section 204(f) of the Commonwealth Attorneys Act, provides for review of contracts in the following manner:

(f) Deeds, leases, contracts and fidelity bonds.—The Attorney General shall review for form and legality, all Commonwealth . . . contracts to be executed by Commonwealth agencies; if the Attorney General determines that a . . . contract is in improper form, not statutorily authorized or unconstitutional, he shall notify in writing within 30 days after its submission the agency affected, the Office of General Counsel and the General Assembly through the offices of the Secretary of the Senate and the Chief Clerk of the House of Representatives. The agency may rewrite the . . . contract to meet the objections of the Attorney General. If the agency disagrees with the objection of the Attorney General, it may appeal the decision of the Attorney General by filing a Petition for Review with the Commonwealth Court in such manner as is provided for appeals from final orders of government agencies pursuant to 42 Pa.C.S.A. § 763 (relating to direct appeals from government agencies). If an instrument has been submitted to the Attorney General and he has not approved it or submitted his objection within 30 days after submission, the instrument shall be deemed to have been approved . . . .

71 P.S. § 732-204(f)

16. Section 204(f) of the Commonwealth Attorneys Act plainly imposes a mandate on the Attorney General to “review for form and legality all Commonwealth . . . contracts to be executed by Commonwealth agencies . . . . [Emphasis added.]” This section also provides a procedure for the Attorney General to notify the agency (among others) of any objection he may have to the contract based on form or legality and a means for resolution of same. Although the Attorney General may object to the contract or sign it to indicate his approval within the 30 day review period, the explicit terms of this provision provide that, absent written objection as to form or legality within the 30 day review period, the contract is deemed approved as to form and legality. 71 P.S. § 732-204(f).

17. Pursuant to the explicit language of Section 204(f), the signature of the Attorney General is not a necessary prerequisite to an effective contract. See e.g., Residence Inn by Marriott, Inc. v. PennDOT, Board of Claims Docket No. 3707 (Order of August 5, 2004); One Source v. PennDOT, Board of Claims Docket No. 3775 (Order of November 4, 2005); In accord, Shovel Transfer and Storage, Inc. v. PLCB, 559 Pa. at 63, 739 A.2d at 137 (1999).

18. The Attorney General’s review of any Commonwealth contract is, by the explicit terms of Section 204(f), strictly limited to a review for form and legality. 71 P.S. § 732-204(f).

19. The absence of the Attorney General's signature on the form of service purchase contract here at issue is not, in and of itself, determinative of the existence of a contract between ATI and PennDOT. Conclusions of Law Paragraphs 15-18.

20. Because ATI did not perform the work contemplated by the proposed service purchase contract here at issue, and because ATI was informed by PennDOT that it should not commence any work prior to receiving a copy of the fully executed contract (or at very least a notice to proceed) and could therefore not have been induced by PennDOT to perform work on the contract prior to receipt of same, ATI has not established a factual basis to support application of equitable estoppel to prevent PennDOT from asserting an Attorney General signature requirement or from denying the existence of a contract. See e.g., Department of Commence v. Casey, 624 A.2d 247 (Pa. Cmwlth. 1993) and Dixon Contracting Company, Inc. v. Department of Environmental Resources, 80 Pa. Cmwlth. 445, 474 A.2d 701 (1984).

21. The Board's Order of March 13, 2002, which rejected PennDOT's challenge to this Board's jurisdiction on the basis of ATI's failure to exhaust administrative remedies has become the "law of the case" and prevents the Board from ruling now that it does not have jurisdiction over the contract claim in this matter on this same basis. See e.g., Yudacufski v. Commonwealth Department of Transportation, 499 Pa. 605, 612, 454 A.2d 923, 926 (Pa. Super. 1982); Harrity v. Medical College of Pennsylvania Hospital, 439 Pa. Super. 10, 12-16, 653 A.2d 5, 6-9 (1994); Commonwealth v. Starr, 541 Pa. 564, 573-78, 664 A.2d 1326, 1331-34 (1995).

22. The Board has subject matter jurisdiction of this case because it is among the general types of cases the Board is authorized to decide (i.e. claims arising from contract). The issue of whether or not the Board may hear this particular matter because of a failure to exhaust administrative remedies is a question of the Board's power to decide this case, not of its subject matter jurisdiction. See, In re Melograne, 571 Pa. 490, 494-95, 812 A.2d 1164, 1166-67 (2002); Feingold v. Bell of Pennsylvania, 477 Pa. 1, 6-7 and 21, 383 A.2d 791, 793-4 and 801; Terminato v. Pennsylvania National Ins. Co., 538 Pa. 60, 69, 645 A.2d 1287, 1291 (1994).

23. Because the issue of whether or not the Board may decide this case despite Plaintiff's failure to exhaust administrative remedies is not one of subject matter jurisdiction, the principle of judicial or equitable estoppel may be applied to prevent PennDOT from asserting the lack of Board jurisdiction on this basis. See e.g., In re Melograne, 571 Pa. 490, 494-5, 812 A.2d 1164, 1166-67 (2002); Buehler v. Philadelphia & Reading Ry. Co., 280 Pa. 92, 124 A. 325 (1924); Bell Atlantic-Pennsylvania, Inc. v. PUC, 763 A.2d 440, 495 (Pa. Cmwlth. 2000); Makoroff v. PennDOT; Makoroff v. PennDOT, Board of Claims Docket No. 3426 (Order of March 13, 2002) and cases cited therein.

24. For the reasons stated in this Board's Order of March 13, 2002, including PennDOT's participation in the Consent Order of the Allegheny County C.C.P., PennDOT's own failure to recognize the claims made there as arising from contract, and the 17 month lapse of time between said Consent Order and the Commonwealth Court's transfer of the contract claim to this Board, PennDOT shall be equitably estopped from asserting ATI's failure to exhaust administrative remedies to deprive the Board of jurisdiction to finally decide this matter. Id.

25. The Board's subject matter jurisdiction is limited to the determination of claims arising from contract, including claims of breach of contract or for damages pursuant to equitable principles such as quantum meruit. Because the Board has determined there is no contract formed between ATI and PennDOT in this matter, and because ATI has not claimed, and has confirmed it does not wish to claim, damages pursuant to quantum meruit, the Board has no subject matter jurisdiction or authority to address additional issues raised by ATI with respect to alleged irregularities or improprieties with the bidding or vetting process in this case. See e.g., Commonwealth v. On-Point, 753 A.2d 911, 913-914 (Pa. Cmwlth. 2000).

### **OPINION**

Plaintiff, Automative Telephone, Inc. ("ATI"), brings this claim against the Pennsylvania Department of Transportation, ("PennDOT") for lost profits resulting from PennDOT's alleged breach of a service purchase contract for the supply of roadside vending services. ATI's claims arise from the announcement of a bid award in favor of ATI made on October 22, 1999, for the supply of vending machine services for several roadside rest areas throughout the Commonwealth, and PennDOT's eventual decision not to enter into a contract with ATI for these services. This decision was communicated to ATI by PennDOT's letter of December 29, 1999, which stated that ATI was not considered to be a responsible contractor, citing four reasons for this determination: (1) the filing of criminal charges against ATI and its principal, Joseph Hersperger, for failure to report and pay state sales taxes; (2) the existence of an outstanding sales tax liability in the amount of \$36,136.48; (3) the failure of ATI to register to do business in the Commonwealth with the Department of State and the actions taken against ATI's predecessor company, HSS Telecommunications and its owner, Richard Hersperger, by the Public Utility Commission and the Attorney General's Bureau of Consumer Protection; and (4) ATI's failure to provide the Commonwealth with accurate information regarding its corporate identity. The letter also asserted that, in accordance with the Commonwealth Attorneys Act, the refusal of the Attorney General's office to sign the contract prohibited PennDOT from proceeding with the contract.

ATI asserts, inter alia, that it had no affiliation with Richard Hersperger or any company that he owned, that the Attorney General was not required to sign the contract, and that a valid contract was formed by the execution of the contract document by all signatures except the Attorney General. ATI also asserts that the charges regarding its registration and corporate identity were simply false, that the issues regarding the sales taxes were being addressed before PennDOT decided to rescind the contract and that the taxes were paid before ATI received the December 29, 1999 letter, and that ATI is now entitled to loss-of-profit damages because of PennDOT's breach of the alleged contract.

In rebuttal, PennDOT argues that a contract was never formed between PennDOT and ATI because the Attorney General never signed the contract, and that even if there was a contract formed, PennDOT was justified in rescinding it because ATI was not a "responsible contractor" as required by the Commonwealth Procurement Code pursuant to the criteria set forth in Management Directive 215.9 and the contract documents. Alternatively, PennDOT argues that if there was a contract, it was not an express contract, but a quasi-contract under which ATI is limited to recovering only in quantum meruit. PennDOT also argues that ATI has failed to prove its damages, because, among other things, its argument that it could perform the contractual requirements is speculative and because it failed to present sufficient evidence supporting its damage claims. Finally, PennDOT argues that ATI did not exhaust its administrative remedies pursuant to § 1712.1 of the Commonwealth Procurement Code.

For the reasons stated more fully below, the Board must reject PennDOT's argument that there is no contract between it and ATI because the Office of Attorney General failed to sign the proposed agreement. However, pursuant to the facts elicited at hearing, the Board is of the opinion that basic principles of contract formation and a plain reading of the statutes and bid

documents involved mandate the conclusion that no contract was ever formed between PennDOT and ATI. Specifically, we find that PennDOT's bid documents constituted an invitation to make an offer; that ATI's bid constituted an offer; and that PennDOT rejected that offer prior to the occurrence of circumstances that could be deemed an acceptance of same, thus precluding the formation of a contract between ATI and PennDOT. Additionally, the fact that no acceptance of ATI's offer was ever transmitted to ATI also precludes the formation of a contract.

### **Attorney General's Signature Requirement**

It is well established by case law and statute that a contract with the Commonwealth will not be formed (i.e. a bid or offer will not be deemed accepted) unless and until the contract is executed by all persons whose signature is required by law. See e.g., Shovel Transfer and Storage, Inc. v. PLCB, 559 Pa. 56, 63, 739 A.2d 133, 136-37 (1999) ("Where the elements for the formation of a contract are prescribed by statute, then the contract is not enforceable until the statutory requirements are met . . . . Thus the first inquiry is whether the signatures were required by statute."); Commonwealth v. On-Point, 821 A.2d 641, 647-48 (Pa. Cmwlth. 2003) (citing Shovel Transfer and noting that in Shovel there were no statutory requirements for the missing signatures); See also, 62 Pa.C.S.A. § 543(a) ("Irrespective of the type of contract, no contract shall be effective until executed by all necessary Commonwealth officials as provided by law.").

PennDOT raises the assertion that the Attorney General's signature is required by statute to be on all Commonwealth contracts in order for the contract to become effective. It cites Section 204(f) of the Commonwealth Attorneys Act, which provides for review of contracts by the Attorney General and states as follows:

(f) Deeds, leases, contracts and fidelity bonds.—The Attorney General shall review for form and legality, all Commonwealth . . . contracts to be executed

by Commonwealth agencies; if the Attorney General determines that a . . . contract is in improper form, not statutorily authorized or unconstitutional, he shall notify in writing within 30 days after its submission the agency affected, the Office of General Counsel and the General Assembly through the offices of the Secretary of the Senate and the Chief Clerk of the House of Representatives. The agency may rewrite the . . . contract to meet the objections of the Attorney General. If the agency disagrees with the objection of the Attorney General, it may appeal the decision of the Attorney General by filing a Petition for Review with the Commonwealth Court in such manner as is provided for appeals from final orders of government agencies pursuant to 42 Pa.C.S.A. § 763 (relating to direct appeals from government agencies). If an instrument has been submitted to the Attorney General and he has not approved it or submitted his objection within 30 days after submission, the instrument shall be deemed to have been approved.

71 P.S. § 732-204(f).

As counsel for ATI correctly points out, this Board has, on previous occasions, held that the Commonwealth Attorneys Act does not require that the Attorney General sign a contract in order for it to become effective. See e.g., Residence Inn by Marriott, Inc. v. PennDOT, Board of Claims Docket No. 3707 (Order of August 5, 2004); One Source v. PennDOT, Board of Claims Docket No. 3775 (Order of November 4, 2005). Although both of these cited cases represent attempts by PennDOT to deny the existence of a contract and defeat Board jurisdiction for want of an Attorney General signature after the contract had been performed and PennDOT had fully enjoyed the benefits of such performance, our fundamental view of this issue has not changed.

Section 204(f) plainly imposes a mandate on the Attorney General to “review for form and legality all Commonwealth . . . contracts to be executed by Commonwealth agencies . . . [Emphasis added].” 71 P.S. § 732-204(f). The section then provides a procedure for the Attorney General to notify the agency (among others) of any objection he may have to the contract based on form or legality and also provides a means for resolution of same. While it is clear that the Attorney General may object to the contract or sign it to indicate his approval within the 30 day review period, it is equally clear by the explicit terms of this provision that,

absent written objection as to form or legality within the 30 day review period, the contract is deemed approved as to form and legality. Accordingly, the Board continues to hold, as we have in previous cases, that the signature of the Attorney General is not a necessary prerequisite to an effective contract. In accord, Shovel Transfer, 559 Pa. at 63, 739 A.2d at 137 (although the Attorney General’s signature was not at issue, the Court did state, in addressing statutory signature requirements that, “it is clear that the only approval required by statute was that of the Liquor Control Board.”). Since it is also clear from the express language of 204(f) that the Attorney General’s review is limited to form and legality, we find PennDOT’s argument for an Attorney General’s signature requirement to be even less persuasive in a situation where, as here, Plaintiff has established that the proposed contract was reviewed by the Office of Attorney General, returned without objection as to form or legality and, in fact, contained no deficiency as to the form or legality. In short, we find that the presence or absence of the Attorney General’s signature on the proposed contract in this case is not determinative. This issue, however, does not conclude our decision.

### **Offer and Acceptance**

The Board’s further analysis begins with recognition that a solicitation for bids for a public contract is not an “offer” to form a contract, but is only an invitation for contractors to submit bids in response to the solicitation. It is the bid itself which constitutes the offer. National Construction Services v. Philadelphia Regional Port Authority, 789 A.2d 306, 309 (Pa. Cmwlth. 2001). As the Commonwealth Court stated:

[W]hen someone advertises for bids [it] is the same as that pertaining to auctions. The advertisement is not an offer. It is a request for offers. This is so even if the common practice is to accept the best bid made. Occasionally, and especially in public bid-letting procedures, the best bidder will have a statutory right to be awarded the contract. This statutory right does not create a contract.

Id.

Moreover, it is quite clear that the October 22, 1999, letter informing ATI that it had been “awarded the vending contract for 35 sites in Pennsylvania” did not itself consummate a contract, since both this letter and the bid documents, in toto, clearly indicate PennDOT did not intend to conclude the bargain without a further manifestation of assent.<sup>1</sup> See e.g., Commonwealth v. On-Point, 821 A.2d at 649.

However, this further manifestation of assent is never forthcoming from PennDOT. Specifically, even though it now appears that the service purchase contract returned by ATI was executed by PennDOT personnel, the agency’s comptroller and the Office of General Counsel (via Mr. Kline)<sup>2</sup>, neither this document nor these actions were ever communicated to ATI. In fact, PennDOT purposefully failed to return (or, more accurately, chose not to return) the signed service purchase contract or any notification thereof to ATI. In fact, PennDOT instead communicated a clear and unequivocal rejection of ATI’s offer by way of the December 29, 1999, letter, which rejection was delivered to ATI no later than December 31, 1999.

It is a long-standing rule of contract formation that an “acceptance” not delivered, is not an acceptance. Simply put, if an offeree signs a contract on day one, but instead of returning it to the offerer, puts it in his desk and never communicates his act or signature, the offeree has, in fact, never manifested assent to the offer. See e.g., Groskin v. Bookmyer, 310 Pa. 588, 590-91, 166 A. 233, 233-34 (1933) (defendant’s act of signing written agreement for sale of real estate and “placing it in the hands of his own attorney, who refused to deliver it, was not a bit more

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<sup>1</sup> The October 22, 1999, award letter stated, in relevant part: “Enclosed is the Service Purchase Contract No. 08-462635 that you must sign, date and return in its entirety. Also enclosed for your information is a copy of the bid proposal with the specifications and provisions . . . . The new contract will become effective after all approvals have been received from the administrative and fiscal personnel in Harrisburg. You are reminded that no activities may be performed until the contract is fully executed.” The bid documents also noted, among other things, that PennDOT reserved the right to disallow any bid it considered unacceptable or not in the best interest of the Commonwealth.

<sup>2</sup> Mr. Kline testified that he was authorized to sign this contract on behalf of the Office of General Counsel. However, evidence at hearing indicates that the signed service purchase contract was never communicated to ATI by PennDOT. It apparently came to ATI’s attention only when produced by PennDOT during discovery in preparation for this hearing.

effective to bind plaintiff than if he had placed it in his own pocket. [citing Restatement of Contracts §64]”]; Morganstern Electric Co. v. Coraopolis Borough, 326 Pa. 154, 156-158, 191 A. 603, 604-05 (1937) (“It is elementary that no obligation is created by the acceptance of an offer unless and until it is transmitted to the offerer.”). PennDOT’s decision not to communicate signing of the service purchase contract or any other act of acceptance of the bid offer to ATI defeats the formation of a contract in this case.

While we believe PennDOT’s decision not to transmit the signed service purchase contract back to ATI (or otherwise communicate an act of acceptance) is sufficient to preclude the formation of the alleged contract, PennDOT’s letter of December 29, 1999, being a clear and unequivocal rejection of the offer, is a further reason we cannot find a contract here. This rejection, delivered before any manifestation of acceptance, terminates the offer and precludes the formation of a contract based on the offer. See e.g., Temple University Hospital, Inc. v. Healthcare Management Alternatives, Inc., 764 A.2d 587, 593 (Pa. Super. 2000). (“Nor can we accept the trial court’s legal conclusion that [defendant] could assent by conduct to an offer it had expressly rejected in writing.”); Leskle v. Haseltine, 155 Pa. 98, 25 A. 886 (1893); Smaligo v. Firemans Fund Insurance Co., 432 Pa. 133, 247 A.2d 577. There is no contract here.

### **Equitable Estoppel**

Plaintiff also asserts that PennDOT should be estopped from asserting that the Attorney General’s signature was required to effectuate the alleged contract. Plaintiff notes, among other things, that the Attorney General’s contract review authority is limited to review for form and legality, and that the proposed contract at issue suffered from no deficiencies in either category. Plaintiff cites, among other cases, Department of Commerce v. Casey, 624 A.2d 247 (Pa. Cmwlth. 1993) and Dixon Contracting Company, Inc. v. Department of Environmental

Resources, 80 Pa. Cmwlth. 445, 474 A.2d 701 (1984) as support for its estoppel argument. Based on our holding noted above and our findings that the signature of the Attorney General was neither necessary nor determinative, the requested estoppel is irrelevant. Moreover, while the Board enthusiastically recognizes Dixon and Casey as good and binding legal precedent, we must agree with PennDOT that this case lacks the factual basis to support application of this equitable principle. In Dixon and Casey (and even in Residence Inn and One Source, supra.) the facts in evidence (or presumed on preliminary objection) established that the defendant had induced plaintiff to fully perform the contract, that the plaintiff had done so, and that it was only after accepting full benefit of the performance that defendant then asserted the invalidity of the contract. This is not the case here. ATI here is, instead, seeking loss-of-profit damages on an alleged contract which PennDOT never entered, has consistently refuted and for which ATI has failed to show any significant performance or justifiable reliance.<sup>3</sup>

### **Failure to Exhaust Administrative Remedies**

Finally, we must address PennDOT's argument that despite the long and rather tortured procedural history that has brought this case to hearing before the Board, we nonetheless lack jurisdiction to address Plaintiff's claim because of ATI's failure to exhaust its administrative remedies with respect to this contract claim. ATI responds that this argument has been previously addressed and denied by the Board in our Order of March 13, 2002, which has now become the "law of the case" and is binding on PennDOT. We agree with ATI and will not reverse our earlier decision.

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<sup>3</sup> Among other things, the bid documents at Paragraph 6 stated, "no work was to begin until a contract has been fully executed and a notice to proceed has been given." The October 22, 1999, letter reiterated this. No contract execution or notice to proceed was ever communicated to ATI. Although ATI presented some testimony that it began to perform but was stopped quickly by PennDOT, the Board determined this short lived attempt to install vending machines minimal and without justifiable reliance given the above written instructions.

We would also note that we continue to believe our prior Order of March 13, 2002, was correct. Although the Board is certainly aware of the general principle that equitable estoppel may not be invoked to create subject matter jurisdiction, we note that the cases cited in our prior opinion and the additional cases cited below still support the proposition that PennDOT may be estopped not only as to facts but also as to legal conclusions such as a jurisdictional challenge based on a failure to exhaust administrative remedies where the equities require. See e.g., Buehler v. Philadelphia & Reading Ry. Co., 280 Pa. 92, 124 A. 325 (1924); Bell Atlantic-Pennsylvania, Inc. v. PUC, 763 A.2d 440, 495 (Pa. Cmwlth. 2000) (citing Buehler with approval). Cf. In re Melograne, 571 Pa. 490, 494-5, 812 A.2d 1164, 1166-67 (2002).<sup>4</sup>

Upon close review of the cases addressing lack of jurisdiction for failure to exhaust administrative remedies, we note that this doctrine has repeatedly been held by Pennsylvania's Supreme Court to be "neither inflexible nor absolute" but subject to exceptions, and has more aptly been described as the doctrine of "primary jurisdiction" or "the power to act" on a claim.<sup>5</sup> Accordingly, we believe that this doctrine of primary jurisdiction relates only to the Board's power or ability to act on this case, but does not affect the Board's subject matter jurisdiction

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<sup>4</sup> In Melograne the Court stated:

This confusion between the meaning of terms [subject matter] "jurisdiction" and "power" is not surprising . . . In Riedel, we teased out the distinctions between these terms, explicating that:

[j]urisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the case then presented for its consideration belongs. Power, on the other hand, means the ability of a decision-making body to order or effect a certain result.

Id. Claims relating to a tribunal's power are, unlike claims of subject matter jurisdiction, waivable, Id. At 125.

Melograne, 571 Pa. at 494-95, 739 A.2d at 1166-67.

<sup>5</sup> See e.g., Feingold v. Bell of Pennsylvania, 477 Pa. 1, 6-7 and 21, 383 A.2d 791, 793-4 and 801 ("the exhaustion of administrative remedies rule is neither inflexible nor absolute, and this Court has established exceptions to the rule.")("The doctrine (of primary jurisdiction) has been applied, for example when an action otherwise within the jurisdiction of the court raises a question of the validity of a rate or action . . .")(J. Pomeroy dissenting); Terminato v. Pennsylvania National Ins. Co., 538 Pa. 60, 69, 645 A.2d 1287, 1291 (1994)("Where the Legislature provides a statutory remedy that is mandatory and exclusive, the general rule is that a court is without power to act. [Emphasis added.]").

over this case. (i.e. ATI's claim is within the general type and class of case which the Board is authorized to address). As noted in Melograne, supra, this distinction is important because it is apparent that the Board has subject matter jurisdiction over the type of case presented by ATI. It also appears, pursuant to Buehler and its progeny, that estoppel may be applied to preclude PennDOT from challenging the Board's power to act based on a failure to exhaust administrative remedies/argument. Because PennDOT initially consented to transfer of this case from the Allegheny County C.C.P. to the Commonwealth Court; did, itself, treat these claims as bid protests or other non-contractual matters and raised no issue of referral to a contracting officer; and the significant lapse of time created by the initial agreement to transfer the case to the Commonwealth Court (17 months or 11 months beyond the six month timeframe to initiate a contract claim at PennDOT), we believe PennDOT should not be allowed to negate this tortured history and assert the lack of Board jurisdiction due to a failure to exhaust administrative remedies.

### **Remaining Issues**

Because we have determined that there is no contract between ATI and PennDOT, and because ATI has made it clear in its pleadings, throughout hearing, and in its post-hearing briefs that it is not seeking damages pursuant to a quasi-contract cause of action,<sup>6</sup> it is appropriate for the Board to conclude its analysis of the case at this point.<sup>7</sup>

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<sup>6</sup> The pleadings identify no quasi-contract claim. Counsel for ATI declined to offer any proof of quasi-contract damages during hearing and further confirmed this in ATI's Reply Brief, p. 17.

<sup>7</sup> Because we find no contract and no liability, the arguments respecting proof of damages are moot. As to any other irregularities or complaints with the bidding or vetting process in this case, we offer no findings or opinion as these matters are beyond our jurisdiction, if not already concluded by the Commonwealth Court's Memorandum and Order of August 23, 2001, dismissing all but the contract claim.

**ORDER**

**AND NOW**, this 12<sup>th</sup> day of January 2007, after a hearing, **IT IS ORDERED** and **DECREED** that the claims of plaintiff, Stanley G. Makoroff, Trustee for Automative Telephone Inc. are hereby **DENIED**. Judgment of no liability on the claims made in this case is entered for defendant, Commonwealth of Pennsylvania, Department of Transportation. Each party herein will bear its own costs and attorney fees.

BOARD OF CLAIMS

OPINION SIGNED

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Jeffrey F. Smith  
Chief Administrative Judge

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Ronald L. Soder, P.E.  
Engineer Member

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John R. McCarty  
Citizen Member