

COMMONWEALTH OF PENNSYLVANIA

SCIENTIFIC GAMES INTERNATIONAL, INC.	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF GENERAL SERVICES AND DEPARTMENT OF REVENUE	:	DOCKET NO. 4036

FINDINGS OF FACT

1. On July 8, 2010, the Department of General Services (“DGS”) issued a Request for Proposals (“RFP”) for the design, development, implementation and maintenance of a Central Computer Control System (“CCCS”) for the Department of Revenue’s (“DOR”) gaming control system. (Ex. J-4)

2. Scientific Games International, Inc. (“SGI” and/or “Claimant”) and GTECH Corporation (“GTECH”) submitted proposals in response to the RFP. (Ex. D-9)

3. On or about November 23, 2010, DGS notified SGI that its proposal had been selected for contract negotiations with DOR and DGS (collectively the “Agencies” and/or “Respondents”). (Exs. J-7, D-1, D-9; N.T. 50-51, 57-68, 148-49, 340-53)

4. Negotiations between representatives of the Agencies and SGI began in January 2011 and continued into April 2011. (N.T. 65-67, 148-49, 341-42)

5. Negotiations between the Agencies and SGI between January and April 2011 centered on the IT Contract Terms and Conditions, which had been included as Appendix A to the RFP. (Exs. J-4, J-5, C-1; N.T. 50-51, 57-68)

6. In an email exchange during the negotiation process on April 22, 2011, Phil Bauer, SGI’s vice president and corporate counsel, suggested to Julia Sheridan of the DOR’s legal office that the Commonwealth first execute the contract and forward it to SGI to “countersign” and return. Ms. Sheridan responded that the final document would be “put together at DGS” and sent first to SGI for its signature, then “returned to DGS, whereupon it will be scanned into the Commonwealth’s system and routed for electronic signatures by the Commonwealth.” (Ex. D-1; N.T. 69-70, 146-47, 163-66, 404-05)

7. On April 29, 2011, Oliver Kerwin (at the time a DGS Assistant Counsel) forwarded an electronic copy of the proposed contract to Mr. Bauer for SGI’s signature. (Exs. J-1, D-2; N.T. 64-67, 145-50, 166-67, 336-39, 374-75)

8. The proposed contract forwarded to SGI on April 29, 2011 was made up of what the parties identified as the “Cover Contract” (a four page document including recitations, signature lines, and a statement incorporating the remaining terms of the proposed contract) and the remaining terms comprised of the IT Terms and Conditions, the Contractor’s Proposal, and the RFP (collectively referred to herein as the “Proposed Contract”). (Exs. J-1, J-3; N.T. 191-92, 256-57)

9. In the April 29, 2011 transmittal email, Mr. Kerwin identified the “final contract documents” which were attached as including the Cover Contract, IT Contract Terms and Conditions, SGI’s Proposal, and the RFP. (Ex. D-2)

10. Mr. Kerwin then instructed Mr. Bauer (in the April 29, 2011 transmittal email) to confirm the accuracy of all the documents and, if SGI agreed with their contents, to “sign the Cover Contract and mail the original to [Mr. Kerwin] and email a scanned version for us to enter into our contracting system to route for Commonwealth signatures.” (Ex. D-2; N.T. 149, 166-67)

11. Mr. Kerwin added that it “will likely take at least 60 days to get all the required Commonwealth signatures.” (Ex. D-2; N.T. 149, 166-67)

12. The electronic copy of the Cover Contract sent to SGI on April 29, 2011, contained signature lines for the DOR Secretary of designee, the DOR Comptroller, the DOR Office of Chief Counsel, the Office of General Counsel, and the Office of Attorney General. (Ex. J-1)

13. On each signature line of the Cover Contract forwarded to SGI on April 29, 2011, was the bracketed notation “[Signature Affixed Electronically].” (Ex. J-1)

14. On May 2, 2011, William Huntley (President of SG Lottery Systems) signed the Cover Contract on behalf of SGI, and Mr. Bauer emailed a scanned copy of the Cover Contract signed by Mr. Huntley to Mr. Kerwin of DGS. (Exs. J-2, D-3; N.T. 78-79, 143-44, 336, 375-77, 411)

15. A printed copy of the Cover Contract (or at least the signature page) with SGI’s signature was then transmitted by DGS to the Secretary of Revenue, Dan Meuser. Mr. Meuser signed the document in ink after it had been returned by SGI to DGS on May 2, 2011. (Exs. J-2, J-3; N.T. 31-32, 78-80, 114-15, 143-44, 393)

16. Consistent with the procedure described in the prior emails between the parties, the Proposed Contract was then scanned, uploaded into the Commonwealth’s electronic procurement system (known as “SRM”) and routed to the other Commonwealth signatories for their review and electronic signatures. (N.T. 31-32, 78-80, 154)

17. Under the SRM system, the standard order in which electronic signatures were obtained (after the agency’s secretary or designee) was the agency’s Comptroller, the agency’s Chief Counsel, the OGC and the OAG. (N.T. 33-38, 144, 201-03, 249-50)

18. Electronic signatures were affixed to the Proposed Contract for the DOR Comptroller and the DOR Office of Chief Counsel on May 13, 2011, and May 16, 2011, respectively. (Ex. J-11; N.T. 33-38, 144, 201-03, 249-50)

19. On May 11, 2011, GTECH filed a protest to the bid award to SGI. (Exs. D-4, D-9; N.T. 168-70)

20. At the time of the filing of GTECH's protest, neither the OGC nor the OAG had electronically approved the Contract. (Exs. J-8, J-11; N.T. 36-41, 156-170, 285-90)

21. As a result of the filing of GTECH's protest, the SRM approval process was stopped before the OGC affixed its signature electronically to indicate its review and approval. (Ex. J-11; N.T. 36, 169-70)

22. On July 11, 2011, DGS Deputy Secretary James Henning issued a final determination of GTECH's protest which granted GTECH's protest in part and denied it in part. (Ex. D-9)

23. Mr. Henning's final determination also continued the stay of the Proposed Contract until SGI was granted a manufacturer's license by the Gaming Control Board or "the period required by law expires." (Ex. D-9)

24. On August 4, 2011, DGS notified SGI that it had canceled the procurement. (Ex. D-8; N.T. 175, 178-79)

25. At hearing, the Commonwealth's witnesses described in detail the established procedure for obtaining signatures on RFP procurement contracts. This procedure is summarized in ¶¶ 26-32 below. (N.T. 42-57, 81-83, 92-115, 121-32, 153-55, 180-96, 235-39; Findings of Fact ("F.O.F.") 26-32)

26. Once the parties have completed negotiations as to specific contract terms, the proposed contract documents are sent to the vendor to sign first, then returned to the Commonwealth agency to obtain the signatures of the various Commonwealth parties involved in the procurement process. (N.T. 153-55)

27. After the vendor signs and returns the proposed contract to the Commonwealth agencies, a scanned version of the proposed contract is routed to Commonwealth signatories in a predetermined order which is: the agency secretary or designee, the agency Comptroller, the agency Chief Counsel, the OGC and the OAG. (N.T. 31-32, 144, 283-84, 289-90, 296-300)

28. While the signature of the agency secretary or designee may be obtained in ink, the rest are provided electronically through the SRM. (N.T. 31-32, 78-80, 114-15, 283-84, 289-90, 309-10, 392-93)

29. This established procedure for obtaining Commonwealth signatures was discussed by the parties and clearly described to SGI during negotiations, and the multiple Commonwealth signatories were reflected on the signature page of the Cover Contract. (Ex. J-1; N.T. 153-54, 374-81, 392-93)

30. Under the Commonwealth's established contracting procedures, no Commonwealth signatures are affixed before the vendor signs the subject contract. (N.T. 153-54)

31. If one Commonwealth signatory in the electronic SRM signature process does not electronically sign the contract, the contract does not proceed to the next signatory. (N.T. 31-32, 290-91)

32. Under the Commonwealth's contracting system, when a contract has been signed by the vendor and by all the Commonwealth signatories, a cover sheet which includes the printed name of the purchasing agent and the annotation "FULLY EXECUTED" is generated by the SRM. This completed document is then sent to the contractor by the purchasing agent to indicate that the contract has been completed by the Commonwealth. (Exs. J-4, J-5, C-7A, C-7B, C-7E, C-7H, C-7I, C-7J, C-7L; N.T. 42-49, 180-93, 220-21, 257-59)

33. In the case of the Proposed Contract, once the Cover Contract had been signed by SGI and returned electronically to DGS, a paper copy of same with the SGI signatures was to be routed first to the Secretary of Revenue for his signature in ink (because the Secretary did not access the SRM system). (Ex. J-3; N.T. 31-32, 79-80, 114-15, 143-44, 393; F.O.F. 15)

34. After the Secretary of Revenue physically signed the Cover Contract, the Proposed Contract (with the ink signatures of SGI and the Secretary of Revenue) was scanned into the SRM system and routed for the electronic signatures of all the other Commonwealth signatories in the standard predetermined order, which in this case was (after the Secretary of Revenue) the DOR Comptroller's office, the DOR's Office of Chief Counsel, the OGC, and the OAG. (Exs. J-1, J-2, J-3, J-11; N.T. 33-38, 144, 201-03, 249-50; F.O.F. 12)

35. The above procedure to be followed in the case of the Proposed Contract had also been explained beforehand to SGI. (Ex. J-1; N.T. 372-81)

36. After the Proposed Contract (with the ink signatures of SGI and the Secretary of Revenue) had been scanned into the SRM system, it was electronically signed by Afrid Irani for the DOR Comptroller and Thomas Gohsler for the DOR legal office on May 13, 2011 and May 16, 2011, respectively. (Ex. J-11; N.T. 36)

37. The electronic document (i.e. the Proposed Contract) was then forwarded to the next signatory in line, OGC's contract attorney, Andrew Clark. (Ex. J-11; N.T. 285-86)

38. Before Mr. Clark reviewed this Proposed Contract, Mr. Kerwin (on May 16, 2011) informed Mr. Clark that the Proposed Contract was stayed because of the filing of

GTECH's protest and directed Mr. Clark that OGC was not to act on the Proposed Contract "while the protest is pending." (Exs. D-4, D-6; N.T. 156-70, 285-90)

39. Mr. Clark had not yet reviewed or approved the Proposed Contract when he was advised by Mr. Kerwin not to proceed further with review or approval on behalf of OGC because of the GTECH protest. (N.T. 285-90)

40. At Mr. Clark's request, the Proposed Contract was ultimately removed from OGC's "queue" for approval. (Exs. D-4, D-5, D-6; N.T. 287-90)

41. The electronic document comprising the Proposed Contract (with the signatures of SGI, the Secretary of Revenue, the DOR Comptroller and the DOR Office of Chief Counsel) was never sent to OAG for its review and approval. (N.T. 289-90)

42. Neither OGC nor OAG ever reviewed or approved the Proposed Contract. (Exs. J-8, J-11; N.T. 36-41, 156-170, 285-90)

43. Mr. Bauer, SGI's vice president and corporate counsel, testified that he had prior experience negotiating procurement contracts with Commonwealth entities, had participated in entering into several such contracts before the Proposed Contract for the CCCS arose, and was familiar with the Commonwealth's established procedures for obtaining Commonwealth signatures. (N.T. 337-39, 382)

44. Mr. Bauer also confirmed that the SRM system had been described to him during negotiations as well as the procedure the Commonwealth expected to follow with the Proposed Contract. As a result, while he had expected electronic signatures for the "approvals" and a physical signature for the DOR Secretary, he expected that this would occur after SGI had signed the document. (N.T. 375-81)

45. Mr. Bauer further testified that he was "surprised" that the copy of the Proposed Contract he received from DGS on April 29, 2011, appeared already to have been signed electronically (due to the "[Signatures Affixed Electronically]" notation) because this was at odds with "the process that had been described" to him previously (i.e. that SGI would receive an unsigned contract for SGI to sign before Commonwealth signatures were affixed). (N.T. 374)

46. Indeed, in the April 29, 2011 email by which DGS sent the "final contract documents" (i.e. the Proposed Contract) to SGI, DGS's Mr. Kerwin still directed Mr. Bauer to have SGI sign the document and return it to DGS "to enter into our [DGS's] contracting system to route for Commonwealth signatures." (Ex. D-2)

47. Mr. Bauer further testified at hearing that he sought to clear up confusion pertaining to the "[Signature Affixed Electronically]" notations on the Cover Contract in his May 2, 2011 email exchange with Mr. Kerwin. (Ex. D-3; N.T. 373-78, 392-93)

48. In this May 2, 2011 email exchange (by which Mr. Bauer also returned a scanned copy of the Cover Contract with SGI's signature to Mr. Kerwin), Mr. Bauer acknowledged his then current understanding:

As you [Mr. Kerwin] confirmed, the Commonwealth will affix the necessary signatures electronically and send a fully executed copy back to SG . . . the Commonwealth has up to 60 days to obtain the signatures, and we [SGI] repeat our request that this process be expedited to the extent possible [emphasis added].

(Ex. D-3; N.T. 143-44, 167-68, 381, 405, 408, 411-15)

49. Notwithstanding his familiarity with Commonwealth contracting procedures, his acknowledgment that these procedures were again described to him during negotiations on the Proposed Contract, and the foregoing acknowledgment in his contemporaneous email of May 2, 2011, Mr. Bauer's hearing testimony on this point is that he believed the "[Signatures Affixed Electronically]" notation for the Secretary of Revenue or his designee indicated that this signature had been electronically affixed, but that he was unclear as to whether the same "[Signatures Affixed Electronically]" notations for the other signatories represented that they too had executed the document. (Exs. D-2, D-3; N.T. 337-39, 373-78, 380-382, 392-93; F.O.F. 43-48)

50. Mr. Bauer explained his stated belief regarding the meaning of the "[Signatures Affixed Electronically]" notations at hearing as follows:

My understanding based on what we had been told was that we should expect the Department of Revenue to sign immediately. And so when they came back signature affixed, I thought, okay, we've got Department of Revenue, but why are there – I knew that they hadn't sent it to OAG or OGC yet. And so I didn't think that made sense and that's what we were trying to get to.

(N.T. 380-81)

51. The Commonwealth's witnesses testified that the "[Signatures Affixed Electronically]" notations on the Cover Contract as emailed to SGI on April 29, 2011 meant that the signatures would be electronically affixed, not that they had been affixed. (N.T. 74-76, 102-11, 114-15, 218-21, 256-57)

52. Whether one puts more credence in Mr. Bauer's May 2, 2011 description of his understanding as to the meaning of the "[Signatures Affixed Electronically]" notations on the signature page of the Cover Contract sent to him on April 29, 2011 or his subsequent explanation of same at hearing, it remains apparent from both that he was uncertain as to whether the notation meant the signatures had been affixed or were to be affixed to the document. (Exs. D-2, D-3; N.T. 337-39, 373-78, 380-382, 392-93; F.O.F. 43-51; Board Finding)

53. SGI did not object to the admission of Ex. D-2 (the April 29, 2011 email) or to subsequent questioning of Mr. Kerwin and Mr. Bauer about the contents of Ex. D-3 (the May 2, 2011 email chain). (N.T. 269-71, 405-09)

54. SGI did object to Mr. Kerwin's testimony about the contents of the April 29, 2011 email (Ex. D-2) and to the admission of the May 2, 2011 email chain (Ex. D-3) on the basis of the parol evidence rule. (N.T. 149-51, 269-71)

55. The Board overruled these objections, finding that the meaning of the "[Signatures Affixed Electronically]" language was ambiguous, rendering parol evidence admissible to explain, clarify or resolve the ambiguity. (N.T. 150-51, 270-71). See e.g. Kripp v. Kripp, 849 A.2d 1159, 1163 (Pa. 2004)

56. The ambiguous nature of the term "[Signatures Affixed Electronically]" as it was used on the April 29, 2011 Proposed Contract document sent to SGI had previously been established by Stacie Amsler, among others, whose testimony as to the ambiguous meaning of this notation had earlier been admitted without objection and was clearly confirmed by Mr. Bauer's testimony. Accordingly, the Board allowed parol evidence to be admitted to explain, clarify and/or resolve the ambiguity created by the "[Signatures Affixed Electronically]" notations in the Cover Contract. (N.T. 31-33, 78-82, 109-11, 142-43, 150-51; F.O.F. 42-55)

57. Mr. Bauer, and SGI's Vice President Brennan Lawrence, also stated at hearing that they actually thought SGI had a fully executed contract upon SGI's signing of the April 29, 2011 document based on the "[Signatures Affixed Electronically]" notations on the Proposed Contract. This testimony, however, is not consistent with SGI's actions subsequent to April 29, 2011. (N.T. 374-75, 406, 458-61; F.O.F. 58-65; Board Finding)

58. In addition to Mr. Bauer's May 2, 2011 email and portions of his testimony which indicates he did not think the April 29, 2011 Proposed Contract had been finally executed by the Commonwealth, both Mr. Bauer and Mr. Lawrence testified at length as to the extensive and urgent nature of the preliminary work SGI needed to perform before it could transition from the existing gaming control system to SGI's CCCS. (N.T. 353-56, 394-95, 426-35, 450-52, 461-62)

59. As per Mr. Bauer and Mr. Lawrence, this preliminary work included obtaining financing for this project, mobilizing SGI resources, developing project specific software, and building and housing data equipment banks to handle every transaction on over 100,000 gaming machines every day. (N.T. 353-56, 394-95, 426-35, 450-52, 461-62)

60. Both Mr. Bauer and Mr. Lawrence also indicated that it was this extensive preliminary work which was the reason SGI was so anxious to get the Proposed Contract fully executed as soon as possible in order to transition from the prior contract, which was due to expire on June 27, 2011. (N.T. 353-56, 394-95, 450-52, 461-62)

61. However, despite this expressed urgency, no evidence was presented that SGI actually began to perform any of these preliminary steps promptly after signing and returning to

DGS what it now argues was a fully executed, binding contract on May 2, 2011. (N.T. 353-56, 374-75, 394-95, 406, 450-62)

62. The only preliminary step identified as having actually been taken was for SGI to apply for a Pennsylvania gaming license. This application, however, was submitted to the Pennsylvania Gaming Commission even before SGI had submitted a bid on the project, so is no indication of when SGI actually thought it had a binding contract for the project here at issue. (N.T. 356-57)

63. Both Mr. Bauer and Mr. Lawrence stated that they required a binding contract to be in place before they could begin mobilizing their resources to perform under the Proposed Contract, then failed to identify any specific steps they initiated to accomplish such mobilization after May 2, 2011. (N.T. 182-90, 220-22, 257-59, 328-31, 353-56, 374-75, 394-95, 406, 450-62)

64. To the contrary, when asked to clarify if any of the CCCS system SGI proposed for Pennsylvania had actually been built, Mr. Lawrence stated that it had not. (N.T. 426-35)

65. The lack of any demonstrated action by SGI to commence its extensive and urgent preparation of the CCCS after May 2, 2011 contradicts the current contention of its witnesses that they thought the “[Signatures Affixed Electronically]” notations on the Proposed Contract meant SGI had a fully executed contract when it signed on May 2, 2011. (Exs. D-2, D-3; N.T. 353-56, 374-75, 394-95, 406, 450-62; F.O.F. 57-64; Board Finding)

66. The actions and statements of both parties clearly manifest their mutual intention that the Proposed Contract be executed by both parties before the obligations and duties expressed therein became binding. (Exs. J-4, J-5, C-I, D-2, D-3; N.T. 182-90, 220-22, 257-59, 328-31, 353-56, 374-75, 394-95, 406, 450-62; F.O.F. 3-6, 8-11, 25-35, 43-48, 59-63, 72-73, 80-81; Board Finding)

67. Because we have found, inter alia, that: Mr. Bauer was familiar with the Commonwealth’s procedures for obtaining signatures on IT contracts; those procedures were discussed with Mr. Bauer during negotiations; DGS’s Mr. Kerwin expressly told Mr. Bauer in the April 29, 2011 email that SGI should transmit the Proposed Contract (once signed by SGI) to DGS in order to obtain the Commonwealth signatures; Mr. Bauer expressly acknowledged (in his May 2, 2011 email) that “the Commonwealth will affix the necessary signatures electronically and send a fully executed copy back to SG”; Mr. Bauer testified that he was uncertain as to the meaning of the “[Signatures Affixed Electronically]” notations on the signature page of the Cover Contract; and no evidence was presented that SGI actually began to perform any of the preliminary steps it identified as needing to be performed urgently after signing and returning to DGS the Proposed Contract on May 2, 2011, we find Mr. Bauer’s present testimony that he believed the “[Signature Affixed Electronically]” notations on the Cover Contract meant the Commonwealth had already signed and that SGI had a fully executed contract upon SGI’s signing of the Proposed Contract on May 2, 2011, to lack credibility. (Exs. D-2, D-3; F.O.F. 43-52, 57-65; Board Finding)

68. For these same reasons, as summarized in the immediately preceding paragraph, we find Mr. Lawrence's testimony that he believed the "[Signature Affixed Electronically]" notations on the Cover Contract meant the Commonwealth had already signed and that SGI had a fully executed contract upon SGI's signing of the Proposed Contract on May 2, 2011, to lack credibility as well. (Exs. D-2, D-2; F.O.F. 43-52, 57-67; Board Finding)

69. On the basis of the evidence presented at hearing, we find that the electronic copy of the Proposed Contract transmitted to SGI on April 29, 2011 had not, in fact, been signed (electronically or otherwise) by any of the Commonwealth signatories as of April 29, 2011. (Exs. D-2, D-3; F.O.F. 6-7, 10-13, 15-18, 20, 24-42, 51; Board Finding)

70. Because we have found that the electronic copy of the Proposed Contract transmitted to SGI on April 29, 2011 had not, in fact, been signed (electronically or otherwise) by any of the Commonwealth signatories as of April 29, 2011; and because we have found the testimony of Mr. Bauer and Mr. Lawrence that they believed that the "[Signature Affixed Electronically]" notations on the Cover Contract meant the Commonwealth had already signed and that SGI had a fully executed contract upon SGI's signing of the April 29, 2011 document to lack credibility, we find, as a matter of fact, that despite its assertions at hearing to the contrary, SGI knew full well that the Proposed Contract it received on April 29, 2011 had not been electronically signed by any of the Commonwealth signatories at that time. (Exs. D-2, D-3; F.O.F. 6-7, 10-13, 15-18, 20, 24-42, 51, 57-69; Board Finding)

71. Because we have found: that the electronic copy of the Proposed Contract transmitted to SGI on April 29, 2011 had not, in fact, been signed (electronically or otherwise) by any of the Commonwealth signatories as of April 29, 2011; and that SGI, despite their present assertions at hearing to the contrary, knew full well that the Proposed Contract it received on April 29, 2011 had not been electronically signed by any of the Commonwealth signatories at that time, we find no factual basis for SGI's argument that the Proposed Contract which SGI signed and transmitted to DGS on May 2, 2011 constituted a contract between the parties at that time. (Exs. D-2, D-3; F.O.F. 69-70; Board Finding)

72. SGI argues, in the alternative, that even if a contract was not formed when SGI signed the April 29, 2011 Proposed Contract document and returned it to DGS on May 2, 2011, the Secretary of Revenue's subsequent execution of the Cover Contract by hand served to bind the parties at that point. (SGI's Proposed Findings of Fact, Conclusions of Law and Brief at p. 18)

73. The Agencies argue, to the contrary, that the lone signature of the Secretary of Revenue on the document which had been returned to DGS was not adequate to form a binding contract (nor did the addition of signatures from the DOR Comptroller and the DOR Office of Chief Counsel form such a contract). (Commonwealth's Proposed Findings of Fact, Conclusions of Law and Brief at pp. 6-13; Commonwealth's Reply to SGI's Proposed Findings of Fact, Conclusions of Law and Brief at pp. 2-4)

74. The Agencies offer three reasons why the Secretary's signature (alone or with the DOR's comptroller's and chief counsel's) was insufficient to bind the Commonwealth: 1) the

Contract had not been reviewed or approved by the OGC or the OAG as required by the Commonwealth Attorneys Act and/or the terms of the Proposed Contract; 2) no delivery of a fully executed contract was made to SGI; and/or 3) the Proposed Contract never became “valid” or “binding” under the explicit terms remaining in the Proposed Contract, specifically Paragraph 1(b) of the IT Contract Terms and Conditions (because no document with the printed name of the purchasing agent was ever created or provided to SGI). (Commonwealth’s Proposed Findings of Fact, Conclusions of Law and Brief at pp. 6-13; Commonwealth’s Reply to SGI’s Proposed Findings of Fact, Conclusions of Law and Brief at pp. 2-4)

75. The original IT Contract Terms and Conditions as included with the RFP provided as follows:

1. TERMS AND SCOPE OF CONTRACT

- (a) The term of the Contract shall commence on the Effective Date and shall end on the Expiration Date identified in the Contract, subject to the other provisions of the Contract. The Effective Date shall be: a) the date the Contract has been fully executed by the Contractor and by the Commonwealth and all approvals required by the Commonwealth contracting procedures have been obtained or b) the date referenced in the Contract, whichever is later. The Contract shall not be a legally binding contract until after the fully-executed Contract has been sent to the Contractor.
- (b) The fully executed Contract shall not contain ink signatures by the Commonwealth. The Contractor understands and agrees that the receipt of an electronically-printed Contract with the printed name of the Commonwealth purchasing agent constitutes a valid, binding contract with the Commonwealth. The printed name of the purchasing agent on the Contract represents the signature of that individual who is authorized to bind the Commonwealth to the obligations contained in the Contract. The printed name also indicates that all approvals required by the Commonwealth contracting procedures have been obtained.
- (c) The Contractor shall not start performance until all of the following have occurred: (1) the Effective Date has arrived; (2) the Contractor has received a copy of the fully executed Contract; and (3) the Contractor has received a Purchase Order. The Commonwealth shall not be liable to pay the Contractor for any supply furnished or work performed or expenses incurred before the Effective Date or before the Contractor receives a copy of the fully executed Contract or before the Contractor has received a Purchase Order. Except as otherwise provided in Section 3, no Commonwealth employee has the authority to verbally direct the

commencement of any work or delivery of any supply under this Contract prior to the Effective Date.

(Ex. J-4; N.T. 57-58)

76. In the negotiation process, between DGS and SGI, Mr. Bauer submitted proposed changes to the IT Contract Terms and Conditions to Ms. Sheridan. (Ex. C-1; N.T. 60-61, 351, 362-64)

77. As a result of negotiations between representatives of DGS and SGI, the language of Paragraph 1, subparagraphs (a), (b), and (c), was changed. (Exs. J-4, J-5, C-1; N.T. 60-68, 209-11, 397-99, 454-55, 467-68)

78. Terms in the original Paragraph 1(a) mandating “all approvals required by the Commonwealth contracting procedures” in order for the Contract to be effective, and requiring delivery of a “fully-executed” contract to SGI in order to be a legally-binding contract, were removed by the parties from the final IT Contract Terms and Conditions. (Exs. J-5, C-1; N.T. 60-68, 209-11, 397-99, 454-55, 467-68)

79. However, the only change to Paragraph 1(b) (describing the requirements for a fully executed, valid, binding contract) negotiated by the parties was in the first sentence, where the language in the RFP that “The fully executed Contract **shall** not contain ink signatures . . .” was changed to “. . . **may** not contain ink signatures . . . (emphasis added).” (Exs. J-5, C-1)

80. The parties, by express terms negotiated between them, eventually set forth the requirements for formation of a valid, binding contract in Paragraph 1(b) (of the final IT Contract Terms and Conditions), which reads as follows:

- (b) The fully executed Contract may not contain ink signatures by the Commonwealth. The Contractor understands and agrees that the receipt of an electronically-printed Contract with the printed name of the Commonwealth purchasing agent constitutes a valid, binding contract with the Commonwealth. The printed name of the purchasing agent on the Contract represents the signature of that individual who is authorized to bind the Commonwealth to the obligations contained in the Contract. The printed name also indicates that all approvals required by the Commonwealth contracting procedures have been obtained.

(Exs. J-5, C-1; N.T. 60-68, 209-11, 397-99, 454-55, 467-68)

81. All Commonwealth IT contracts contain substantially identical language to Paragraph 1(b). According to both Mr. Kerwin of DGS and OGC’s Mr. Clark, generation of the SRM contract cover sheet with the purchasing agent’s name printed thereon is a standard and

necessary step to indicate completion of the Commonwealth's procurement contracting process. (Exs. J-4, J-5, C-1; N.T. 182-90, 220-22, 257-59, 328-31)

82. At hearing, SGI introduced into evidence 12 exhibits representing contracts obtained from the Commonwealth's eMarketplace, a web site where the public may access Commonwealth contracts and information on procurements. (Exs. C-7A, C-7B, C-7C, C-7D, C-7E, C-7F, C-7G, C-7H, C-7I, C-7J, C-7K, and C-7L; N.T. 55-56)

83. Each of the contracts in these exhibits contained language substantially identical to that in Para 1(b) of the IT Contract Terms and Conditions in the Proposed Contract. (Exs. J-5, C-7A, C-7B, C-7C, C-7D, C-7E, C-7F, C-7G, C-7H, C-7I, C-7J, C-7K, and C-7L; N.T. 182-90; F.O.F. 79-81)

84. Eight of the contract exhibits (referenced in F.O.F. 81) included the SRM cover sheet/printout identified by the Agencies' witnesses as the means by which the printed name of a purchasing agent (and the notation "FULLY EXECUTED") is added to the contract document to indicate its completion. (Exs. C-7A, C-7B, C-7C, C-7E, C-7H, C-7I, C-7J, and C-7L; N.T. 220-22, 258-59, 328-31; F.O.F. 32, 82)

85. Although the Agencies stipulated orally at hearing to the accuracy of the 12 contracts (Exs. C-7A – C-7L) which SGI had obtained from the eMarketplace website (i.e. that the documents were what they purported to be), the Agencies, pointedly, did not stipulate that Exhibits C-7A through C-7L were complete as presented. In fact, Ms. Amsler testified credibly that complete contracts as posted on eMarketplace would have included the SRM cover sheets/printouts which were missing from Exs. C-7D, C-7F, C-7G, and C-7K. SGI offered no direct testimony that these four exhibits were complete. (N.T. 107-13, 127-32, 134-139)

86. Without the SRM cover sheet/printouts with the printed name of a purchasing agent accompanying the contract document in the remaining four exhibits, the Agencies' witnesses stated that they could not identify these remaining four contract documents as having been completed from the exhibit alone, even though they also contained the "[Signature Affixed Electronically]" notation on the signature lines for each Commonwealth signatory.¹ (N.T. 107-13, 181-90, 220-22, 258-59)

87. While terms in the original CCCS proposed contract at Paragraph 1(a) mandating "all approvals required by the Commonwealth contracting procedures" in order for the contract to be effective, and requiring delivery of a "fully-executed" contract to SGI in order to be a legally-binding contract, were removed by the parties from the final IT Contract Terms and Conditions in the course of negotiations between January and April 2011, the language of Paragraph 1(b) remained essentially intact. (Exs. J-4, J-5, C-1; F.O.F. 75-80)

¹Ms. Amsler did testify that one of the four contract exhibits shown to her (Ex. C-7A) was an "effective" Commonwealth contract, even though the exhibit (as presented) did not include a cover sheet with the printed name of the purchasing agent. She explained, however, that this was only because she was personally familiar with that particular contract and knew independently that it had been finalized. N.T. 102-04.

88. The plain language of Paragraph 1(b) remaining in the Proposed Contract, agreed to by both parties, required the production “of an electronically-printed Contract with the printed name of the Commonwealth purchasing agent” in order to constitute “a valid, binding contract with the Commonwealth.” (Ex. J-5; F.O.F. 79-80; Board Finding)

89. As earlier stated in credible and uncontradicted testimony from the Commonwealth’s witnesses, the printed name of the purchasing agent is added to a procurement contract by generation of an SRM cover sheet containing this printed name and a notation “FULLY EXECUTED.” (Exs. J-4, J-5, C-7A, C-7B, C-7E, C-7H, C-7I, C-7J, C-7L; N.T. 42-49, 180-93, 220-21, 257-59; F.O.F. 32)

90. Paragraph 1(b) of the Proposed Contract also states that it is this purchasing agent (not the Secretary of Revenue) who is the “individual who is authorized to bind the Commonwealth to the obligations contained in the [Proposed] Contract.” (Ex. J-5; F.O.F. 79-80; Board Finding)

91. By its plain terms, Paragraph 1(b) of the Proposed Contract required the addition of the printed name of the purchasing agent to the Proposed Contract in order to indicate the completion of the execution process of this contract and the Commonwealth’s intent to be bound thereby. (Exs. J-5, C-1; N.T. 258-59; F.O.F. 79-86; Board Finding)

92. Paragraph 1(b) does not require the purchasing agent to sign the Proposed Contract, but rather requires the addition of the printed name of the purchasing agent to be added to the Proposed Contract as an overt act to indicate the Commonwealth’s final acceptance of the Proposed Contract signed by SGI (i.e. SGI’s offer). (Ex. J-5; F.O.F. 32, 79-91; Board Finding)

93. This express provision (Paragraph 1(b)), requiring “an electronically-printed Contract with the printed name of the Commonwealth purchasing agent” in the final IT Contract Terms and Conditions by express agreement of the parties, remained as the final overt act of acceptance by the Commonwealth required to constitute “a valid, binding contract with the Commonwealth.” (Exs. J-5, C-1; F.O.F. 32, 79-92; Board Finding)

94. SGI argued that the absence of a signature line for the purchasing agent on the Cover Contract led it to understand that the Secretary of Revenue was the purchasing agent. (SGI’s Proposed Findings of Fact, Conclusions of Law and Brief at p. 16)

95. The express terms of Paragraph 1(b) of the Proposed Contract did not require a signature for the “purchasing agent” but instead required the overt act of adding the printed name of the purchasing agent to the subject contract. Accordingly, no signature line for the “purchasing agent” was therefore required on the Proposed Contract. (Exs. J-5, C-1; F.O.F. 32, 79-93; Board Finding)

96. No evidence was presented that anyone from SGI inquired of the Agencies during the course of negotiations who the purchasing agent was for the Proposed Contract, and no

credible evidence was presented that anyone from the Commonwealth misled SGI as to the identity of the purchasing agent. (N.T. 371, 478-79; Board Finding)

97. Contrary to SGI's subjective belief that the DOR Secretary was the purchasing agent, each of the Agencies' witnesses testified (without contradiction), and we so find, that Mary Kay Breen of DOR was the purchasing agent for the Proposed Contract. (N.T. 48-49, 119-20, 215-16, 247-48, 331)

98. The Proposed Contract between SGI and the Agencies did not include an SRM cover sheet/printout with the printed name of a purchasing agent added to it, and one was never created for the Proposed Contract. (Exs. J-1, J-5; N.T. 31-34, 48-49, 119-20; Board Finding)

99. Because no "electronically-printed Contract with the printed name of the purchasing agent" (who was explicitly identified in Paragraph 1(b) as the "individual who is authorized to bind the Commonwealth to the obligations contained in the Contract") was ever generated or produced (as specifically required under the terms of Paragraph 1(b) of the final IT Terms and Conditions in the Proposed Contract), we find that this final overt act specified by the parties indicating acceptance of the Proposed Contract and intent to be bound thereby by the Commonwealth never occurred. (Exs. J-1, J-2, J-3, J-5, J-8, J-11, D-4, D-6, D-9; N.T. 36-41, 48-49, 119-20, 156-70, 215, 247-48, 285-90, 331; F.O.F. 79-98; Board Finding)

100. Paragraph 1(b) of the IT Contract Terms and Conditions also stated the manner by which the Agencies were to communicate their acceptance of the Proposed Contract signed by SGI (i.e. SGI's offer). Specifically, this provision states that it is SGI's "receipt of an electronically-printed Contract with the printed name of the Commonwealth purchasing agent [emphasis added]" which would constitute "a valid, binding contract with the Commonwealth." (Ex. J-5; F.O.F. 78-93; Board Finding)

101. Although the parties negotiated the "delivery" requirement of Paragraph 1(a) (as originally proposed) out of the Proposed Contract, the aforementioned "receipt" requirement remained in Paragraph 1(b). It is also clear from all the evidence presented that SGI never received "an electronically-printed Contract with the printed name of the purchasing agent" on (or attached to) the Proposed Contract documents for the CCCS project. (Exs. J-4, J-5, C-1; N.T. 31-34, 48-89, 60-68, 119-20, 209-11, 397-99, 454-55, 467-68; F.O.F. 75-80, 87-93, 97-100; Board Finding)

CONCLUSIONS OF LAW

1. 62 Pa. C.S. § 1724(a)(1) provides, inter alia, that:

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

62 Pa. C.S. § 1724(a)(1).

2. It is well settled that the Board has exclusive jurisdiction over claims for money damages arising out of a contract with Commonwealth agencies. Id., See also Hanover Insurance Company v. SWIF, 35 A.3d 849, 852 (Pa. Cmwlth. 2012).

3. Further, the Board has exclusive jurisdiction to determine whether a contract has been “entered into” for the purpose of invoking its jurisdiction. Id.; Department of General Services v. Limbach Company and Penn Transportation Services, Inc., 862 A.2d 713, 716-717 (Pa. Cmwlth. 2004); Scientific Games International, Inc. v. Com., Department of Revenue, et al., 66 A.3d 740, 759 (Pa. 2013).

4. While the defendant has the burden of supporting a preliminary objection to the court’s jurisdiction with facts and legal argument, once the jurisdictional issue is properly raised, the burden of proving jurisdiction is upon the party asserting it. Schmitt v. Seaspray-Sharkline, Inc., 531 A.2d 801, 803 (Pa. Super. 1987); Deyarmin v. CONRAIL, 931 A.2d 1, 18-19 (Pa. Super. 2007).

5. In order to form a contract, there must be an offer, acceptance, and consideration or a mutual meeting of the minds. Ribarchak v. Municipal Authority of the City of Monongahela, 44 A.3d 706, 708 (Pa. Cmwlth. 2012).

6. In determining whether a valid offer and acceptance have been made, courts look to the objective manifestation of the parties regardless of their subjective beliefs and understandings. Ribarchak v. Municipal Authority of the City of Monongahela, 44 A.3d 706 at 708; Rambo v. Greene, 906 A.2d 1232, 1236 (Pa. Super. 2006); Ingrassia Construction Co. v. Walsh, 486 A.2d 478, 482-83 (Pa. Super. 1984).

7. Where an intention is manifested in any way that legal obligations between parties shall be deferred until a writing is executed, preliminary negotiations and agreements do not constitute a contract. Whitemarsh Twp. Auth. v. Finelli Bros., Inc., 184 A.2d 512, 515 (Pa.

1962) (unsigned bid was void); Krause v. Great Lakes Holdings, Inc., 563 A.2d 1182, 1186 (Pa. Super. 1989).

8. Executing a written agreement is uniformly recognized to be an objective manifestation of an intention to be bound by the executed document. See e.g. Long v. Brown, 582 A.2d 359, 363 (Pa. Super. 1990).

9. The party asserting the existence of a contract has the burden of proving its existence and validity. Viso v. Werner, 369 A.2d 1185 (Pa. 1977); Smith v. McLane, 75 F. Supp. 219 (D. Pa. 1948); 12 P.L.E. § 33.

10. Parol or other extrinsic evidence is admissible to explain a latent ambiguity, which arises where a writing appears unambiguous on its face but there is some collateral matter which makes the meaning uncertain. In re Spectrum Arena, Inc., 340 F. Supp. 786, 792 (E.D. Pa. 1971); Leebov v. United States Fidelity & Guaranty Co., 165 A.2d 82, 86 (Pa. 1960); 24 P.L.E. § 332.

11. “A latent ambiguity is one that becomes apparent when the instrument is sought to be enforced and it is then discovered that the intention of the parties cannot be ascertained without extrinsic evidence.” Id., citing Brown, M., Pennsylvania Evidence, George T. Bisel Co. (1949, Supp. 1970); 24 P.L.E. § 332.

12. Parol evidence of the writings and conduct of the parties is permitted to determine the parties’ intention with respect to the circumstances attending the execution of the contract and subsequent acts of the parties. Such testimony does not seek to vary the terms of the writing nor to show that anything was omitted from its provisions, but merely tends to prove the meaning of the parties at the time the contract was executed. Rochester & Pittsburgh Coal & Iron Co. v. Makoma Coal Co., 271 Pa. 394, 398-399, 114 A. 261 (Pa. 1921); 24 P.L.E. § 333, FN 27.

13. Because the contract documents which DGS sent to SGI on April 29, 2011, (i.e. the Proposed Contract) contained the bracketed notation “[Signature Affixed Electronically]” on each signature line of the Cover Contract; and because we have found the meaning of these “[Signatures Affixed Electronically]” notations in the Cover Contract to be ambiguous as to whether the term means that the signatures had been affixed or were to be affixed; and because this ambiguity relates to the parties’ intentions with respect to the execution of the Proposed Contract and became apparent when SGI sought to enforce the terms of the document, we conclude that it is a latent ambiguity for which parol evidence is permitted to determine the parties’ intention with respect to the meaning of this notation and the execution of the Proposed Contract. Exs. J-1, J-2, J-3, D-1, D-2, D-3; Conclusions of Law (“C.O.L.”) 10-12.

14. Because the evidence presented at hearing clearly established, inter alia: that the electronic copy of the Proposed Contract transmitted to SGI on April 29, 2011 had not, in fact, been signed (electronically or otherwise) by any of the Commonwealth signatories as of April 29, 2011; that SGI was familiar with the Commonwealth’s established procedures for obtaining Commonwealth signatures and the signature procedure the Agencies intended to use

for this Proposed Contract, both of which dictated that the Commonwealth's signatures were to be affixed only after SGI had signed the Proposed Contract; that the April 29, 2011 and May 2, 2011 emails between Mr. Kerwin and Mr. Bauer further established that, contrary to certain hearing testimony of Mr. Bauer and Mr. Lawrence that they believed SGI had a fully executed contract upon SGI's signing of the April 29, 2011 document, SGI knew full well that the Commonwealth signatures had not been affixed to the Cover Contract as of April 29, 2011 but instead understood that the phrase "[Signatures Affixed Electronically]" meant that the Commonwealth's signatures were subsequently to be affixed to the Cover Contract; and because the parties clearly intended that the Proposed Contract be executed by both parties before the obligations and duties expressed therein became binding, we conclude that the Proposed Contract document which SGI signed and transmitted to DGS on May 2, 2011 did not, at that point, constitute a contract between the parties. Exs. J-1, J-2, J-3, D-1, D-2, D-3; C.O.L. 5-9.

15. Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer. Restatement (second) of Contracts, § 50 (1981).

16. An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act. Restatement (second) of Contracts, § 30 (1981).

17. The offeror is the master of his offer. An offeror can specify any mode of acceptance that he pleases, and his provision as to time, place and manner or mode of acceptance must be complied with. Van Schoiack v. United States Liability Insurance Company, 133 A.2d 509, 514 (Pa. 1957); Bilt-Rite Contractors, Inc. v. Patriot Roofing, Inc., 1999 U.S. Dist. LEXIS 2459 (E.D. Pa. 1999); 12 P.L.E. § 24.

18. When an offer states a **manner of acceptance**, it becomes the exclusive mode of creating the contract. Hatalowich v. Redevelopment Authority of Monessen, 312 A.2d 22, 24 (Pa. 1973).

19. Because we have found that the parties, in Paragraph 1(b) of the Proposed Contract, expressly stated that it was the purchasing agent who was the "individual who is authorized to bind the Commonwealth to the obligation's contained in the [Proposed] Contract" and further set forth the manner by which the Commonwealth would accept SGI's offer (i.e. SGI's signed Proposed Contract) to be the production by the Commonwealth "of an electronically-printed Contract with the printed name of the Commonwealth purchasing agent" in order to constitute a valid, binding contract"; and because no "electronically-printed Contract with the printed name of the purchasing agent" or SRM cover sheet containing this printed name for the Proposed Contract was ever created by the Commonwealth as specifically required under the terms of Paragraph 1(b) of the IT Terms and Conditions, we conclude that no contract has been entered into by SGI with the Agencies. Exs. J-5, C-1; C.O.L. 5-9, 15-18.

20. Because we have found that the parties, in Paragraph 1(b) of the Proposed Contract, expressly stated that it was the purchasing agent who was the "individual who is authorized to bind the Commonwealth to the obligation's contained in the [Proposed] Contract"

and further set forth the manner by which the Commonwealth would accept SGI's offer (i.e. SGI's signed Proposed Contract) to be the "receipt" by SGI "of an electronically-printed Contract with the printed name of the Commonwealth purchasing agent" in order to constitute a valid, binding contract"; and because no "electronically-printed Contract with the printed name of the purchasing agent" or SRM cover sheet containing this printed name for the Proposed Contract was ever received by SGI, as specifically required under the terms of Paragraph 1(b) of the IT Terms and Conditions, we conclude that no contract has been entered into by SGI with the Agencies. Exs. J-5, C-1; C.O.L. 5-9, 15-18.

21. Because we have found that no contract was entered into by SGI with the Agencies, we conclude that the Board lacks subject matter jurisdiction over Counts II and III of SGI's Statement of Claim filed with this Board on April 6, 2012. 62 Pa. C.S. § 1724(a)(1); C.O.L. 1-4.

OPINION

Presently before the Board are preliminary objections filed by the Commonwealth of Pennsylvania, Department of General Services (“DGS”) and Department of Revenue (“DOR”) (collectively the “Defendants” or the “Agencies”) to Counts II and III of the Statement of Claim (“Claim”) filed by Scientific Games International, Inc. (“SGI”) on April 6, 2012.² In these remaining counts of its Claim, SGI asserts that, pursuant to a Request for Proposals (“RFP”) issued by DGS on July 8, 2010, it entered into a valid, binding contract with DOR for the design, development, implementation and maintenance of a Central Computer Control System (“CCCS”) for DOR’s gaming control system. In Counts II and III of its Claim, SGI asserts that the Agencies breached their contract by canceling same on August 4, 2011. In their preliminary objections to Counts II and III, the Agencies assert that no valid binding contract was entered into by the parties and that the Board therefore lacks subject matter jurisdiction over the remaining Claim. The issue before us is whether a contract exists between SGI and DOR, giving the Board jurisdiction over this dispute in accordance with Section 1724(a)(1) of the Procurement Code. See 62 Pa. C.S. § 1724(a)(1).

Standard of Review

In opposing the Agencies’ preliminary objections, SGI asserts that the Agencies bear the burden of clearly demonstrating that a binding agreement was not executed, arguing that all doubts regarding preliminary objections must be resolved against the objecting party, in this case the Agencies. As support for this proposition, SGI cites Slaybaugh v. Newman, 479 A.2d 517

² Preliminary objections to Count I of SGI’s Claim, asserting a violation of 62 Pa. C.S. § 521, were sustained, and Count I was dismissed by Order of the Board on July 31, 2013. Docket No. 4036.

(Pa. Super. 1984) and Koken v. Steinberg, 825 A.2d 723 (Pa. Cmwlth. 2003). Both these cases address preliminary objections in the nature of a demurrer.

In the instant case, however, the Agencies challenge the Board's subject matter jurisdiction. Accordingly, while the Agencies have the burden of supporting their objection to the Board's jurisdiction with facts and legal argument, once the jurisdictional issue is properly raised, the burden of proving jurisdiction is upon the party asserting it. Schmitt v. Seaspray-Sharkline, Inc., 531 A.2d 801, 803 (Pa. Super. 1987); Deyarmin v. CONRAIL, 931 A.2d 1, 18-19 (Pa. Super. 2007). Because the Board's subject matter jurisdiction over the claims asserted here by SGI in Counts II and III is predicated upon the existence of a contract between the parties, we conclude that the party asserting jurisdiction, SGI, has the ultimate burden of establishing that a valid contract exists. Id.; Department of General Services v. Limbach Company and Penn Transportation Services, Inc., 862 A.2d 713, 716-717 (Pa. Cmwlth. 2004); Scientific Games International, Inc. v. Com., Department of Revenue, et al., 66 A.3d 740, 759 (Pa. 2013). See also Viso v. Werner, 369 A.2d 1185 (Pa. 1977); Smith v. McLane, 75 F. Supp. 219 (D. Pa. 1948); 12 P.L.E. § 33.

Upon initial consideration of the Agencies' preliminary objections challenging jurisdiction, the Board determined from the pleadings "that the issue of whether a contract exists in the matter at hand requires a more fully developed factual record." Docket No. 4036, Opinion and Order issued July 31, 2013. As a result, the Board held a fact hearing on December 17-18, 2013, at which time the parties were invited to present whatever evidence they felt relevant to this jurisdictional issue.

Factual Background

On July 8, 2010, DGS issued an RFP for the design, development, implementation and maintenance of DOR's gaming control system. SGI and GTECH Corporation ("GTECH") each submitted proposals in response to the RFP and, on or about November 23, 2010, DGS notified SGI that its proposal had been selected for contract negotiations. Negotiations between representatives of DGS and SGI began in January 2011 and continued into April 2011. In an email exchange during the negotiations on April 22, 2011, SGI's vice president and corporate counsel, Phil Bauer, suggested that the Commonwealth first execute the contract and forward it to SGI to "countersign" and return. Julia Sheridan of the DOR's legal office responded (in the email exchange) by stating that the final document would be "put together at DGS" and sent first to SGI for its signature, then "returned to DGS, whereupon it will be scanned into the Commonwealth's system and routed for electronic signatures by the Commonwealth."

On April 29, 2011, Oliver Kerwin (at the time a DGS Assistant Counsel) forwarded an electronic copy of the proposed contract to Mr. Bauer for SGI's signature. This proposed contract was made up of what the parties identified as the "Cover Contract" (a four page document including recitations, signature lines, and a statement incorporating the remaining terms of the proposed contract) and the remaining terms comprised of the IT Terms and Conditions, the Contractor's Proposal, and the RFP (collectively referred to herein as the "Proposed Contract"). (Exs. J-1, J-5, D-2; N.T. 191-92, 256-57). In the April 29, 2011 transmittal email, Mr. Kerwin identified the "final contract documents" which were attached as including the Cover Contract, IT Contract Terms and Conditions, SGI's Proposal, and the RFP. Mr. Kerwin then directed that Mr. Bauer confirm the accuracy of all the documents and, if SGI agreed with their contents, to "sign the Cover Contract and mail the original to [Mr. Kerwin] and

email a scanned version for us to enter into our contracting system to route for Commonwealth signatures.”

The electronic copy of the Cover Contract sent to SGI on April 29, 2011 contained signature lines for the DOR Secretary or designee, the DOR Comptroller, the DOR Office of Chief Counsel, the Office of General Counsel (“OGC”), and the Office of Attorney General (“OAG”). On each of these signature lines was the bracketed notation “[Signature Affixed Electronically].”

On May 2, 2011, William Huntley (President of SG Lottery Systems) signed the Cover Contract on behalf of SGI, and Mr. Bauer returned a scanned copy of the Cover Contract signature page signed by Mr. Huntley to Mr. Kerwin of DGS. A printed copy of the Cover Contract (or at least the signature page) with SGI’s signature was then transmitted by DGS to the Secretary of Revenue, Dan Meuser. Mr. Meuser signed this document in ink after it had been returned by SGI to DGS on May 2, 2011. Consistent with the procedure described in the prior emails between the parties, the Proposed Contract was then scanned, uploaded into the Commonwealth’s electronic procurement system (known as “SRM”) and routed to the other Commonwealth signatories for their review and electronic signatures. Under the SRM system, the standard order in which electronic signatures were obtained (after the agency’s secretary or designee) was the agency’s Comptroller, the agency’s Chief Counsel, the OGC and the OAG. Electronic signatures were affixed for the DOR Comptroller and the DOR Office of Chief Counsel on May 13, 2011 and May 16, 2011, respectively. (Ex. J-11; N.T. 33-38, 144, 201-03, 249-50).

However, on May 11, 2011, GTECH had filed a protest to the bid award to SGI. As a result, the SRM approval process was stopped before the OGC affixed its signature electronically to indicate its review and approval. The Proposed Contract was subsequently removed from OGC's "queue" without having been reviewed or approved. The Proposed Contract was never sent to OAG for its review and approval. Instead, on August 4, 2011, DGS notified SGI that it had canceled the procurement.

Summary of the Parties' Arguments

SGI argues, first, that the document transmitted by DGS to SGI on April 29, 2011, with the "[Signature Affixed Electronically]" notation on the signature lines for each Commonwealth signatory identified in the document should be considered as fully executed by the Commonwealth at that time. SGI thus maintains that this document constituted a valid offer, which was accepted by SGI when William Huntley (President of Scientific Games Lottery Systems) signed the document and it was returned to DGS on May 2, 2011. At that point, SGI argues, a valid, binding contract was, in fact, formed.

Alternatively, SGI argues that, if a contract was not formed when SGI signed the Cover Contract document as part of the Proposed Contract, the subsequent execution of the Cover Contract in ink by the Secretary of Revenue served as an acceptance of what SGI asserts would have constituted SGI's written offer (i.e. the Proposed Contract signed by SGI). In other words, SGI argues that the Secretary's signature alone (when added to the document previously signed by SGI) was sufficient to form a binding contract, even though a copy of the Proposed Contract signed by the Secretary was never delivered to SGI, and even though the Proposed Contract was never reviewed, approved or signed by the OGC or the OAG. SGI cites to several Pennsylvania

cases as support for this alternate theory of contract formation. These cases include: Shovel Transfer and Storage, Inc. v. Pennsylvania Liquor Control Board, 739 A.2d 133 (Pa. 1999); Department of Commerce v. Casey, 624 A.2d 247 (Pa. Cmwlth. 1993); Residence Inn by Marriott, Inc. v. Com., Department of Transportation, B.O.C. Dkt. No. 3707, Opinion and Order of August 5, 2004; and Makoroff v. Com., Department of Transportation, B.O.C. Dkt. No. 3426, Opinion and Order of January 12, 2007.

In response to SGI's first argument, the Agencies assert that the electronic copy of the document sent to SGI on April 29, 2011, had not, in fact, been signed electronically (or otherwise) by any of the Commonwealth signatories. They also assert that the notation "[Signature Affixed Electronically]" meant only that the electronic signatures would be affixed in the future as the Agencies followed their standard SRM procurement protocol, not that the signatures had already been affixed, and that SGI knew full well at the time it received the Proposed Contract on April 29, 2011 that this document had not been signed by any Commonwealth parties.

In response to SGI's alternate theory of contract formation, the Agencies argue that the lone signature of the Secretary of Revenue on the Cover Contract document (which had been signed by SGI and returned to DGS) was not adequate to form a binding contract for essentially three reasons. First, the Proposed Contract had not been reviewed or approved by the OGC or the OAG as required by the document itself and/or by the Commonwealth Attorneys Act. Second, no delivery of a fully executed contract document was made to SGI. Third, the Proposed Contract never became "valid" or "binding" under the Proposed Contract's remaining terms (specifically Paragraph 1(b) of the IT Contract Terms and Conditions) because no

document with the printed name of the assigned purchasing agent for this Proposed Contract was ever generated or provided to SGI.

“Signature Affixed Electronically”

SGI argues initially that the bracketed notation “[Signature Affixed Electronically]” on the signature line for each Commonwealth signatory on the Cover Contract document provided to it on April 29, 2011, should be considered as the valid signatures of those individuals. Thus, SGI maintains that this document constituted a valid offer, which was accepted by SGI when Mr. Huntley signed the document and it was returned to DGS on May 2, 2011. At that point, SGI argues, a valid, binding contract was, in fact, formed.

In support of its argument, SGI points first to the provision in Paragraph 1(b) of the IT Contract Terms and Conditions which states that the “fully executed Contract may not contain ink signatures by the Commonwealth” and then to Mr. Kerwin’s April 29, 2011 transmittal email to SGI’s Mr. Bauer in which Mr. Kerwin referred to the attached as the “final contract documents.” Additionally, SGI argues that, from the objective appearance of the Cover Contract version it received on April 29, 2011 (with the “[Signature Affixed Electronically]” notations), the Agencies had already signed the document and thereby expressed an apparent intent to be bound (an offer), which was accepted when it was subsequently executed by SGI. As support for this position, SGI cites to Ribarchak v. Municipal Authority of the City of Monongahela, 44 A.3d 706 (Pa. Cmwlth. 2012); Rambo v. Greene, 906 A.2d 1232 (Pa. Super. 2006); and Ingrassia Construction Co. v. Walsh, 486 A.2d 478, 482-83 (Pa. Super. 1984), all of which express the general proposition that, in determining whether a valid offer and acceptance have been made,

courts look to the objective manifestation of the parties regardless of their subjective beliefs and understandings.

In response, the Agencies argue that it is clear from all the evidence of record that, notwithstanding the “[Signature Affixed Electronically]” notation, the document it submitted to SGI on April 29, 2011, had not been executed by any of the signatories on behalf of the Commonwealth and that SGI knew this at the time. Specifically, the Agencies point out that they have provided uncontroverted proof that the document transmitted to SGI on April 29, 2011, had not, in fact, been signed by any of the Commonwealth’s signatories. Additionally, the Agencies concede that the “use of the phrase ‘Signature Electronically Affixed’ is admittedly ambiguous” and capable of meaning either that the signatures will be affixed or have been affixed.³ However, they assert further that the surrounding circumstances (including the conduct of the parties before and after April 29, 2011) demonstrate that SGI knew the electronic copy of the Cover Contract it had received from DGS on April 29, 2011 (with the “[Signature Affixed Electronically]” notations) did not mean that the signatures had already been electronically affixed, and therefore did not express an intent by the Agencies to be bound at that time. These surrounding circumstances, the Agencies argue, include the undisputed testimony describing the Commonwealth’s standard SRM contracting procedures, the procedure followed by the Agencies in this case, SGI’s expressed understanding of the Commonwealth’s standard signing procedures and the procedures to be followed in this case, SGI’s expressed uncertainty as to the actual meaning of the “[Signature Affixed Electronically]” notation at or about the time it received the Proposed Contract on April 29, 2011, and SGI’s contemporaneous acknowledgment that the

³ Agencies’ Proposed Findings of Fact, Conclusions of Law and Brief at p. 6.

Commonwealth's signatures would be added after SGI returned the Proposed Contract on May 2, 2011, the date SGI now claims that a valid, binding contract was created.

Based on the facts adduced at hearing, the Board is in substantial agreement with the Agencies on this issue. For the reasons explained below, we find that a contract was not formed between the Agencies and SGI on or about May 2, 2011, when the Proposed Contract was signed by SGI and returned to DGS.

At hearing, the Commonwealth's witnesses described in detail the regular, established procedure for contracting with the Commonwealth and obtaining signatures on RFP procurement contracts. (F.O.F. Paragraph 25-32). They explained that, once the parties have completed negotiations as to specific contract terms, the proposed contract documents are sent to the vendor to sign first, then returned to the Commonwealth agency to obtain the signatures of the various Commonwealth parties involved in the procurement process. Proposed contract documents are routed to Commonwealth signatories in a predetermined order as follows: the agency secretary or designee, the agency comptroller's office, the agency chief counsel's office, the OGC and the OAG. While the signature of the agency secretary or designee may be obtained in ink, the rest are provided electronically. If one signatory in the electronic signature process does not electronically sign the proposed contract, the proposed contract does not proceed to the next signatory. (N.T. 31-31, 290-91).

This standard, established Commonwealth contracting process was discussed by the parties and clearly described to SGI during the contract negotiations for the CCCS contract. Additionally, these signatories were reflected on the signature page of the Cover Contract.

In the case of the Proposed Contract, once the Cover Contract had been signed by SGI and returned electronically to DGS, a paper copy of same with the SGI signatures was to be routed first to the Secretary of Revenue for his signature in ink (because the Secretary did not have access to the SRM system). The Proposed Contract (with the ink signatures of SGI and the Secretary) was then to be scanned into the SRM system and routed for the remaining electronic signatures of all the other Commonwealth signatories in the standard, predetermined order (i.e. after the Secretary of Revenue or his designee, the DOR Comptroller's office, the DOR's Office of Chief Counsel, the OGC, and the OAG). This too had been explained beforehand to SGI. (Ex. J-11; N.T. 33-38, 144, 201-03, 249-50).

As testified to by Stacie Amsler (DOR's director of fiscal management at the time), after the Secretary of Revenue signed the Cover Contract in ink, the Proposed Contract (with the ink signatures of SGI and the Secretary of Revenue) was scanned into the SRM system and then electronically signed by Afrid Irani for the DOR Comptroller and Thomas Gohsler for the DOR Office of Chief Counsel. (Ex. J-11; N.T. 36). This electronic document (i.e. the Proposed Contract) was then forwarded to the next signatory in line, OGC's contract attorney, Andrew Clark. Before Mr. Clark reviewed this Proposed Contract, however, the process was stopped due to the protest filed by GTECH on May 11, 2011. The electronic document comprising the Proposed Contract was then subsequently removed from OGC's "queue" without having been reviewed or approved. The Proposed Contract (with the signatures of SGI, the Secretary of Revenue, the DOR Comptroller and the DOR Office of Chief Counsel) was never sent to OAG for its review and approval.

In addition to the uncontroverted testimony noted above concerning the Commonwealth's SRM contracting procedures in general and the specific contracting procedures the parties agreed

to (and began) with the Proposed Contract, the Board was also presented with the testimony and emails of SGI's Mr. Bauer. Among other things, Mr. Bauer testified that he had prior experience negotiating procurement contracts with Commonwealth entities, had participated in entering into several such Commonwealth contracts before the Proposed Contract for the CCCS arose, and was familiar with the Commonwealth's procedures for obtaining Commonwealth signatures. (N.T. 337-39, 382). He also confirmed that the SRM system, the Commonwealth's established contracting procedures, and the intended signing procedure for the Proposed Contract had been described to him during negotiations and, as a result, while he had expected electronic signatures for the "approvals" and a physical signature for DOR, he expected that this would occur after SGI had signed the document. (N.T. 380).

Mr. Bauer testified further that he was "surprised" that the copy of the Proposed Contract he received from DGS on April 29, 2011 appeared already to have been signed electronically (due to the "[Signatures Affixed Electronically]" notation) because this was at odds with "the process that had been described" to him previously (i.e. that SGI would receive an unsigned contract for SGI to sign before Commonwealth signatures were affixed). (N.T. 374). Indeed, in the April 29, 2011 email (Ex. D-2) by which DGS sent the "final contract documents" (i.e. the Proposed Contract) to SGI, DGS's Mr. Kerwin still directed Mr. Bauer to have SGI sign the document and return it to DGS "to enter into our [DGS's] contracting system to route for Commonwealth signatures."

Accordingly, it was Mr. Bauer himself who, as he stated at hearing, sought to clear up the confusion pertaining to the "[Signatures Affixed Electronically]" notations on the Cover Contract by way of his May 2, 2011 email exchange with Mr. Kerwin. (Ex. D-3). In this May 2, 2011 email exchange, by which Mr. Bauer also returned the scanned copy of the Cover Contract

with SGI's signature to Mr. Kerwin, Mr. Bauer acknowledged his then current understanding. To wit, Mr. Bauer stated:

As you [Mr. Kerwin] confirmed, the Commonwealth will affix the necessary signatures electronically and send a fully executed copy back to SG . . . the Commonwealth has up to 60 days to obtain the signatures, and we [SGI] repeat our request that this process be expedited to the extent possible. [Emphasis added].

(Ex. D-3).

Notwithstanding his familiarity with Commonwealth contracting procedures, his acknowledgment that these procedures were again described to him during negotiations on the Proposed Contract, and the foregoing acknowledgment in Mr. Bauer's contemporaneous email of May 2, 2011, Mr. Bauer's present testimony on this point is that he believed the "[Signatures Affixed Electronically]" notation for the Secretary of Revenue or his designee indicated that this signature had been electronically affixed, but that he was unclear as to whether the same "[Signatures Affixed Electronically]" notations for the other signatories represented that they too had executed the document. As he stated at hearing:

My understanding based on what we had been told was that we should expect the Department of Revenue to sign immediately. And so when they came back signature affixed, I thought, okay, we've got Department of Revenue, but why are there – I knew that they hadn't sent it to OAG or OGC yet. And so I didn't think that made sense and that's what we were trying to get to.

(N.T. 380-381).

Whether one puts more credence in Mr. Bauer's May 2, 2011 description of his understanding as to the meaning of the "[Signatures Affixed Electronically]" notations on the signature page of the Cover Contract sent to him on April 29, 2011 or his subsequent explanation of same at hearing, it remains apparent from both that he was uncertain as to whether the notation meant the signatures had been affixed or were to be affixed to the document. It is for

this reason, as well as significant testimony from others involved in the contracting process, that the Board accepted additional evidence to clarify the meaning of this notation on the Cover Contract as it was presented to SGI.⁴

Moreover, we find the assertions of Mr. Bauer and SGI's Vice President Brennan Lawrence (made at hearing) that they actually thought SGI had a fully executed contract upon SGI's signing of the April 29, 2011 Proposed Contract document (and/or its return to DGS on May 2, 2011) to be wholly inconsistent with their subsequent actions. In addition to Mr. Bauer's May 2, 2011 email, both Mr. Bauer and Mr. Lawrence testified at length as to the extensive and urgent nature of the preliminary work SGI needed to perform before it could transition from the existing gaming control system to SGI's CCCS. As per their descriptions, this preliminary work included obtaining financing for this project, mobilizing SGI resources, developing project specific software, and building and housing data equipment banks to handle every transaction occurring on over 100,000 gaming machines every day. Both witnesses also indicated that it was this extensive preliminary work which was the reason SGI was so anxious to get the Proposed Contract fully executed as soon as possible in order to transition from the prior contract, which was due to expire on June 27, 2011. (N.T. 353-56, 394-95, 450-52, 461-62).

⁴ SGI did not object to the admission of Ex. D-2 (the April 29, 2011 email) or to subsequent questioning of Mr. Kerwin and Mr. Bauer about the contents of Ex. D-3 (the May 2, 2011 email chain). SGI did object to Mr. Kerwin's testimony about the contents of the April 29, 2011 email (Ex. D-2) and to the admission of the May 2, 2011 email chain (Ex. D-3) on the basis of the parol evidence rule. The Board overruled these objections, finding that the meaning of the "[Signatures Affixed Electronically]" language was ambiguous, rendering parol evidence admissible to explain, clarify or resolve the ambiguity. (N.T. 150-51, 270-71). See e.g. Kripp v. Kripp, 849 A.2d 1159, 1163 (Pa. 2004). The ambiguous nature of the term "[Signatures Affixed Electronically]" as it was used on the April 29, 2011 document sent to SGI had previously been established by Stacie Amsler, among others, whose testimony as to the ambiguous meaning of this notation had earlier been admitted without objection and was clearly confirmed by Mr. Bauer's testimony. (Exs. J-1, D-2; N.T. 31-33, 78-82, 109-11, 142-43, 150-51). Accordingly, the Board allowed parol evidence to be admitted to explain, clarify and/or resolve the ambiguity created by the "[Signatures Affixed Electronically]" notations in the Cover Contract.

Despite the urgency expressed by Messrs. Bauer and Lawrence, however, no evidence was presented that SGI actually began to perform any of these preliminary steps promptly after signing and returning to DGS what it now argues was a fully executed, binding contract on May 2, 2011. In fact, both Mr. Bauer and Mr. Lawrence stated that they required a binding contract to be in place before they could begin mobilizing their resources to perform under the Proposed Contract, then failed to identify any specific steps they initiated to accomplish such mobilization after May 2, 2011.⁵ To the contrary, when asked to clarify if any of the CCCS system SGI proposed for Pennsylvania had actually been built, Mr. Lawrence stated that it had not. (N.T. 426-435).

For all the foregoing reasons discussed above, we find Mr. Bauer's current testimony to lack credibility to the extent it suggests that he considered the Proposed Contract document sent to him on April 29, 2011 to have been fully executed electronically by all Commonwealth signatories due to the "[Signatures Affixed Electronically]" notations. For these same reasons, we find Mr. Lawrence's testimony on this issue to lack credibility as well.

On the basis of the evidence presented at hearing, we find that the electronic copy of the Proposed Contract transmitted to SGI on April 29, 2011 had not, in fact, been signed (electronically or otherwise) by any of the Commonwealth signatories as of April 29, 2011. We also find, as a matter of fact, that despite its assertions at hearing to the contrary, SGI knew full well that the Proposed Contract it received on April 29, 2011 had not been electronically signed by any of the Commonwealth signatories at that time. Accordingly, we find no factual basis for

⁵ The only preliminary step of significance identified as having actually been taken by SGI was to apply for a Pennsylvania gaming license. This application, however, was submitted to the Pennsylvania Gaming Commission even before SGI had submitted a bid on the project, so is no indication of when SGI actually thought it had a binding contract for the project here at issue.

SGI's argument that the Proposed Contract which SGI signed and transmitted to DGS on May 2, 2011 constituted a contract between the parties at that point in time.

Effect of the Secretary of Revenue's subsequent ink signature

SGI argues, in the alternative, that even if a contract was not formed when SGI signed the April 29, 2011 document, the Secretary of Revenue's subsequent execution of the Cover Contract by hand served to bind the parties.⁶ SGI asserts that because the Secretary is authorized to bind DOR, "no other signatures [were] required to signify the Commonwealth's assent to the terms of the Agreement."⁷ SGI's primary support for this assertion appears to come from the holding in Shovel Transfer and Storage, Inc. v. Pennsylvania Liquor Control Board, 739 A.2d 133 (Pa. 1999). In Shovel Transfer, the Supreme Court found that a contract existed between Shovel and the Liquor Control Board ("LCB") where a written contract, previously executed by Shovel, was subsequently signed by the LCB Chairman, notwithstanding the absence of signatures by other individuals whose signature lines were included on the contract document. Id. at 135-137.

The Agencies argue, to the contrary, that the lone signature of the Secretary of Revenue on the document which had been returned to DGS was not adequate to form a binding contract (nor did the addition of signatures from the DOR Comptroller and the DOR Office of Chief Counsel form such a contract). The Agencies essentially offer three reasons why the Secretary's signature (alone or with the comptroller's and chief counsel's) was insufficient to bind the Commonwealth: 1) the Contract had not been reviewed or approved by the OGC or the OAG as

⁶ In its alternative argument, SGI claims that the Secretary of Revenue's signature "served as an acceptance of what would constitute SGI's written offer – its submission to the Agencies of the form of agreement duly executed on its [SGI's] behalf." SGI's Proposed Findings of Fact, Conclusions of Law and Brief, p. 18.

⁷ Id.

required by the Commonwealth Attorneys Act and/or the terms of the Proposed Contract; 2) no delivery of a fully executed contract was made to SGI; and/or 3) the Proposed Contract never became “valid” or “binding” under the explicit terms remaining in the Proposed Contract, specifically Paragraph 1(b) of the IT Contract Terms and Conditions (because no document with the printed name of the purchasing agent was ever created or provided to SGI).

We find the Agencies’ third argument, based on clear-cut and long-established legal principles, as well as the plain facts as we have found them in this case, to be dispositive. Accordingly, we confine our discussion and holding to this third argument.⁸

Remaining contract term requirements for a “valid, binding contract”

As noted above, the Agencies appear to argue that, by express agreement of the parties under Paragraph 1(b) of the IT Terms and Conditions, “an electronically-printed Contract with the printed name of the Commonwealth purchasing agent” was required to establish the existence of a “valid binding contract with the Commonwealth.”⁹ It therefore follows that, because no such action was taken and no such document was created, no valid, binding contract has been made.

In response, SGI argues that it understood the “purchasing agent” to be the Secretary of Revenue. In support of its purported understanding, SGI asserts that: 1) the term “purchasing agent” is not capitalized in Paragraph 1(b); 2) the “purchasing agent” is not identified in the contract documents and there is no signature line for the purchasing agent in the Cover Contract;

⁸ We consider the Agencies’ first two arguments to contain difficulties based, *inter alia*, on the fact that the “delivery” requirement was specifically negotiated out of the Proposed Contract and our belief that the decisions and reasoning in the Commonwealth Court cases of Department of Commerce v. Casey, 624 A.2d 247 (Pa. Cmwlth. 1993) and Department of Health v. Data-Quest, Inc., 972 A.2d 74 (Pa. Cmwlth. 2009) continue to have significant precedential value.

⁹ Agencies’ Reply to SGI’s Proposed Findings of Fact, Conclusions of Law and Brief at p. 2.

and 3) the only signature line for DOR is for the Secretary or his designee, who SGI asserts was the individual with authority to bind the agency. (N.T. 370-71; SGI Brief at p. 16).

Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer. Restatement (second) of Contracts, § 50 (1981). An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act. Restatement (second) of Contracts, § 30 (1981). The offeror is the master of his offer. An offeror can specify any mode of acceptance that he pleases, and his provision as to time, place and manner or mode of acceptance must be complied with. Van Schoiack v. United States Liability Insurance Company, 133 A.2d 509, 514 (Pa. 1957); Bilt-Rite Contractors, Inc. v. Patriot Roofing, Inc., 1999 U.S. Dist. LEXIS 2459 (E.D. Pa. 1999); 12 P.L.E. § 24. When an offer states a **manner of acceptance**, it becomes the exclusive mode of creating the contract. Hatalowich v. Redevelopment Authority of Monessen, 312 A.2d 22, 24 (Pa. 1973).

In the instant case, the parties, by express terms negotiated between them, set forth the requirements for formation of a valid, binding contract in Paragraph 1(b) of the IT Contract Terms and Conditions. Paragraph 1(b) reads in its entirety as follows:

- (a) The fully executed Contract may not contain ink signatures by the Commonwealth. The Contractor understands and agrees that the receipt of an electronically-printed Contract with the printed name of the Commonwealth purchasing agent constitutes a valid, binding contract with the Commonwealth. The printed name of the purchasing agent on the Contract represents the signature of that individual who is authorized to bind the Commonwealth to the obligations contained in the Contract. The printed name also indicates that all approvals required by the Commonwealth contracting procedures have been obtained.

(Ex. J-5).

Mr. Kerwin testified that all Commonwealth IT contracts contain language substantially identical to Paragraph 1(b). Moreover, according to both Mr. Kerwin and OGC's Mr. Clark, affixing the purchasing agent's printed name on an SRM cover sheet/printout to a contract is the final and necessary step in the Commonwealth's contracting procedure.

At hearing, SGI introduced into evidence 12 exhibits representing contracts obtained from the Commonwealth's eMarketplace, a web site where the public may access contracts and information on Commonwealth procurements. (N.T. 55-56). Each of the contracts in these exhibits contained language substantially identical to that in Paragraph 1(b) of the IT Terms and Conditions to the Proposed Contract. Eight of these contract exhibits (Exs. C-7A, B, C, E, H, I, J, and L) included the SRM cover sheet/printout identified by the Agencies' witnesses as the means by which the printed name of a purchasing agent (and the notation "FULLY EXECUTED") is added to the contract document to indicate its completion. Without the SRM cover sheet/printouts with the printed name of a purchasing agent accompany the other four exhibits (Exs. C-70, F, G and K), the Agencies' witnesses could not identify these exhibits as representing completed contracts from the exhibit alone even though they also contained the "[Signature Affixed Electronically]" notation on the signature lines for each Commonwealth signatory. (F.O.F. 82-86).

While terms in the original CCCS proposed contract at Paragraph 1(a) mandating "all approvals required by the Commonwealth contracting procedures" in order for the contract to be effective, and requiring delivery of a "fully-executed" contract to SGI in order to be a legally-binding contract, were removed by the parties from the final IT Contract Terms and Conditions in the course of negotiations between January and April 2011, the language of Paragraph 1(b) remained essentially intact. In fact, the only change to Paragraph 1(b) negotiated by the parties

was in the first sentence, where the language in the original RFP stating that “The fully executed Contract shall not contain ink signatures . . .” was changed to “. . . may not contain ink signatures [Emphasis added].” (See Exs. J-1, J-5, C-1).

The plain language of this remaining Paragraph 1(b), as agreed to by both parties, explicitly stated, inter alia, that it was the purchasing agent who was the “individual who is authorized to bind the Commonwealth to the obligations contained in the [Proposed] Contract.” This paragraph also expressly called for the production “of an electronically-printed Contract with the printed name of the Commonwealth purchasing agent” in order to constitute “a valid, binding contract with the Commonwealth.” In other words, the plain language of Paragraph 1(b) required the addition of the printed name of the purchasing agent to the Proposed Contract in order to indicate the completion of the execution process of this contract and the Commonwealth’s intent to be bound thereby as the final overt act of acceptance required to constitute “a valid, binding contract with the Commonwealth.”

As to the lack of a signature line for the purchasing agent on the Cover Contract itself, we find this argument inapposite. Paragraph 1(b) did not, by its plain terms, require a signature, and no signature line for the “purchasing agent” was therefore required on the contract. Rather this provision required the overt act of adding the printed name of the assigned purchasing agent to the Proposed Contract to indicate the Commonwealth’s final acceptance of SGI’s offer (i.e. the Proposed Contract signed by SGI).

We also find SGI’s protest that it understood the Secretary of Revenue to be the “purchasing agent” for the Proposed Contract to be less than persuasive. No evidence was presented to indicate that anyone from SGI inquired of the Agencies who the purchasing agent

was for this Proposed Contract, and there was no credible evidence that anyone from the Commonwealth misled SGI as to the identity of the purchasing agent. (N.T. 371, 478-79). Contrary to SGI's subjective belief that the DOR Secretary was the purchasing agent, and as each of the Agencies' witnesses testified to without contradiction, Mary Kay Breen of DOR was the purchasing agent for the SGI Proposed Contract. (N.T. 48-49, 119-20, 215, 247-48, 331).

Viewing the above evidence and testimony, the Board finds that Paragraph 1(b) of the IT Contract Terms and Conditions of the Proposed Contract expressly stated the manner by which the Agencies would indicate their acceptance of the Proposed Contract signed by SGI (i.e. SGI's offer). This manner of acceptance, as stated in Paragraph 1(b), clearly required the Commonwealth to produce "an electronically-printed Contract with the printed name of the Commonwealth purchasing agent" in order to constitute "a valid, binding contract with the Commonwealth." This same testimony and evidence just as clearly establishes that such "an electronically-printed Contract with the printed name of the Commonwealth purchasing agent" or an SRM cover sheet/printout with the printed name of a purchasing agent (as was the Agencies' practice) was never produced or created for the Proposed Contract. Accordingly, this Proposed Contract never became a valid, binding contract between the parties under the express terms of Paragraph 1(b) of the Proposed Contract itself.

Paragraph 1(b) of the IT Contract Terms and Conditions also stated the manner by which the Agencies were to communicate their acceptance of the Proposed Contract to SGI. Specifically, this provision states that it is SGI's "receipt of an electronically-printed Contract with the printed name of the Commonwealth purchasing agent [emphasis added]" which constitutes "a valid, binding contract with the Commonwealth." Although the parties negotiated the "delivery" requirement of Paragraph 1(a) (as originally proposed) out of the Proposed

Contract, the aforementioned “receipt” requirement remained in Paragraph 1(b). It is also clear from all the evidence presented that SGI never received “an electronically-printed Contract with the printed name of the purchasing agent” on (or attached to) the Proposed Contract documents for the CCCS project. Accordingly, failure of this remaining “receipt” requirement also stands as a further impediment to formation of a contract between SGI and the Agencies.

Because no “electronically-printed [Proposed] Contract with the printed name of the purchasing agent” (who was explicitly identified as the “individual who is authorized to bind the Commonwealth to the obligations contained in the [Proposed] Contract”) was ever produced or received (by the Agencies or SGI), as specifically required under the terms of Paragraph 1(b) of the IT Terms and Conditions of the Proposed Contract, we must conclude that no valid, binding contract has been created between SGI and the Agencies. Because no valid, binding contract was entered into by SGI with the Agencies, we must further conclude that the Board lacks subject matter jurisdiction over SGI’s remaining claims pursuant to 62 Pa. C.S. § 1724(a)(1). See also, Limbach, 862 A.2d at pp. 716-717. Accordingly, we sustain Defendants’ preliminary objections to Count II and Count III with prejudice.

ORDER

AND NOW, this 2nd day of September, 2014, upon consideration of the Respondents' preliminary objections to Counts II and III of SGI's Statement of Claim, SGI's answer, the Respondents' reply, SGI's sur-reply, and the evidence presented at hearings held December 17-18, 2013, it is hereby **ORDERED** and **DECREED** that the preliminary objections for lack of subject matter jurisdiction pursuant to 62 Pa. C.S. § 1724(a)(1) are **SUSTAINED**. Claimant's Statement of Claim (now comprised only of Counts II and III) is **DISMISSED** with prejudice.

ORDER SIGNED

BOARD OF CLAIMS

Jeffrey F. Smith
Chief Administrative Judge

Harry G. Gamble, P.E.
Engineer Member

Andrew Sislo
Citizen Member