COMMONWEALTH OF PENNSYLVANIA

DURKEE LUMBER CO., INC.	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES	:	DOCKET NO. 3797

FINDINGS OF FACT

1. Durkee Lumber is a Vermont corporation with a principal business address at 1712 Route 22A, Shoreham, Vermont 05770. (Statement of Claim at ¶ 2).

2. DCNR is an agency of the Commonwealth of Pennsylvania with its principal office address at 7th Floor, Rachel Carson State Office Building, Harrisburg, PA 17105. It is authorized to advertise, award, and administer sales of timber from Pennsylvania's state forests. (Statement of Claim and Answer at ¶¶ 2, 3).

3. In March 2004, DCNR advertised for bids pursuant to a prospectus for the sale of certified saw timber and pulp wood stumpage on 76 acres of state forest designated Susquehannock State Forest Timber Stumpage Sale 15-2003BC11, Fire Tower Trail. (Statement of Claim and Answer at ¶ 4).

4. A copy of the proposed contract was made available for inspection at the forest district office pursuant to the bid prospectus inviting proposals. (H.T. 156; D-Ex. 2B).

5. The Fire Tower Trail bid prospectus provided for a contract completion date of May 31, 2006. It did not require any deadline for construction of a haul road. (D-Ex. 2B).

6. On April 7, 2004, DCNR publicly opened and read the bids on Fire Tower Trail. The highest bidder was Durkee Lumber with a total bid of $57,000.00. (Statement of Claim and Answer at ¶¶ 5, 6).

7. DCNR notified Durkee Lumber by letter dated April 14, 2004 that its bid had been accepted on Fire Tower Trail. Included with the April 14 letter were copies of the timber sale contract for Durkee Lumber to execute and return to DCNR with a letter of credit. (P-Ex. 2, 3).

8. Wendy Anne Durkee, President of Durkee Lumber, executed the Fire Tower Trail Contract on behalf of Durkee Lumber promptly after it was received and returned it to DCNR prior to June 3, 2004. (H.T. 23, 26; D-Ex. 13).

9. In April 2004, DCNR advertised for bids pursuant to a prospectus for the sale of certified saw timber and pulp wood stumpage on 156 acres of state forest designated

Susquehannock State Forest Timber Stumpage Sale 15-2003BC01, Circle Game. (Statement of Claim and Answer at ¶ 7).

10. A copy of the proposed contract was made available for inspection at the forest district office pursuant to the bid prospectus inviting proposals. (H.T. 147-148; D-Ex. 147-148).

11. The Circle Game bid prospectus and proposed contract provided for a contract completion date of September 30, 2006. (D-Ex. 1B).

12. The Circle Game bid prospectus and proposed contract also included dates for haul road construction on the tract, providing that construction could not begin before May 14, 2004 and must be completed before October 31, 2004. (D-Ex. 1B, p. 9).

13. The bid prospectuses for both sales provided that the successful bidder was required to execute DCNR's Tree Estimate Timber Stumpage Sale contracts. The prospectuses did not provide specifics regarding DCNR's execution of the contracts nor specify the means by which DCNR would indicate its acceptance of Durkee Lumber's bid. (D-Ex. 1B, 2B).

14. On May 12, 2004, DCNR publicly opened and read the bids on Circle Game. The highest bidder was Durkee Lumber with a total bid of $177,900.00. (Statement of Claim and Answer at ¶¶ 7, 8).

15. DCNR notified Durkee Lumber by letter dated May 12, 2004 that its bid had been accepted on Circle Game, but did not include contracts for execution, instead informing Durkee Lumber that the contracts would be prepared and forwarded as soon as possible. (P-Ex. 4).

16. The Circle Game contract was sent to Durkee Lumber for execution on June 3, 2004 under cover of a letter from Mark W. Deibler, DCNR Chief of the Silviculture. (P-Ex. 5; D-Ex. 13).

17. The June 3, 2004 letter from DCNR that accompanied the Circle Game contract advised Durkee Lumber of DCNR's concerns that Durkee Lumber might not have the requisite knowledge of the Department's contracts or the available resources to complete the state forest sales. DCNR's concerns were based on two incidents that arose when Durkee Lumber previously contracted with DCNR for timber stumpage sales. The June 3, 2004 letter described these incidents. (H.T. 34, 35; P-Ex. 5; D-Ex. 13).

18. Citing the concerns noted immediately above, DCNR's June 3, 2004 letter requested additional information from Durkee Lumber before DCNR would execute the contract. (P-Ex. 5; D-Ex. 13).

19. DCNR stated in its letter that the additional information was required to assure that Durkee Lumber had the physical and financial resources to complete its work under the contracts by the contract expiration dates of September 30, 2006 (Circle Game) and May 31, 2006 (Fire Tower Trail). (P-Ex. 5; D-Ex. 13).

20. The additional information requested in the June 3, 2004 letter included: (1) a plan of action, including identification of crew leaders, contract information, available dates to meet with the District Forester and timeframes for beginning and completing road construction and timber harvest operations; and (2) Durkee Lumber's most recent financial statements. (P-Ex. 5; D-Ex. 13).

21. Wendy Anne Durkee executed the Circle Game contract on behalf of Durkee Lumber shortly after it was received in June 2004 and returned it to DCNR. (H.T. 26-28).

22. Mr. Durkee responded on behalf of Durkee Lumber to DCNR's June 3, 2004 letter in a June 20, 2004 letter to Mr. Deibler setting forth Durkee Lumber's plans for proceeding with Fire Tower Trail and Circle Game, as well as detailing a bank failure which prevented completion of a prior contract with DCNR. With respect to the prior contract problems, the letter recounted the resulting agreement with the Commonwealth to relinquish the contract and "wipe the slate clean." (P-Ex. 6).

23. Mr. Durkee also submitted two letters dated July 8, 2004 to DCNR setting forth dates on which Durkee Lumber planned work would begin and be completed on road construction and timber harvest operations for each contract, as well as a date for meeting with the District Forester. (P-Ex. 10, 11).

24. The July 8, 2004 letters indicated Durkee Lumber planned that road construction on Circle Game would begin the week of August 15, 2004 and be completed the week of September 1, 2004, with timber harvesting to begin September 30, 2004 and be completed January 30, 2005. Mr. Durkee also indicated that Durkee Lumber planned that road construction on Fire Tower Trail would begin the week of July 26, 2004 and be completed the week of August 1, 2004 with timber harvesting to begin September 1, 2004 and be completed January 30, 2005. (P-Ex. 10, 11).

25. The July 8, 2004 letter also specified, in response to another item in DCNR's June 3, 2004 letter requesting a plan of action, that Mr. Durkee would be available to meet with the District Forester on July 28, 2004. (P-Ex. 10, 11).

27. Mr. Durkee considered the dates in his July 8, 2004 letters to be estimates based on, inter alia, the contracts being returned by DCNR in a timely fashion and the absence of unforeseen delays, such as adverse weather. He did not intend these interim dates to be mandatory or understand that Durkee Lumber would be bound by them. (H.T. 44-49).

28. It appears from the evidence presented that Mr. Durkee did not meet with the District Forester on July 28, 2004 or provide the requested financial statements, and DCNR raised no issue or objection to Durkee Lumber's failure to comply with these items requested in the June 3, 2004 letter. (H.T. 50-51, 160; P-Ex. 5; D-Ex. 13).

29. The June 3, 2004 letter stated, in relevant part:

> Please submit the following information relating to your physical and financial resources to support your capabilities for completing State Forest timber sale #15-2003BC01 by the contract expiration date of September 30, 2006 and State forest timber sale #15-2003BC11 by the contract expiration date of May 31, 2006:
>
> A detailed description or plan of action for completing these sales. This plan should include:
>
> - Crew leader(s) or individual coordinating timber sale operations. Who is responsible for ensuring that these sales will be completed in accordance with contract provisions? This person should be available to meet on site to discuss issues as they arise. This individual should also be provided a copy of the contract and be familiar with the terms of the contract.
> - Contact information for your crew leader(s) or sale administrator (e.g. name, title, address, phone, e-mail, etc.).
> - Available date(s) that your crew leader or contract administrator and road construction contractor can meet with the District Forester on site to discuss operations.
> - Your timeframe for beginning and completing road construction and improvement work, including the name, address and phone of the contractor.
> - Your timeframe for beginning and completing timber harvest operations.
>
> A copy of your most recent financial statement.
>
> Your responses to the special conditions outlined in this letter will be attached and incorporated into the contracts. Failure to comply with the special conditions will be cause for termination of the contracts.

(D-Ex. 13)

30. The Board notes, inter alia, that DCNR's June 3, 2004 letter requested "information relating to your [Durkee Lumber's] physical and financial resources" to support completion of the contracts by the completion dates stated in the bid prospectus and proposed contract. More importantly, we note that the request states that Durkee Lumber's "responses to the special conditions outlined in this letter will be attached and incorporated into the contracts" but then states that, "[f]ailure to comply with the special conditions [not Durkee's responses to the special conditions] will be cause for termination of the contracts." (P-Ex. 5; D-Ex. 13).

31. The Board finds that the June 3, 2004 letter is ambiguous as to the effect of supplying the additional information requested therein. Specifically, the different phrasings in the last two sentences of the quoted portion of the letter (noted in F.O.F. 29-30 immediately above) could lead a reasonable person to understand that the "special conditions" referred to therein were DCNR's demands for more information and that failure to supply this information would be grounds for termination of the contracts. In any event, even though the June 3, 2004 letter does talk about incorporating Mr. Durkee's responses into the contracts, it does not say that failure to comply with Durkee Lumber's responses to the special conditions (i.e. Durkee Lumber's estimated timeframes for haul road construction and timber harvesting) would be grounds for terminating the contracts. (P-Ex. 5; D-Ex. 13; Board Finding).

32. No credible testimony or rationale was provided to the Board as to why Mr. Durkee would knowingly or intentionally commit Durkee Lumber to: (1) complete the Fire Tower Trail timber harvest 16 months prior to the contract completion date (January 30, 2005 instead of May 31, 2006); (2) complete the Circle Game timber harvest 20 months prior to the contract completion date (January 30, 2005 instead of September 30, 2006); or, (3) complete the haul roads prior to the times required by the bid and proposed contract documents. (F.O.F. ¶ 5, 11, 12, 24; Board Finding).

33. During Durkee Lumber's operations, DCNR's own field personnel believed and told Mr. Durkee that Durkee Lumber's deadline for completing the haul road construction for the Circle Game tract was October 31, 2004, the date provided in the bid documents and proposed contract (not the September 1, 2004 date estimated by Mr. Durkee in his response to the June 3, 2004 letter). (H.T. 168-169; D-Ex. 1B and 2B, 11 and 13; P-Ex. 5, 10 and 11; Board Finding).

34. It was reasonable for Durkee Lumber to believe that Mr. Durkee had provided only estimates for haul road construction and timber harvest operations for the two tracts rather than hard and fast deadlines for incorporation into the contracts and that Durkee Lumber had until the contract completion dates provided in the two contracts it signed to finish work on these projects. Similarly, it was reasonable for Mr. Durkee to believe that the date for completion of the Circle Game haul road was October 31, 2004, as provided in the bid and proposed contract documents. (H.T. 168-169; F.O.F. ¶ 3-33; Board Finding).

35. After it received the signed contracts and the letters of July 8, 2004 from Durkee Lumber, DCNR added Paragraph 37, which sought to incorporate the interim job completion dates set forth in the work plan supplied by Mr. Durkee in the July 8, 2004 letters into the final version of each contract as new deadlines for haul road construction and timber harvest. DCNR executed and returned both contracts, now including Paragraph 37, to Durkee Lumber with cover letter dated July 15, 2004. (P-Ex. 1, 2).

36. At the time Ms. Durkee executed the two contracts, Paragraph 37 was not included in either of the two documents. (Joint Exhibit No. 1, Joint Stipulation, Paragraph 2; H.T. 28).

37. Paragraph 37 in each contract executed by DCNR reads as follows:

> 37. The letter from Roy Durkee to Mark Deibler, dated July 8, 2004, indicating specific dates on which road construction will begin and will be completed, and on which timbering operation will begin and will be completed, are incorporated by reference in this contract as additional terms and conditions. The contract will otherwise expire [September 30, 2006 for Circle Game and May 31, 2006 for Fire Tower Trail].

(P-Ex. 1, 2).

38. Neither of the July 15, 2004 cover letters enclosing the fully executed Fire Tower Trail or Circle Game contracts, nor any additional oral or written communication, notified Durkee Lumber that Paragraph 37 had been added to either of these contracts. (P-Ex. 1, 2; H.T. 33, 49; Board Finding).

39. Other than the June 3, 2004 cover letter, which the Board has found to be imprecise and ambiguous as to exactly what it intended regarding "special conditions" and what effect the information provided was to have, there was no other written or oral attempt to notify Durkee Lumber that DCNR considered the dates in Durkee Lumber's July 8, 2004 letters to be binding and mandatory prior to Durkee Lumber's execution of the contracts or DCNR's execution of the contracts. (H.T. 33, 49; P-Ex. 1, 2; F.O.F. ¶ 16-38; Board Finding).

40. Durkee Lumber executed written contract documents which did not include Paragraph 37 and intended to be bound by those contract documents. Thereafter, DCNR executed the contract documents after it had unilaterally modified them to include Paragraph 37. DCNR intended to be bound by these modified documents and also to bind Durkee Lumber thereto. (H.T. 28, 32-33, 265; P-Ex. 1-4; D-Ex. 1, 2; Board Finding).

41. Durkee Lumber did not agree with, nor assent to, the inclusion of Paragraph 37 into its timber sale contracts with DCNR for the Circle Game or Fire Tower Trail tracts. (F.O.F. ¶ 3-40; Board Finding).

42. Paragraph 37 stated terms additional to those contained in the bid specifications by DCNR; offered by Durkee Lumber in its bid submission; or agreed upon between the parties. (H.T. 28, 32-33, 265; P-Ex. 1, 2; D-Ex. 1, 2; F.O.F. ¶ 3-41; Board Finding).

43. The incorporation by reference of Durkee Lumber's work plan in Paragraph 37 would operate to require new or different completion dates for specific contract tasks, all of which would occur well over a year before the contract completion dates provided in the bid documents and in the proposed contract documents referenced therein and executed by Durkee Lumber. (P-Ex. 1, 2 and 10, 11; D-Ex. 1A, 1B, 2A, 2B, 5; F.O.F. ¶ 32-42; Board Finding).

44. In the Circle Game contract, the incorporation by reference of Durkee Lumber's work plan in Paragraph 37 provided for a different date for the completion of the haul road than that specified in the proposed contract document referenced in the bid documents and executed by Durkee Lumber. The date incorporated by reference in Paragraph 37 was September 1, 2004 and the date on page 9 of the original proposed contract documents was October 31, 2004. (P-Ex. 1, 10; D-Ex. 1A, 1B; F.O.F. ¶ 32-33).

45. The additional terms in Paragraph 37 materially altered the bid terms and each proposed contract. (P-Ex. 1, 2; D-Ex. 1, 2; F.O.F. ¶ 3-44; Board Finding).

46. Mr. Durkee first came to Pennsylvania on August 23, 2004 to make preparations to perform the work under the contracts, beginning with the larger Circle Game contract and then proceeding to the Fire Tower Trail project. On the same day, Mr. Durkee stopped by the District Forester office, after having canceled or missed the appointments set by his letter of July 8, 2004 and other subsequently arranged appointments. (H.T. 50-51, 160).

47. In trying to make conversation, without raising his voice, Mr. Durkee commented to the secretary at the District Forester's office regarding events that had occurred that day on the site. He is reported as stating that he was not pleased or happy about working with Ms. Thankful Batterson, the Management Forester for Circle Game. (H.T. 269-270, 285).

48. August and September of 2004 were characterized by unusually heavy rain, including the remnants of a hurricane. The wet weather precluded Durkee Lumber from beginning its work on the haul road which was required before timber cutting could begin on the Circle Game contract. (H.T. 49, 256).

49. On September 7, 2004, Michael Lester, Assistant State Forester at DCNR, wrote to Mr. Durkee that due to the fact he had not begun work he had failed to comply with the terms of Paragraph 37. Mr. Lester's letter warned that if significant steps were not made to comply by September 17, 2004, the contracts would be terminated. (P-Ex. 12).

50. After receiving the certified September 7, 2004 letter from DCNR, Mr. Durkee responded with a letter dated September 13, 2004 in which he recounted four days of meetings with district forestry personnel in Pennsylvania where he discussed road work for the contracts and what had to be done. Additionally, the September 13, 2004 letter stated there was confusion as to the addition of Paragraph 37 to the contracts and that Mr. Durkee had included documents accompanying his estimated timeframes which indicated he would not be held to the dates. (P-Ex. 12, 13).

51. At hearing, Mr. Durkee did not produce the documents referred to in his September 13, 2004 letter stating that Durkee Lumber would not be held to the dates in its work plan. (Board Finding).

52. Mr. Durkee's September 13, 2004 letter did invite Mr. Lester to contact Durkee Lumber's attorney to verify the information contained in that letter and forwarded a unit payment on Fire Tower Trail even though such payment was not yet required under the contract. (P-Ex. 13; H.T. 286).

53. Mr. Durkee received no response to his September 13, 2004 letter, nor did he receive any other warnings that progress was not acceptable or that the contracts might be terminated. (H.T. 55).

54. Mr. Wambaugh, Assistant District Forester for DCNR, submitted a report to Mr. Deibler which stated that on September 20, 2004 DCNR received a block payment in the amount of $3,663.00 from Durkee Lumber on the Fire Tower Trail tract. (P-Ex. 16).

55. On October 6, 2004, Mr. Durkee visited the Circle Game site with Ms. Batterson and Daniel Smith, a DCNR employee from a contiguous district. (H.T. 170).

56. Mr. Durkee temporarily left this meeting to make preparations for the arrival of trucks at the site. Ms. Batterson testified that when he returned, Mr. Durkee said something to the effect of "don't worry, I'm not going to tell anybody about the condoms and champagne." (H.T. 171). Mr. Smith recollects the statement slightly differently, testifying that Mr. Durkee said "shall I get a blanket and champagne," then moments later added, "at least I didn't mention about the condoms yet." (H.T. 228-229).

57. Mr. Smith then left the site. Ms. Batterson and Mr. Durkee remained and toured the site, during which time Mr. Durkee became infuriated because of a discussion regarding stone for the haul road. (H.T. 172, 175-177).

58. Immediately after the October 6, 2004 meeting with Mr. Durkee, Ms. Batterson orally reported Mr. Durkee's remarks and conduct to her supervisor, Tom Wallace. She then filed a written report six days later. Mr. Smith, at Mr. Wallace's request, filed a written report the next day. Mr. Wallace sent the reports to Mr. Deibler but did not discuss them with him. Both reports identified the incident as one of "inappropriate" comments and reported the statement made by Mr. Durkee without making any specific complaints. (H.T. 176, 198, 227, 229, 235; D-Ex. 10).

59. Although he had the reports regarding Mr. Durkee's remarks from Ms. Batterson and Mr. Smith, Mr. Wallace never met with Mr. Durkee, never talked with Mr. Durkee about the incident, and was never consulted about Durkee Lumber's termination. (H.T. 236-37).

60. On October 8, 2004, Mr. Wambaugh went to the Circle Game site and discussed installing culvert pipes with a backhoe instead of a bulldozer as Mr. Durkee had apparently planned, whereupon Mr. Durkee became enraged. (H.T. 277-78).

61. On October 12, 2004, Ms. Batterson and Mr. Wambaugh visited the Circle Game site. Ms. Batterson noted that: Mr. Durkee had started the road work, the site looked <u>good</u> (underlined twice in Ms. Batterson's report), all pipes were in, and it appeared that advancement was being made. Mr. Wambaugh concurred in Ms. Batterson's belief that the site looked good. (H.T. 177, 216-17, 282; D-Ex. 11).

62. Ms. Batterson testified that, during this same October 12, 2004 visit, Mr. Durkee was angry with his equipment operator, and that he argued with Ms. Batterson concerning the need to build a new landing at the bottom of the haul road, threw a contract at her, and suggested

that she needed to get pregnant and have children. (H.T. 178-179, 183).

63. By October 20, 2004, Mr. Durkee had started to stone the haul road at Circle Game. (H.T. 184).

64. On October 25, 2004, Ms. Batterson and Mr. Durkee were alone at the Circle Game site. Ms. Batterson testified that, in the course of a discussion regarding the amount of stone to be applied to the haul road, Mr. Durkee blew up, cussing and screaming, saying something to the effect that Ms. Batterson did not have any business being in the woods, which was a man's world, and that she should not expect the two of them to get along. Following this argument, Ms. Batterson called the District Forest Office and requested John Wambaugh or another state forest ranger who was a uniformed law enforcement agent to come out and join them at the site. Ms. Batterson hoped that a man of the law could calm the situation and defuse Mr. Durkee's anger. (H.T. 185-190).

65. With the ranger present, Mr. Durkee did become calm and cease his diatribe. Ms. Batterson testified that her concern was that Mr. Durkee was so far out of control that she could not discuss the condition of the haul road with him. Ms. Batterson did not file an incident report nor did she file any other complaint regarding this occurrence. The only entry in Ms. Batterson's contemporaneous log indicated Mr. Durkee was "very mad proceeding with the stoning." (H.T. 188-191; D-Ex. 11; P-Ex. 16).

66. By October 26, 2004 Mr. Durkee had finished stoning the haul road at Circle Game, and on October 28, 2004 the road was completed. (H.T. 55, 56, 190; P-Ex. 15, 16; D-Ex. 11, 14).

67. Although Paragraph 37 purported to incorporate the work plan schedule by reference to Mr. Durkee's letters of July 8, 2004, Paragraph 15 of the Circle Game contract provided that the haul road was to be completed by October 31, 2004. No specific date for the completion of the haul road had been inserted in the blank space left in that paragraph of the Fire Tower Trail contract. (H.T. 168, 190; P-Ex. 1, 2; D-Ex. 1, 2 Timber Sale Contracts at page 9).

68. In a letter to Durkee Lumber dated November 2, 2004, Mr. Wambaugh wrote that the Circle Game haul road had been satisfactorily completed. There was no mention in the letter of any intent to terminate the contracts. (P-Ex. 15; D-Ex. 16).

69. Neither Mr. Wambaugh nor Ms. Batterson were asked for a recommendation concerning the termination of Durkee Lumber's contracts. (H.T. 221-22, 309).

70. Other than the September 7, 2004 letter, DCNR gave Durkee Lumber no warnings regarding timeliness of performance. On the contrary, Ms. Batterson reminded Mr. Durkee that October 31, 2004 was the date for completion of the haul road specified in Paragraph 15 of the Circle Game contract. (H.T. 55, 168; P-Ex. 1, 2; D-Ex. 1, 2 and 11).

71. Dennis Sorgen, Assistant District Forester in charge of the Fire Tower Trail contract, stated that, due to the wet weather, the Fire Tower Trail haul road could not have been started before early to mid October. (H.T 256).

72. In a November 1, 2004 telephone conversation between Mr. Durkee and Mr. Sorgen, Mr. Durkee informed Mr. Sorgen that he had broken his leg and would not be able to start on the haul road on the Fire Tower Trail site until the Spring of 2005. (H.T. 251; D-Ex. 12).

73. By letter dated November 10, 2004, but not mailed until November 16 or 17, 2004, Michael Lester, Assitant State Forester, informed Durkee Lumber that DCNR terminated the Circle Game and Fire Tower Trail contracts. (H.T. 361-62; P-Ex. 17; D-Ex. 18).

74. In its November 10, 2004 letter, DCNR cited as reasons for its decision to terminate Durkee Lumber's contracts that Durkee Lumber was not in compliance with Paragraph 37 of the contracts and also that Mr. Durkee was agitated on occasion and used inappropriate language. (P-Ex. 17; D-Ex. 18).

75. On or about November 18, 2004, Mr. Lester contacted Mr. Durkee by phone to advise him that DCNR was terminating the contracts. At the time of this call, Mr. Lester was unaware that Durkee Lumber had completed the Circle Game haul road. (H.T. 361-62, 369; D-Ex. 17).

76. In his telephone conversation with Mr. Durkee, Mr. Lester stated he was canceling the contract because Durkee Lumber's contractual obligations had not been met and that Mr. Lester was even more concerned about Mr. Durkee's inappropriate and abusive behavior and profane language. (D-Ex. 17; H.T. 364).

77. Also in the phone conversation, Mr. Durkee disputed the bases for Mr. Lester's decision and, in doing so, Mr. Durkee used some mildly profane and insulting language, whereupon Mr. Lester hung up the phone. (H.T. 363).

78. Neither Mr. Lester nor Mr. Deibler went to the district or asked to meet with Mr. Durkee concerning complaints about Mr. Durkee or Durkee Lumber. (H.T. 341).

79. Mr. Lester did not speak with anyone in the district about weather conditions or about what might be causing any delays on Circle Game or Fire Tower Trail operations. (H.T. 367).

80. Nobody ever warned Mr. Durkee before the contract termination notices that DCNR and/or its employees considered his language inappropriate or profane. (H.T. 61).

81. Mr. Durkee's language and conduct complained of by DCNR, while at times deplorable, did not deprive DCNR of the benefit reasonably expected from the contracts, that is the construction of haul roads, the removal of timber and the restoration of the site. (H.T. 56, 59; P-Ex. 15; D-Ex. 16; F.O.F. ¶ 55-80; Board Finding).

82. Both of the present contracts contained an Exhibit B entitled Nondiscrimination/Sexual Harassment Clause. This clause provided that "each contract entered into by a governmental agency shall contain the following provisions by which the contractor agrees" not to discriminate against or intimidate the contractor's employees or subcontractors by

reason of "gender, race, creed, or color." (P-Ex. 1, 2; D-Ex. 1, 2).

83. DCNR did not cite a violation of Exhibit B to the contracts, the nondiscrimination/sexual harassment clause, as a basis for terminating Durkee Lumber's contracts at the time of termination in any of the communications between the parties. (P-Ex. 17,;D-Ex. 17, 18; Board Finding).

84. Although DCNR cited Mr. Durkee's conduct in its letter of November 10, 2004, as a basis for termination of the contracts, it did not specify the conduct complained of or cite specific incidents. Significantly, DCNR's letter noted that its field staff "expressed deep frustration in working with" Mr. Durkee, and objected to his language as "inappropriate", "unprofessional" and "unacceptable." The letter did not suggest that Mr. Durkee's conduct was discriminatory or intimidating or that it constituted sexual harassment. (P-Ex. 17; D-Ex. 18).

85. DCNR did not allege, or present evidence to prove, that Mr. Durkee or Durkee Lumber discriminated against, harassed or intimidated Durkee Lumber's own employees or subcontractors. (Board Finding).

86. Mr. Durkee's angry outbursts appear to have been generated primarily by haul road construction requirements conveyed to him or enforced by DCNR employees. He directed his anger and crude comments to DCNR's female forest technician, Ms. Batterson, and also to other male DCNR employees including Daniel Smith, John Wambaugh and Michael Lester when these requirements were communicated to him. (H.T. 175-176, 178-179, 187, 188, 228-229, 231, 277-278, 279-280, 363; D-Ex. 10; F.O.F. ¶ 55-66; Board Finding).

87. In spite of Mr. Durkee's volatile behavior and coarse language, Ms. Batterson continued to perform her job diligently, interacting with Mr. Durkee, sometimes with other DCNR foresters and sometimes alone, as necessary. Ms. Batterson never complained to her superiors that she was discriminated against or intimidated on account of her gender, race, creed or color, nor did she ever request of her superiors that her working relationship with Mr. Durkee be altered in any way. (H.T. 173, 183, 184, 186-190; Board Finding).

88. In response to leading questions posed to her on direct examination at hearing, Ms. Batterson agreed with DCNR's lawyer that she felt intimidated on October 6, 2004 as a result of one of Mr. Durkee's angry outbursts. However, Ms. Batterson did not make any mention of the angry outburst or her feelings regarding it in the incident report that she prepared and filed that same date. (H.T. 171-172, 176; D-Ex. 10; F.O.F. ¶ 55-59).

89. Ms. Batterson's request for second state forest ranger due to Mr. Durkee's angry outburst of October 25, 2004 appears to be the only time Ms. Batterson's actions even remotely suggest that Mr. Durkee may have intimidated her. However, this outburst appears to have been generated by Ms. Batterson's advice regarding the amount of stone to be applied to the haul road and we do not find it to constitute sexual harassment, discrimination or intimidation of a sexual or gender based nature. (H.T. 185-190; F.O.F. ¶ 64-65; Board Finding).

90. Under the circumstances described above, including the fact that Ms. Batterson did not report or indicate any discrimination or intimidation on her part in the incident report filed concerning events of October 6, 2004 or otherwise, and because she continued to work with Mr. Durkee without any request to her supervisors to modify this arrangement, DCNR has not established that Ms. Batterson was, in fact, intimidated by Mr. Durkee to any material extent at the time of the events here at issue. (F.O.F. ¶ 55-88; Board Finding).

91. DCNR did not establish by preponderance of evidence that Mr. Durkee's angry conduct and crude language, while obnoxious, did, in actuality, intimidate any of the DCNR employees on the basis of "gender, race, creed or color." (F.O.F. ¶ 55-89; Board Finding).

92. DCNR based its decision to terminate Durkee Lumber's contract on failure to meet the deadlines referenced in Paragraphs 37 and on Mr. Durkee's behavior. At no time did DCNR make a determination that Durkee Lumber could not complete all of the work specified in the contracts by the contract expiration dates of May 31, 2006 and September 30, 2006. (H.T. 59, 361; P-Ex. 17; D-Ex. 18; Board Finding).

93. Both Durkee Lumber and DCNR are parties chargeable with the knowledge and skill of merchants in dealing with the sale of timber. (F.O.F. ¶ 1-92; Board Finding).

Damages

94. Mr. Durkee submitted a Damage Summary Sheet which contained estimates of income to be realized from the logging of the trees and the expenses associated with the Circle Game and Fire Tower Trail operations. In it, he claimed lost profit of $565,042.00, which included the $23,633.00 cost of installing a haul road and the submission of $52,000 in cash for the purchase of a bond. (H.T. 66-70; P-Ex. 22).

95. Mr. Durkee did not visit the sites to estimate the value of the timber prior to bidding for the contracts. (H.T. 21. 22, 78, 106).

96. A site visit to assess the quality of timber is essential for determining the price to be anticipated from the sale of that timber. (H.T. 410-411, 424-425, 462).

97. Because he did not visit the site before bidding, Mr. Durkee could not adequately assess the grade of lumber he would realize from his logging operations. (H.T. 154, 410-411, 414-415).

98. Mr. Durkee relied on the contract to determine the volume of lumber on the tract. The contract, however, has no information regarding the grade of lumber to be harvested. (H.T. 411-413, 505).

99. To determine the value of the timber in the present case, it would be necessary to look at the value of the lumber and the cost of producing the lumber including drying the lumber, the costs of the saw mill and the cost of transportation, among other things. (H.T. 403).

100. DCNR's expert testified, without contradiction, that the quality of many of the trees to be cut on the tracts in question were poor, in that they had holes and splits, were hollow or had multiple stems. Also, much low grade growth was marked with yellow paint, meaning that it had to be cut even though it might not be worth hauling it out of the forest for sale. Many of the better trees were marked blue, meaning they were reserved and could not be cut. (H.T. 412-415, 417-418).

101. Although Mr. Durkee testified that he looked at the timber to determine its grade in preparing his summary of lost profits, he relied on a "rule of thumb" to determine the percentages attributable to the different grades. These percentages were applied to the volume of timber listed in the contract. (H.T. 69-70, 504-505).

102. Mr. Durkee did not anticipate that many trees on the tracts that were of a better grade could not be harvested. (H.T. 163).

103. Without a clear assessment of the grade and quantity of timber available for cutting on the tracts, Durkee Lumber could not accurately estimate the value of the lumber that could ultimately be sold. (F.O.F. ¶ 94-102; Board Finding).

104. In determining the expenses for logging, Mr. Durkee testified variously that he would use his own crew to cut the timber and that also he would hire a crew. Mr. Durkee acknowledged that it was much more expensive to hire a crew, but he did not take account of this expense in summarizing his lost profit. (H.T. 507-508, 515-516; P-Ex. 22; D-Ex. 19).

105. Mr. Durkee indicated that he planned on using his own kiln to dry timber in order to realize costs savings. However, he also testified that the kiln had not been assembled and that he would have to arrange to have the timber dried at a greater cost until his kiln was running. No evidence was presented as to this cost or the time required to set up the kiln. (H.T. 437-438, 500, 514-515).

106. Mr. Durkee did not itemize costs for specific expenses in conducting his logging operations, including expenses for fuel or insurance. (H.T. 516-517, 518; P-Ex. 22; D-Ex. 19).

107. Mr. Durkee testified that he expected to use two men to run his skidder at $12.00 an hour in his logging operations. His summary did not specifically account for this expense. Instead, he explained that he intended to hire whatever number of employees he needed and pay them from a general fund that was not specifically accounted for. (N.T. 508, 510, 520-522, p. 58).

108. In calculating the revenue he expected to realize from sale of lumber and veneer removed from the site, Mr. Durkee relied on market reports for northern timber pertaining to the month he anticipated the timber would be harvested. (N.T. 135-136).

109. DCNR's expert noted that the sites in question were located in the Appalachian area and that Appalachian hardwood prices were applicable. The expert observed that Northern hardwood prices, used by Mr. Durkee to calculate lost profits, were somewhat higher and

wouldn't apply to trees from the Appalachian area. (H.T. 440-441; D-Ex. 19, 23-1).

110. Mr. Durkee also applied premiums in his calculations for certain loads. (N.T. 69-70, 113).

111. Durkee Lumber's evidence did not demonstrate how Mr. Durkee determined the amount of timber to which any premium could be applied. (N.T. 114-116).

112. The Board finds that Mr. Durkee's testimony regarding prospective lost profits is not adequately supported by sufficient documentary evidence, evidence of industry practices, expert report or other substantiating evidence. (F.O.F. ¶ 94-111; Board Finding).

113. DCNR's expert witness calculated the revenues and expenses he would have expected these tracts to generate and concluded that the two contracts would have resulted in a loss of $103,000 to Durkee Lumber. (H.T. 461).

114. Mr. Durkee's testimony regarding lost profits was too speculative and inconsistent to be credible. (F.O.F. ¶ 94-113; Board Finding).

115. Durkee Lumber failed to provide sufficient credible evidence to establish the amount of Durkee Lumber's lost profits, if any, with reasonable certainty. (F.O.F. ¶ 94-114; Board Finding).

116. As a condition of the two contracts entered into by Durkee Lumber and DCNR, Durkee Lumber was required to establish a letter of credit for bonding purposes. DCNR acted on the bonds to recover its losses on the projects and received payment in the approximate amount of $45,000 for Circle Game and $8,000 for Fire Tower Trail, a total of $53,000. (H.T. 376-378).

117. In a letter addressed to Mr. Lester of DCNR dated September 13, 2004, Mr. Durkee stated that he was forwarding a unit payment to the District. (P-Ex. 13).

118. On November 4, 2004, Mr. Wambaugh submitted two reports regarding the projects to Mr. Deibler. Included in one report was an entry, dated September 20, 2004, acknowledging receipt of $3,663.00 block payment from Durkee Lumber. (P-Ex. 16; H.T. 259).

119. Construction of the Circle Game haul road cost Durkee Lumber $23,633.14. (H.T. 67; P-Ex. 21).

120. The Board finds the costs outlined in F.O.F. ¶ 116-119 to be reasonable. Durkee Lumber incurred costs totaling $80,296.14 in the performance of its contracts with DCNR ($53,000.00 + $3,663.00 + $23,633.14). (F.O.F. ¶ 116-119; Board Finding).

121. Durkee Lumber filed its claim with DCNR respecting the Circle Game and Fire Tower Trail contracts on May 9, 2005. (Statement of Claim and Answer, ¶¶ 28, 31).

122. Although DCNR failed to convince the Board of its interpretation of the Harassment Clause or that Mr. Durkee's boorish conduct constituted a sufficient basis for DCNR's termination of its timber sale contracts with Durkee Lumber, we do acknowledge that DCNR's actions were not taken without reason. Accordingly, we find that DCNR's actions in terminating Durkee Lumber's two timber sale contracts prematurely were not taken in bad faith or in an arbitrary or vexatious manner. (F.O.F. ¶ 55-91; Board Finding).

CONCLUSIONS OF LAW

1. The Board of Claims has exclusive jurisdiction to hear and determine this matter as a claim against the Commonwealth of Pennsylvania, Department of Conservation and Natural Resources, arising from a contract entered into by the Commonwealth. Board of Claims Act, 72 P.S. Secs. 4651-1 – 4651-10, repealed by Act of December 3, 2002, P.L. 1147, No. 142 (current law now codified at Sections 1701-1751 of the Commonwealth Procurement Code, 62 Pa.C.S.A. secs. 1701-1751).

2. The Board of Claims has jurisdiction over the parties as well as the subject matter of the claim asserted by plaintiff, Durkee Lumber Co., Inc. Board of Claims Act, 72 P.S. Secs. 4651-1 – 4651-10, repealed by Act of December 3, 2002, P.L. 1147, No. 142 (current law now codified at Sections 1701-1751 of the Commonwealth Procurement Code, 62 Pa.C.S.A. secs. 1701-1751).

3. The basic elements of a contract are offer, acceptance and consideration. Koken v. Steinberg, 825 A.2d 723, 729 (Pa. Cmwlth. 2003).

4. To establish consideration, it is sufficient that the contract confer a benefit upon the promisor or a detriment upon the promisee – a bargained for exchange. Here the contracts provided a bargained for exchange of dollars and road construction for the right to cut and remove timber. The basic contracts in this case evidenced adequate consideration. Pyle v. Department of Public Welfare, 730 A.2d 1046, 1050 (Pa. Cmwlth. 1999).

5. In public contracts, the contractor's submission of a bid is the offer as opposed to the agency's solicitation for bids. Once the bid is submitted, the agency is free to accept or reject the contractor's offer. National Const. Services, Inc. v. Philadelphia Regional Port Authority, 789 A.2d 306, 309 (Pa. Cmwlth. 2001).

6. Durkee Lumber's submission of its bids for the Circle Game and Fire Tower Trail contracts constituted an offer to contract with DCNR on the terms specified in the proposed contracts and the invitations to bid. Id.

7. However, a binding contract cannot be formed until the bid is accepted by the means specified by the parties or as required by statute. Jay Township Authority v. Cummins, 773 A.2d 828, 830 (Pa. Cmwlth. 2001).

8. Section 543 of the Procurement Code (with minor exceptions not relevant here) requires the execution of a written agreement "by all necessary Commonwealth officials" in order to form an effective contract with the Commonwealth. At a minimum, an authorized signature for the contracting state agency itself is required to form an effective contract with that state agency. 62 Pa.C.S. § 543; See also, Firetree Ltd. v. Department of General Services, BOC Dkt. 3779, Order of May 2, 2006, aff'd, 920 A.2d 906 (Pa. Cmwlth. 2007).

9. The necessary means of acceptance must also be transmitted to the offeror in order to form a contract. See, Stanley G. Makoroff v. Department of Transportation, BOC Dkt. 3426, Order of January 12, 2007, aff'd, 2007 WL 4208624 (Pa. Cmwlth. 2007).

10. A contractual relation is formed when a written contract is formally entered into which represents all material terms embodied in the offer and acceptance. Pyle v. Department of Public Welfare, 730 A.2d 1046, 1050 (Pa. Cmwlth. 1999)

11. The Pennsylvania Procurement Code, which applies to the present contracts for the sale of timber on state land, provides that other law, including the Pennsylvania Uniform Commercial Code, can augment the Procurement Code when necessary. 62 Pa.C.S. §104.

12. The Pennsylvania Uniform Commercial Code applies to the contracts between Durkee Lumber and DCNR for the sale of timber to be cut. 13 Pa.C.S. § 2107(b).

13. In the Pennsylvania Uniform Commercial Code, the phrase "between merchants" means "any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants." 13 Pa.C.S.A. § 2104.

14. The present transaction is one between merchants since both Durkee Lumber and DCNR are parties chargeable with the knowledge or skill of merchants in dealing with the sale of timber. Id.

15. Under Pennsylvania common law, a contract was formed only by an acceptance that exactly matched the terms of the offer. However, Section 2207(a) of the Pennsylvania Uniform Commercial Code ("PUCC") provides that, as between merchants, an expression of acceptance that includes additional or different terms operates as a legal acceptance of the offer and results in a binding contract. Flender Corporation v. Tippins International Inc., 830 A.2d 1279 (Pa. Super. 2003); Beaver Valley Alloy Foundry, Co. v. Therma-Fab, Inc., 814 A.2d 217 (Pa. Super. 2002). The additional terms in the acceptance are to be construed as proposals for additions to the contract. 13 Pa. C.S. § 2207(b). Such terms become part of the contract unless "they materially alter it." 13 Pa. C.S. § 2207(b)(2); United Coal & Commodities Co., Inc. v. Hawley Fuel Coal, Inc., 525 A.2d 741 (Pa. Super. 1987); Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102 (C.A.3 (Pa.) 1992).

16. DCNR's return of the executed contracts to Durkee Lumber was a sufficient acceptance to form a valid, binding contract, even though the new Paragraph 37 had been inserted in each of them and was at variance with Durkee Lumber's offer, because of the effect of the Pennsylvania Uniform Commercial Code. Id.; 62 Pa.C.S.A. § 543(a); See also, Firetree and Makoroff, supra.

17. The contracts in the present case were formed when the contract documents were executed by the necessary Commonwealth officials (including an authorized signature by DCNR) and placed in the mail by DCNR for delivery to Durkee Lumber. This occurred on or about July 15, 2004 after DCNR's insertion of Paragraph 37 into the contract documents. Id.

18. The PUCC provides a means for determining whether additional language used in the acceptance but not found in the offer becomes part of the contract:

> The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (1) the offer expressly limits acceptance to the terms of the offer;

(2) they materially alter it; or
(3) notification of objection to them have already been given. . . .

13 Pa.C.S. § 2207(b).

19. The formation of a valid contract requires the mutual assent of the contracting parties. Degenhardt v. Dillon Co., 669 A.2d 946, 950 (Pa. 1996).

20. A party's signature to a contract is evidence of its intention to be bound thereby. Petrie v. Haddock, 119 A.2d 45, 47 (Pa. 1956).

21. The parties mutually agreed to certain terms of the contracts; however, this did not include the provisions of Paragraph 37, as that paragraph was added after Durkee Lumber's execution of the contracts. Id.

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22. Durkee Lumber did not assent to the addition of new and/or different deadlines for haul road construction and timber harvest operations (referenced in new Paragraph 37) from those contained in the bid documents and original contract when it provided the additional information requested in DCNR's letter of June 3, 2004. Although this letter requested additional information from Durkee Lumber and set out special conditions, this letter was ambiguous and unclear as to what DCNR meant by "special conditions" or what was required to comply with them. The ambiguous letter is construed against the drafter, in this case DCNR. See e.g., In re Breyer's Estate, 379 A.2d 1305, 1310 (Pa. 1977).

23. An additional term is material, and will not be incorporated by reference if it would result in surprise or hardship to the party against whom enforcement is sought. Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 448 (C.A.3 (Pa.) 2003).

24. Paragraph 37 is a material additional term to the mutually agreed upon terms of the contracts. Therefore, Paragraph 37 is not enforceable under the Pennsylvania Uniform Commercial Code. 13 Pa.C.S. § 2207(b).

25. The dates referenced in Paragraph 37 for the construction of haul roads and timber harvest operations for the Fire Tower Trail tract and the Circle Game tract represent material additions to the basic contract terms otherwise agreed to by the parties. Paragraph 37, therefore, is neither enforceable nor adequate reason for DCNR's terminations of Durkee Lumber's two timber sale contracts. Id.

26. The Procurement Code provides explicit requirements and procedures for competitive bidding. 62 Pa.C.S.A. § 512.

27. When a governmental entity employs competitive bidding for a contract, bidding procedures are mandatory and must be specifically followed. Acchione v. City of Philadelphia, 397 A.2d 37 (Cmwlth. Cr. 1979).

28. Public contracts require common specifications and common treatment of bidders in the bidding process resulting in an awarded contract which conforms to the bid specifications. Philadelphia Warehousing and Cold Storage v. Hallowell, 490 A.2d 955, 956-57 (Pa. Cmwlth.

1985); American Totalisator Co., Inc. v. Seligman, 384 A.2d 242, 258 (Pa. Cmwlth. 1977); Louchheim v. City of Philadelphia, 66 A. 1121 (Pa. 1907); Guthrie v. Armstrong, 154 A. 33 (Pa. 1931).

29. In public contracting, should the Commonwealth fail to follow bidding procedures, the public purpose of competitive bidding is defeated and judicial intervention is proper. Ezy Parks v. Larson, 454 A.2d 928 (Pa. 1982).

30. A governmental entity may not materially alter the terms of a publicly bid contract after the bids have been opened and the contract awarded since such an alteration would violate bidding laws. Philadelphia Warehousing and Cold Storage v. Hallowell, 490 A.2d 955, 956-57 (Pa. Cmwlth. 1985); American Totalisator Co., Inc. v. Seligman, 384 A.2d 242, 258 (Pa. Cmwlth. 1977).

31. A contract term that violates a provision of a statute enacted in aid of significant public policies will not be enforced. American Ass'n of Meat Processors v. Casualty Reciprocal Exchange, 588 A.2d 491 (Pa. 1991). Courts have held that portions of agreements that violate a statutory provision are unenforceable, as are clauses that fly in the face of public policy. Watrel v. Commonwealth, Department of Education, 488 A.2d 378 (Pa. Cmwlth. 1985) (term of retirement contract providing for pension contributions from a non-employee is unenforceable); Miesen v. Frank, 522 A.2d 85 (Pa. Super. 1987) (indemnification clause in marriage separation contract unenforceable as violation of public policy in providing child support).

32. In the context of competitive bidding, courts have repeatedly refused to enforce contracts or provisions entered into in violation of bidding procedures whether established by statute or in the specifications of the Commonwealth's request for proposal. American Totalisator Co., Inc. v. Seligman, 414 A.2d 1037 (Pa. 1980), Conduit & Foundation Corp. v. City of Philadelphia, 401 A.2d 376 (Cmwlth. Ct. 1979), Shaeffer v. City of Lancaster, 754 A.2d 719 (Cmwlth. Ct. 2000), Ezy Parks v. Larson, 454 A.2d 928 (Pa. 1982).

33. Because the new contract terms DCNR sought to incorporate through Paragraph 37 materially altered the bid terms, Paragraph 37 terms are unenforceable as violations of Pennsylvania's public contracting and bidding laws. DCNR's termination of Durkee Lumber's contracts was, therefore, improper and without merit to the extent it relied on Paragraph 37. Id.

34. Because Paragraph 37 is not enforceable by reason of the PUCC and/or violation of the public bidding law, the only harvesting deadlines remaining in the two contracts are the completion dates of May 31, 2006 (Fire Tower Trail) and September 30, 2006 (Circle Game). The Circle Game contract alone also included a deadline of October 31, 2004, for completing the haul road for that tract. Durkee Lumber completed the Circle Game haul road on October 28, 2004, thereby meeting, even exceeding, that contractual deadline. Durkee Lumber therefore did not breach the operable contract terms providing for the time for completion of either the haul roads or the logging operations. (P-Ex. 1-2).

35. DCNR breached the contract for Circle Game and Fire Tower Trail by its decision to prematurely terminate these two contracts, since these actions by DNCR constituted active interference with Durkee Lumber's ability to perform the two contracts. See e.g., Able-Hess Assoc., Inc. v. Cmwlth., State System of Higher Education, 2003 WL 22524494 (Pa. Bd. Claims

2003), affirmed in unreported opinion by Commonwealth Court. See also, Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park, 509 Pa. 553, 506 A.2d 862 (1986).

36. In order to justify the non-performance or termination of a contract by one party because of the breach of another, the breach must be material. Gray v. Gray, 671 A.2d 1166, 1172 (Pa. Super. 1996).

37. Restatement (Second) Contracts § 241 provides the following guidelines for determining whether a breach is material. It states:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Gray, 671 A.2d at 1172.

38. While the Board does not condone Mr. Durkee's conduct in using offensive language, it finds under these facts and circumstances that this conduct does not rise to the level of a material breach of the contracts. Id.

39. Because Mr. Durkee's inappropriate conduct did not constitute a deprivation of benefits to DCNR under these contracts for payment, construction of haul roads and the removal of timber, this conduct does not constitute a material breach by Durkee Lumber permitting termination of the contracts by DCNR. Id.

40. Mr. Durkee's behavior toward DCNR employees did not violate the nondiscrimination and sexual harassment clause of the contracts since that clause is drafted to pertain to a contractor's conduct toward its own employees and subcontractors, not Durkee Lumber's conduct toward DCNR employees. (P-Ex. 1, 2 Exhibit B, D-Ex. 1, 2 Exhibit B). See also, In re Breyer's Estate, 379 A.2d 1305, 1310 (Pa. 1977).

41. DCNR failed to carry the burden of proving the discriminatory or harassing conduct it is alleging against Durkee Lumber as a basis for DCNR's termination of the timber sale contracts here at issue. Martin v. Unemployment Compensation Board of Review, 749 A.2d 541 (Pa. Cmwlth. 2000).

42. DCNR did not establish sufficient facts to support its allegation that Mr. Durkee's angry outbursts and rude comments actually intimidated anyone or constituted discrimination or sexual harassment of any material extent in violation of the nondiscrimination/sexual harassment clause of the contract. Id. (P-Ex. 1, 2 Exhibit B; D-Ex. 1, 2 Exhibit B).

43. Because Mr. Durkee was not shown to have violated the nondiscrimination/sexual harassment clause of the contracts, DCNR's termination of the contracts on that basis was improper and constituted active interference by DCNR with Durkee Lumber's performance of the two timber sale contracts here at issue. Accordingly, DCNR breached its timber sale contracts with Durkee Lumber. Id.

44. In a breach of contract case, the general measure of damages is "that the aggrieved party should be placed as nearly as possible in the same position he or she would have occupied had there been no breach." Commonwealth, Department of Transportation v. Brozzetti, 684 A.2d 658, 665 (Pa. Cmwlth. 1996).

45. Failure to realize expected profits because of a breach of contract is a compensable loss "if there is evidence to establish the loss of profits with a reasonable certainty and to show that the loss of profits was a proximate consequence of the wrong and where there is evidence that a loss of profits was within the contemplation of the parties." 16 Summ. Pa. Jur.2d Commercial Law § 6.55 (citing Brozzetti, 684 A.2d 658).

46. Durkee Lumber's evidence regarding lost profit was speculative and inconsistent and, as the trier of fact, the Board has determined that it is not sufficiently credible to determine lost profit damages with reasonable certainty. Id. See also, Melzer v. Witsberger, 480 A.2d 991, 998 n.9 (Pa. 1984).

47. In determining the credibility of the expert witness, the trier of fact is free to believe all, part, or none of the evidence. Commonwealth v. Lambert, 795 A.2d 1010, 1014 (Pa. Super. 2002).

48. Although the Board found DCNR's expert witness to be credible, due to the differences in the logging operations run by DCNR's expert and Durkee Lumber, the Board cannot utilize DCNR's expert testimony and calculation that the present site would yield a financial loss to determine with reasonable certainty an accurate measure of damages for lost profits. Id.

49. When lost profits as expectation damages cannot be measured with reasonable certainty, contract law offers reliance damages:

> While the traditional law of contract remedies implements the policy that goods and services should be consumed by the person who values them most highly, and hence the preference for expectation damages, other theories of damages provide alternative avenues for contract enforcement. This is especially so where an injured party is entitled to recover for breach of contract, but recovery based on traditional notions of expectation damages is clouded because of the uncertainty in measuring the loss in value to the aggrieved contracting party. See Restatement, supra, § 349 cmt. a; 5 Arthur L. Corbin, supra, § 1031, at 188. Thus,

> where a court cannot measure lost profits with certainty, contract law protects an injured party's reliance interest by seeking to achieve the position that it would have obtained had the contract never been made, usually through the recovery of expenditures actually made in performance or in anticipation of performance.

ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659, 669 (C.A. 3 (Pa.) 1998).

50. The law makes clear that reliance damages may be available, following the breach of a contract, in order to put a party back in the position in which it would have been had the contract not been made. Shovel Transfer and Storage, Inc. v. Pennsylvania Liquor Control Bd., 739 A.2d 133, 140 (Pa. 1999).

51. Durkee Lumber incurred expenses in reliance on the contracts which were reasonable, given the circumstances. First, Durkee Lumber expended $53,000.00 to obtain its letter of credit; Second, Durkee Lumber expended $23,633.14 for the construction of the haul road on the Circle Game contract in preparation to harvest that contract's timber; finally, Durkee submitted a partial block payment of $3,663.00, which now becomes an expense.

52. Because DCNR materially breached its Fire Tower Trail and Circle Game contracts with Durkee Lumber; and Durkee Lumber cannot establish its lost profits with reasonable certainty, yet has incurred the reasonable expense identified above, DCNR is liable to Durkee Lumber for a total of $80,296.14 ($53,000 + $3,663 + $23,633.14) in reliance damages. Id.

53. DCNR is liable for payment of prejudgment interest on the aggregate amount of Durkee's cost of damages set forth in F.O.F. 119 ($80,296.14). Prejudgment interest is payable at the statutory rate for judgments (6% per annum) beginning on May 9, 2005, the date on which Durkee Lumber presented its claim to DCNR, and running through the date of this Opinion and Order. (41 P.S. § 202, legal rate of interest; Section 1751 of the Commonwealth Procurement Code, 62 Pa.C.S.A § 1751; P-Ex. 20).

54. The 6% per annum statutory rate of interest for judgments equals a daily rate of interest of 0.000164 (.06 divided by 365 days). The number of days for which Durkee is entitled to prejudgment interest on its aggregate amount of extended costs damages is 970 days (May 9, 2005 to January 4, 2008). Thus: $80,296.14 (aggregate extended cost damages) x 0.000164 x 970 days = $12,773.51 in prejudgment interest. Id.

55. Durkee Lumber is awarded $93,069.65 ($80,296.14 + $12,773.51) in damages and prejudgment interest.

56. The Board may, in its discretion, award a Plaintiff reasonable attorneys fees, penalties and costs if it finds the Defendant's withholding of payment due Plaintiff to be done in an arbitrary or vexatious manner. It may award costs (other than attorney's fees) in its discretion. 62 Pa.C.S. § 3935, 62 Pa.C.S. § 1725(e).

57. Because we find DCNR's actions in terminating Durkee Lumber's two timber contracts prematurely were not taken in bad faith or in an arbitrary or vexatious manner, the Board will deny Durkee Lumber's claim for attorney's fees and costs for these claims. 62 Pa. C.S. § 3935; See also, A.G. Cullen v. SSHE, 898 A.2d 1145, 1164-1166 (Pa. Cmwlth. 2006); DGS v. Pittsburgh Building Company, 920 A.2d 973 990 (Pa. Cmwlth. 2007).

OPINION

Plaintiff, Durkee Lumber Co., Inc. ("Durkee Lumber"), brings claims for damages against the Department of Conservation and Natural Resources ("DCNR"). These claims arise from DCNR's termination of two contracts for timber sales before the jobs were completed.

In the spring of 2004, DCNR undertook timber sales from two tracts, Fire Tower Trail and Circle Game, located in Susquehannock State Forest, Potter County, Pennsylvania. Plaintiff, Durkee Lumber, was the successful high bidder on both sales at $57,000 and $177,900 respectively, entitling it to cut and sell timber from these designated state forest lands. However, after notifying Durkee Lumber of its successful high bids, DCNR then sought further information and assurances from Durkee Lumber due to previous dealings between the parties as to Durkee Lumber's "physical and financial resources to support [Durkee's] capabilities for completing [the Circle Game timber sale] by the contract expiration date of September 30, 2006 and [the Fire Tower Trail timber sale] by the contract expiration date of May 31, 2006." Notwithstanding its request for this additional information, DCNR forwarded copies of the timber sales contracts to be executed by Durkee Lumber before its receipt of this additional information. Durkee Lumber, as instructed, signed the contracts and returned them to DCNR for execution. DCNR then inserted a new Paragraph 37 into the contracts, executed same and returned them to Durkee Lumber.

Paragraph 37 purports to incorporate portions of the additional information provided by Durkee Lumber into these two contracts, including timeframes for commencing and completing haul road construction and beginning and completing timber harvest operations that are either in addition to, or in conflict with, dates otherwise stated in the bid documents and initial contract terms. DCNR then uses Durkee Lumber's failure to meet the additional terms/dates regarding the construction of the haul roads introduced by Paragraph 37 as its primary justification for

early termination of these two timber sales contracts. The parties dispute the validity of Paragraph 37. Durkee Lumber claims it is not part of the agreed-to contracts. In contrast, DCNR relies upon it for its early termination of the contracts.

DCNR also claims Durkee Lumber breached the contracts due to Roy Durkee's conduct toward DCNR employees. Durkee Lumber contends that the actions of Mr. Durkee did not reach the level of materiality required for breach of the contracts so as to justify DCNR's early termination of the contracts at issue.

Contract Formation and Paragraph 37

Durkee Lumber's primary argument against the validity of Paragraph 37 appears to assert that a contract had been formed between itself and DCNR prior to the time DCNR inserted Paragraph 37 and executed the contracts. Thus, Durkee Lumber argues that DCNR's addition of Paragraph 37 was an improper modification of an existing contract, done without consideration. Because of the specific actions and timing in the formation of the two contracts here, the Board must conclude that this argument fails. However, because of these same specifics, the Board does find that Pennsylvania's Uniform Commercial Code and fundamental principles of public bid law cause DCNR's attempt to introduce Paragraph 37 into the timber sale contracts to be ineffective and the paragraphs to be unenforceable.

The basic elements of a contract are offer, acceptance, and consideration. Koken v. Steinberg, 825 A.2d 723, 729 (Pa. Cmwlth. 2003). To establish consideration, it is sufficient that the contract confer a benefit upon the promisor or a detriment upon the promisee – a bargained for exchange. Pyle v. Department of Public Welfare, 730 A.2d 1046, 1050 (Pa. Cmwlth. 1999). Here the contracts provided a bargained for exchange of dollars and road construction for timber. The basic contracts in this case evidenced adequate consideration. However, the offer and acceptance elements raise issues here that we must examine more closely.

In publicly bid contracts, the contractor's submission of a bid is the offer, as opposed to the agency's solicitation for bids. National Const. Services, Inc. v. Philadelphia Regional Port Authority, 789 A.2d 306, 309 (Pa. Cmwlth. 2001). Once the bid is submitted, the agency is free to accept or reject the contractor's offer. Id. However, a binding contract cannot be formed until the bid is accepted by the means specified by the parties or as required by statute. Jay Township Authority v. Cummins, 773 A.2d 828, 830 (Pa. Cmwlth. 2001).

DCNR solicited bids for the sale of timber on the Fire Tower Trail and Circle Game tracts to which Durkee Lumber replied by submitting the highest bid to purchase timber on each tract. As submitted, these bids constituted offers by Durkee Lumber. DCNR then notified Durkee Lumber that it had accepted its Fire Tower Trail bid by letter dated April 14, 2004 and its Circle Game bid by letter dated May 12, 2004. The April 14, 2004 letter included copies of the Fire Tower Trail contract for Durkee Lumber to execute. The May 12, 2004 letter included no contract, but copies of the Circle Game contract were forwarded later, under cover of a letter dated June 3, 2004.

The bid documents provided that the successful bidder would be required to execute DCNR's Tree Estimate Timber Stumpage Sale contract, copies of which were made available for inspection at the forest district office. Curiously, however, the bid documents did not speak to DCNR's execution of the same contracts or otherwise explicitly describe a specific means of acceptance to be utilized by DCNR. Accordingly, absent some statutory requirement to the contrary, the Board would be bound to agree with Plaintiff that a contract for the sale of timber from both Circle Game and Fire Tower Trail was formed before DCNR's insertion of Paragraph 37 and its execution and return of the contracts to Durkee Lumber.[1]

[1] Depending upon one's interpretation of the bid documents, the intent evidenced solely by this documentation suggests that a contract could be formed as early as the issuance of DCNR's acceptance letters or as late as Durkee Lumber's execution of the two contracts and return of same to DCNR.

Unfortunately for Plaintiff's argument, 62 Pa.C.S. Section 543 (with minor exceptions not relevant here) requires the execution of a written agreement "by all necessary Commonwealth officials" in order to form an effective contract with the Commonwealth. An authorized signature for the contracting state agency itself is required to form an effective contract with that state agency. See, Firetree Ltd. v. Department of General Services, BOC Dkt. 3779, Order of May 2, 2006, aff'd, 920 A.2d 906 (Pa. Cmwlth. 2007). This necessary means of acceptance must also be transmitted to the offeror in order to form a contract. See, Stanley G. Makoroff v. Department of Transportation, BOC Dkt. 3426, Order of January 12, 2007, aff'd, 2007 WL 4208624 (Pa. Cmwlth. 2007). Thus, in the case at hand, because Paragraph 37 was apparently inserted by DCNR into the two timber sale contracts before DCNR executed these contracts and returned same to Durkee Lumber we cannot say that Paragraph 37 was a modification to an already existing contract.

Although the Board has not found Durkee Lumber's "modification without consideration" argument persuasive, there are other bases in contract law and in Pennsylvania's version of the Pennsylvania Uniform Commercial Code ("PUCC") that prevent the enforcement of Paragraph 37. Specifically, we find that PUCC Section 2207(a) prevents the inclusion of Paragraph 37 as a term of the contracts and Pennsylvania case law precludes the enforcement of same as an illegal, material modification to the bid documents following an award of the bid.

As noted above, DCNR initially notified Durkee Lumber that it had accepted its Fire Tower Trail bid by letter dated April 14, 2004 and its Circle Game bid by letter dated May 12, 2004. The April 14, 2004 letter included copies of the Fire Tower Trail contract for Durkee Lumber to execute. The May 12, 2004 letter included no contract, but copies of the Circle Game contract were forwarded later, under cover of a letter dated June 3, 2004. In its June 3, 2004 letter, DCNR expressed concerns regarding Durkee Lumber's failure to perform past contracts

for timber sales. It also requested that additional information be provided by Durkee Lumber in order to assure DCNR that Durkee Lumber possessed the physical and financial resources to complete the two contracts by their respective expiration dates of May 31, 2006 (Fire Tower Trail) and September 30, 2006 (Circle Game). The letter stated, in relevant part, as follows:

> Please submit the following information relating to your physical and financial resources to support your capabilities for completing State Forest timber sale #15-2003BC01 by the contract expiration date of September 30, 2006 and State forest timber sale #15-2003BC11 by the contract expiration date of May 31, 2006:
>
> A detailed description or plan of action for completing these sales. This plan should include:
>
> - Crew leader(s) or individual coordinating timber sale operations. Who is responsible for ensuring that these sales will be completed in accordance with contract provisions? This person should be available to meet on site to discuss issues as they arise. This individual should also be provided a copy of the contract and be familiar with the terms of the contract.
> - Contact information for your crew leader(s) or sale administrator (e.g. name, title, address, phone, e-mail, etc.).
> - Available date(s) that your crew leader or contract administrator and road construction contractor can meet with the District Forester on site to discuss operations.
> - Your timeframe for beginning and completing road construction and improvement work, including the name, address and phone of the contractor.
> - Your timeframe for beginning and completing timber harvest operations.
>
> A copy of your most recent financial statement.
>
> Your responses to the special conditions outlined in this letter will be attached and incorporated into the contracts. Failure to comply with the special conditions will be cause for termination of the contracts.

Mr. Roy Durkee responded to the June 3, 2004 letter in several correspondences. On June 20, 2004, he sent a letter describing his plans for performing the two contracts as well as an

explanation for his inability to complete the prior contract with DCNR. The letter stated that a bank failure had interfered with Durkee Lumber's prior contract and that Durkee Lumber had reached an agreement with DCNR permitting the parties to "wipe the slate clean" on their prior dealings. Mr. Durkee also sent two additional letters dated July 8, 2004. These provided dates for a meeting with relevant personnel and for beginning and completing both road construction and timbering operations. It does not appear that Mr. Durkee provided the requested financial information for Durkee Lumber.

Meanwhile, Durkee Lumber, through Wendy Durkee, had already signed the two contracts supplied by DCNR and returned them to DCNR. These contracts did not include a Paragraph 37.[2] Only after DCNR received the executed contracts from Durkee Lumber did DCNR revise the contract documents by adding Paragraph 37, execute same, and then return them to Durkee Lumber by letter dated July 15, 2004. Paragraph 37 provided as follows:

> The letter from Roy Durkee to Mark Deibler, dated July 8, 2004, indicating specific dates on which road construction will begin and will be completed, and on which timbering operations will begin and will be completed, are incorporated by reference in this contract as additional terms and conditions. The contract will otherwise expire [September 30, 2006 for Circle Game and May 31, 2006 for Fire Tower Trail].

DCNR did not alert Durkee Lumber to the new paragraph upon return of the fully executed versions, and Durkee Lumber did not notice that Paragraph 37 had been added to the lengthy document. Thus, the fully executed contracts contained new Paragraph 37 which had been unilaterally inserted by DCNR after Durkee Lumber had signed the contracts.

A contract is formed when the parties manifest assent to all the material terms embodied in the offer and acceptance. Reed v. Pittsburgh Board of Public Education, 862 A.2d 131 (Pa. Cmwlth. 2004). It is basic contract law that "the formation of a valid contract requires the

[2] Ms. Durkee had, in fact, signed and returned the contract for Fire Tower Trail to DCNR even before Durkee Lumber's receipt of the June 3, 2004 letter.

mutual assent of the contracting parties." Degenhardt v. Dillon Co., 669 A.2d 946, 950 (Pa. 1996). The material terms of Durkee Lumber's bid submission, i.e. the offer, were memorialized in the contracts originally forwarded to Durkee Lumber for execution. Durkee Lumber's execution of the contracts without Paragraph 37 signified its intention to be bound by the terms of those contracts. Petrie v. Haddock, 119 A.2d 45, 47 (Pa. 1956). Similarly, DCNR's execution of the two timber sale contracts with the addition of new Paragraph 37 evidences its intention to be bound by the revised contracts.

The foregoing sequence of events, of course, raises the initial question of whether or not Durkee Lumber actually assented to the addition of Paragraph 37 as an enforceable term in the contracts when it provided the additional information requested by DCNR in its June 3, 2004 letter. DCNR asserts that its June 3, 2004 letter was clear that it would incorporate the information requested of Durkee Lumber into additional contract terms, so that Durkee Lumber's provision of this information does constitute its assent to these additional terms, sight unseen. Mr. Durkee, in his testimony, adamantly disagrees. He asserts that he never intended nor understood that the timeframes he provided for haul road and timber harvesting operations would be made hard and fast terms of the contract. Rather, he asserts, these were given only for informational purposes as estimates of anticipated operations, subject to weather and other contingencies, just like the financial, contact and meeting date information that was also requested by DCNR.

Although we acknowledge this to be a close question, we find, on the evidence as a whole, that Durkee Lumber did not intend, nor did it in fact, assent to the addition of the new timeframes for commencement and completion of haul roads and harvesting operations as hard and fast deadlines for these activities. To begin with, the Board found Mr. Durkee's testimony entirely credible as to his understanding and intent in providing this information. Secondly,

DCNR's own conduct is inconsistent with incorporation of all the information requested into additional material terms of the contracts.[3] Third, if the additional dates provided by Mr. Durkee are viewed as anything other than estimates, the new timeframes of Paragraph 37 either conflict with other dates in the contract/bid terms or greatly truncate the time allowed for timber harvesting operations for no discernable reason.[4] Fourth, the Board does not find the June 3, 2004 letter to be all that clear as to its intent. Specifically, DCNR's June 3, 2004 letter is ambiguous as to exactly what is meant by the term "special conditions" as used in the letter. We can see, for instance, how Mr. Durkee could have understood that DCNR's demand for the additional information in the June 3, 2004 letter was, itself, a "special condition"; that failure to comply with this information request would be grounds for termination of the contracts; and that he was complying with these "special conditions" for the two contracts by supplying the various information requested, rather than committing to observe his estimates for haul road construction and harvesting operation (that either contradicted or were wildly at variance with initial contract dates) as hard and fast deadlines. Where a document is ambiguous, it is construed against the drafter, in this case, DCNR. In re Breyer's Estate, 379 A.2d 1305, 1310 (Pa. 1977).

For all the foregoing reasons, we find that Durkee Lumber's offer was appropriately viewed as containing only the terms contained in the original timber stumpage sale contract referenced in the bid documents and signed by Durkee Lumber. We further find that the

[3] For one thing, the testimony indicates that several initial meeting dates with DCNR provided in Mr. Durkee's letters were missed without an issue being raised. Also, DCNR field personnel continued to tell Mr. Durkee that the haul road for Circle Game had to be complete by October 31, 2004 (the initial contract date) not the September 1, 2004 date in Mr. Durkee's response letter.

[4] In his responses to the June 3, 2004 letter, Mr. Durkee estimated that road construction on Circle Game would begin the week of August 15, 2004 and be complete by September 1, 2004, with timber harvest to run from September 30, 2004 to January 30, 2005. The Circle Game contract terms, as bid, required completion of the haul road by October 31, 2004 and allowed for timber harvesting until expiration of the contract on September 30, 2006 (19 months more than Mr. Durkee estimated for his harvesting operation). Mr. Durkee also estimated that road construction on the Fire Tower Trail would run from the week of July 26, 2004 to the week of August 1, 2004, with harvesting operations to run from September 1, 2004 to January 30, 2005. The Fire Tower Trail contract terms, as bid, only required completion of timber harvesting operations by May 31, 2006 (16 months more than Mr. Durkee estimated).

acceptance issued by DCNR contained the original timber stumpage sale contract executed by Durkee Lumber plus the additional Paragraph 37, the addition of which was not assented to by Durkee Lumber.

The Pennsylvania Uniform Commercial Code, as adopted by Pennsylvania, addresses the issue of contract formation when the acceptance does not exactly match the offer, but instead contains additional terms.[5] The PUCC applies to contracts for the sale of timber to be cut. 13 Pa. C.S. § 2107(b) ("A contract for the sale . . . of timber to be cut is a contract for the sale of goods within this division whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance."). Pursuant to the Procurement Code, other law, including the PUCC, can augment it when necessary. 62 Pa.C.S. § 104 ("Unless displaced by the particular provisions of this part, existing Pennsylvania law, including Title 13 (relating to the commercial code), shall supplement the provisions of this part.").

Section 2207(a) of the PUCC provides that, as between merchants,[6] an expression of acceptance that includes additional or different terms operates as a legal acceptance of the offer and results in a binding contract. Flender Corporation v. Tippins International Inc., 830 A.2d 1279 (Pa. Super. 2003); Beaver Valley Alloy Foundry, Co. v. Therma-Fab, Inc., 814 A.2d 217 (Pa. Super. 2002). The additional terms in the acceptance are to be construed as proposals for additions to the contract. 13 Pa. C.S. § 2207(b). Such terms become part of the contract unless "they materially alter it." 13 Pa. C.S. § 2207(b)(2); United Coal & Commodities Co., Inc. v.

[5] Pennsylvania's Uniform Commercial Code ("PUCC") changed the pre-existing common law. Common law contract theory held that a contract could be formed only by an acceptance that exactly matched the terms of the offer. Where the acceptance differed from the offer, the common law considered it a counter offer subject to acceptance by the original offeror. Flender Corp. v. Tippins International, Inc., 830 A.2d 1279 (Pa. Super. 2003).

[6] In the PUCC, the phrase "between merchants" means "any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants." 13 Pa.C.S.A. § 2104. It is clear from the testimony in this case that both Plaintiff and Defendant, by way of experience and expertise, may safely be considered "merchants" in the sale of timber and timber rights.

Hawley Fuel Coal, Inc., 525 A.2d 741 (Pa. Super. 1987); Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102 (C.A.3 (Pa.) 1992). Although DCNR maintains Paragraph 37 is part of its contracts with Durkee Lumber, the issue remains whether the addition of this provision, that first appeared in DCNR's acceptance when it sent the fully executed contract to Durkee Lumber, materially alters the contracts between the parties.

An additional term is material, and will not be incorporated by reference, if it would result in surprise or hardship to the party against whom enforcement is sought. Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 448 (C.A.3 (Pa.) 2003). Here, Durkee Lumber did not anticipate that its work plan was to become a specific and mandatory provision in the contract and therefore experienced both surprise and hardship as a result of the addition of Paragraph 37 and DCNR's attempt to impose new completion dates by reference.

In the present case, Durkee Lumber executed a contract that it understood to embody the terms of the offer that included set expiration dates. DCNR's addition of Paragraph 37 to the contract documents already executed and accepted by Durkee Lumber proposed to add new expiration dates for the completion of the specific tasks of constructing haul roads and harvesting timber that were materially different from, or in addition to, dates provided in the offer. The contracts executed by Durkee Lumber included contract completion dates in May 2006 for Fire Tower Trail and September 2006 for Circle Game. The new dates added by Paragraph 37 provided that the major tasks of all the road building and timber harvesting in both contracts would be completed by early 2005, about six months from the date the contracts were executed. Thus, the dates provided for in Paragraph 37 proposed to compress most of the work of the contracts, which had an approximate two year time frame, into six months.

Paragraph 37 clearly proposed material changes to the agreements between the parties. Therefore, pursuant to Section 2207 of the PUCC (as adopted by Pennsylvania) Paragraph 37 is

not part of the contracts between Durkee Lumber and DCNR, and cannot be enforced against Durkee Lumber. We note also that DCNR itself has acknowledged the materiality of the added timeframes by citing them as the basis for terminating the contract with Durkee Lumber since only a material breach can provide a basis for termination of a contract. Gray v. Gray, 671 A.2d 1166 (Pa. Super. 1996).[7]

Pursuant to the facts of this case, and in light of the PUCC and relevant court decisions, the Board concludes that the dates referenced in Paragraph 37 for the construction of haul roads and timber harvest operations for the Fire Tower Trail tract and the Circle Game tract represent material additions to the contract agreed to by the parties. Paragraph 37, therefore, is neither enforceable nor adequate reason for DCNR's terminations of Durkee Lumber's two timber sale contracts.

Alternatively, there exists an additional and independent reason why Paragraph 37 cannot be enforced in either contract. This is because the schedule of new and different completion dates for haul road and timber harvest operations constitute materially different terms than those that were included in the bid documents of either contract. Bid procedures are specified in the Procurement Code, and a competitive bidding process prescribed by this code was adopted by DCNR when it issued its prospectuses inviting bidding on the two contracts at issue here. 62 Pa.C.S.A. §§ 511, 512. Where bidding procedures are provided for by statute, those provisions are mandatory and must be strictly followed. Acchione v. City of Philadelphia, 397 A.2d 37 (Cmwlth. Ct. 1979); Shaeffer v. City of Lancaster, 754 A.2d 719 (Pa. Cmwlth. 2000).

[7] Pennsylvania courts have found additional or different terms included in an acceptance to be material, and therefore unenforceable in other instances: Flender Corporation v. Tippins International Inc., 830 A.2d 1279 (Pa. Super. 2003) (court refused to enforce arbitration where terms of acceptance differed from offer); United Coal & Commodities Co., Inc. v. Hawley Fuel Coal, Inc., 525 A.2d 741 (Pa. Super. 1987) (court held that a change in the terms governing the contract price was material and unenforceable); Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102 (C.A.3 (Pa.) 1992) (additional term excluding consequential damages, thereby eliminating a remedy otherwise available to the offeror, was held material and unenforceable); but see, Beaver Valley Alloy Foundry, Co. v. Therma-Fab, Inc., 814 A.2d 217 (Pa. Super. 2002) (additional terms providing for innocuous testing and inspection procedures were not material and were therefore incorporated into the contract.)

It is a fundamental precept of public contracting that all bids must be based on the same assumptions, thereby requiring the public body to prescribe a common set of terms and conditions for all bidders. By following this precept, bids can be fairly compared in order to award the contract to the best bidder. Accordingly, previously prepared bid specifications which are available to all competitors must form the basis on which the bids are prepared and contracts made. Ezy Parks v. Larson, 454 A.2d 928 (Pa. 1982), 982), quoting 10 McQuillan, Municipal Corporations Section 29.29 at 302 (Revised 3rd Ed. 1981). Courts will not uphold contracts where terms are "renegotiated," "clarified" or otherwise changed in any material way after the bid has been awarded. American Totalisator Co., Inc. v. Seligman, 414 A.2d 1037 (Pa. 1980) (government agency had no discretion to allow bidder to "clarify" its bid and amend its cost proposal after competitive bids had been opened); Philadelphia Warehousing & Cold Storage v. Hallowell, 490 A.2d 955 (Pa. Cmwlth. 1985) (contract was awarded in violation of bidding procedures where a department deviated from its original proposal by separating one contract into two in private negotiations with successful bidder); Ezy Parks v. Larson, 454 A.2d 928 (Pa. 1982) (ambiguity in bid instructions regarding evaluation of improvements on leased land cannot be negotiated "on an ad hoc basis by ex parte explanation." Id. at 933).

In the present case, there is no serious dispute that Durkee Lumber's contract was modified in a material way from the bid terms after the bidding was closed and the contract award announced. The introduction of a new and more restrictive operations schedule by the addition of Paragraph 37 deviates in a material way from DCNR's own specifications in its invitations to bid and is contrary to the procedures it was required to follow by law.[8]

[8] To be clear, the Board is not here suggesting that DCNR could not seek additional information and assurances from Durkee Lumber as to its financial status, ability to perform and other factors relevant to Durkee Lumber's bona fide status as a responsible bidder. However, when DCNR began to impose additional terms regarding the timing of haul road construction and timber operations which materially altered the conditions under which work was to be performed, it went beyond assurances that Durkee Lumber was a responsible bidder.

A contract term that violates a provision of a statute enacted in aid of significant public policies will not be enforced. American Ass'n of Meat Processors v. Casualty Reciprocal Exchange, 588 A.2d 491 (Pa. 1991). Courts have held that portions of agreements that violate a statutory provision are unenforceable, as are clauses that fly in the face of public policy. Watrel v. Commonwealth, Department of Education, 488 A.2d 378 (Pa. Cmwlth. 1985) (term of retirement contract providing for pension contributions from a non-employee is unenforceable); Miesen v. Frank, 522 A.2d 85 (Pa. Super. 1987) (indemnification clause in marriage separation contract unenforceable as violation of public policy in providing child support). In the context of competitive bidding, courts have repeatedly refused to enforce contracts or provisions entered into in violation of bidding procedures whether established by statute or in the specifications of the Commonwealth's request for proposal. American Totalisator Co., Inc. v. Seligman, 414 A.2d 1037 (Pa. 1980), Conduit & Foundation Corp. v. City of Philadelphia, 401 A.2d 376 (Cmwlth. Ct. 1979), Shaeffer v. City of Lancaster, 754 A.2d 719 (Cmwlth. Ct. 2000), Ezy Parks v. Larson, 454 A.2d 928 (Pa. 1982).

The new contract terms DCNR sought to incorporate through Paragraph 37 are unenforceable as violations of Pennsylvania's public contracting and bidding laws. DCNR's termination of Durkee Lumber's contract was, therefore, improper and without merit to the extent it relied on Paragraph 37.

Breach of Duty

A. Time for Completion

Because Paragraph 37 is not enforceable, the only harvesting deadlines remaining in the two contracts are the completion dates of May 31, 2006 (Fire Tower Trail) and September 30, 2006 (Circle Game). The Circle Game contract alone also included a deadline of October 31, 2004, for completing the haul road for that tract. Durkee Lumber completed the Circle Game

haul road on October 28, 2004, thereby meeting, even exceeding, that contractual deadline. Nevertheless, DCNR terminated both of Durkee Lumber's contracts in November 2004 by means of a letter and a telephone call.

DCNR's argument that Durkee Lumber breached its contracts by failing to meet the contractual timeframes is unavailing. As discussed above, Paragraph 37, on which DCNR relies, is not enforceable. Durkee Lumber had met the only completion date, the one for completing the Circle Game haul road, that occurred before the contract was terminated. Over a year and a half remained to complete all the other work on the two contracts, and DCNR did not present any evidence to demonstrate that Durkee Lumber was unlikely to complete the job in that time. Durkee Lumber therefore did not breach the operable contract terms providing for the time for completion of either the haul roads or the logging operations. DCNR breached the contract for Circle Game and Fire Tower Trail by its decision to prematurely terminate these two contracts, since these actions by DCNR constituted active interference with Durkee Lumber's ability to perform the two contracts. See e.g., Able-Hess Assoc., Inc. v. Cmwlth., State System of Higher Education, 2003 WL 22524494 (Pa. Bd. Claims 2003), affirmed in unreported opinion by Commonwealth Court. See also, Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park, 509 Pa. 553, 506 A.2d 862 (1986).

B. Objectionable Conduct

DCNR also argues that Durkee Lumber was not in compliance with either contract in light of Mr. Durkee's conduct toward DCNR employees. Specifically, DCNR contends that the contracts forbid intimidation, discrimination and sexual harassment of its employees by public contractors and that Mr. Durkee intimidated Ms. Batterson and engaged in angry or abusive conduct with her and other DCNR employees.

I. Materiality

In order to justify the non-performance or termination of a contract by one party because of the breach of another, the breach must be material. Gray v. Gray, 671 A.2d 1166, 1172 (Pa. Super. 1996); Borough of Greentree to Use of Castelli Const. Co. v. Tortorete, 211 A.2d 76, 78 (Pa. Super. 1965); Schlein v. Gross, 142 A.2d 329, 333 (Pa. Super. 1958). While the Board does not condone Mr. Durkee's conduct, it finds, under the facts and circumstances of this case, that his conduct does not rise to the level of a material breach of the contracts.

The termination letter of November 10, 2004 (P-Ex. 17) states as follows with respect to conduct as the basis for DCNR's termination of the contracts:

> In addition [to non-compliance with Paragraph 37], our field staff has expressed deep frustration in working with your representative, Roy Durkee. He has on several occasions become extremely agitated while engaged in conversation with our staff in the field and the Central Office. He has used inappropriate remarks and profanity during these discussions. His comments are viewed as unprofessional and unacceptable by this Bureau.

The evidence produced by DCNR at hearing supports this description of Mr. Durkee's conduct. In considering whether this behavior, by itself, represented a material breach of the contracts, the Restatement of Contracts provides the following guidelines:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) Contracts § 241; Gray v. Gray, 671 A.2d 1166, 1172 (Pa. Super. 1996).

Mr. Durkee's exhibition of anger and use of inappropriate language, while deplorable, was not proven to have deprived DCNR of the benefit it reasonably expected from a contract for the construction of haul roads and the sale and removal of timber. Restatement § 241(a)(e). In fact, Ms. Batterson, a DCNR field employee, expressed only satisfaction with the progress of work on the Circle Game site. In contrast, premature termination of the contract would cause Durkee Lumber to lose money already spent on the project as well as anticipated profits and the forfeiture of the performance bonds/letters of credit. Restatement § 241(c). Moreover, DCNR never complained to Mr. Durkee that his conduct was affecting either the performance of DCNR's employees or the contract work. Therefore, Mr. Durkee was never given the opportunity to modify his behavior and "cure" the problem that DCNR perceived. Restatement § 241(d). While Mr. Durkee may have been agitated on occasion and used inappropriate language, Durkee Lumber had contracted to build roads and cut timber in compliance with its contracts and was progressing according to schedule in this regard. Mr. Durkee's agitated conduct and profanity was not a material breach of the terms and conditions of this contract.

II. Nondiscrimination/Sexual Harassment Clause

In explaining its reasons for termination of the contracts, DCNR's November 10, 2004 letter does not cite specific instances of Mr. Durkee's alleged misconduct. Also significantly absent from the termination letter are the bases DCNR now claims for the termination, that is, intimidation, discrimination and/or sexual harassment. Nonetheless, DCNR now argues that Exhibit B to each of the contracts, the Nondiscrimination/Sexual Harassment Clause, (hereinafter the "Harassment Clause") expressly prohibits Mr. Durkee's behavior at the work site and permits DCNR's termination of the contract.

Despite DCNR's belated assertion, however, a fair reading of Exhibit B, the Harassment Clause, reveals that it does not apply to Mr. Durkee's conduct in this case. Specifically, the Board finds that this clause requires each governmental contractor to avoid intimidation, discrimination and sexual harassment with respect to the hiring treatment and management of its own employees, subcontractors or suppliers, not DCNR's. For instance, the clause states that "[e]ach contract entered into by a governmental agency shall contain the following provision by which the contractor agrees: . . ." that, among other things, it shall not discriminate in the hiring of any employees by reason of gender, race, creed, or color. Similarly, "contractors shall not discriminate by reason of gender, race, creed or color against any subcontractor or supplier who is qualified to perform the work to which the contracts relate." Other provisions require the contractor and his subcontractors to maintain written policies regarding sexual harassment and furnish documents to demonstrate compliance with the clause. Violation of the clause exposes the contractor to serious penalties: "[T]he Commonwealth may cancel or terminate the contract, and all money due or to become due under the contract may be forfeited for a violation of the terms and conditions of this Nondiscrimination/Sexual Harassment Clause." Plaintiff's Exhibits 1, 2, Defendant's Exhibit 1, 2 at Exhibit B (Nondiscrimination/Sexual Harassment Clause, § 7).

DCNR claims that Mr. Durkee violated Paragraph 2 of the clause by way of his comments to the park rangers, particularly Ms. Batterson. Paragraph 2 reads "[n]either the contractor nor any subcontractor nor any person on their behalf shall in any manner discriminate against or intimidate any employee involved in the manufacture of supplies, the performance of work, or any other activity required under the contract on account of gender, race, creed, or color." Plaintiff's Exhibits 1, 2, Defendant Ex. 1, 2 at Exhibit B (Nondiscrimination/Sexual Harassment Clause, § 2). While the Board recognizes that "employee" is not defined in this sentence when read in isolation, when read in the context of the Harassment Clause as a whole,

the Board reads "employee" in this sentence to be the same as in the remainder of the provision (i.e. as applying to employees and subcontractors hired by the contractor, not those employed by the governmental agency).[9] DCNR did not present any evidence that Durkee Lumber discriminated against, intimidated or harassed its own employees or subcontractors on the basis of gender, race, creed or color. Therefore, the Board concludes that Durkee Lumber did not violate the Harassment Clause and that Durkee Lumber's contracts cannot be terminated for this reason.

DCNR also failed to establish by a preponderance of evidence that Mr. Durkee's angry outbursts and crude comments were actually intimidating to anyone. Having alleged violation of its nondiscrimination/sexual harassment clause, DCNR bears the burden of proving discriminatory or harassing conduct. See Martin v. Unemployment Compensation Board of Review, 749 A.2d 541 (Pa. Cmwlth. 2000); Andrews v. Unemployment Compensation Board of Review, 698 A.2d 151 (Pa. Cmwlth. 1997). Rather than establishing harassment or intimidation on the basis of gender, race or any other prohibited bases, the evidence shows Mr. Durkee's angry outbursts to be indiscriminately directed at everybody within earshot and, more importantly, fails to show that anybody was actually intimidated by Mr. Durkee to any material extent. With one exception, no written complaints regarding Mr. Durkee's conduct were filed during the contract performance by any DCNR employees. The only reports that were filed regarding offensive conduct by Mr. Durkee were filed by two DCNR employees (one male - one female) at the direction of a supervisor. These reports detailed an incident on October 6, 2004 where Mr. Durkee had walked away from the two DCNR employees, Ms. Batterson and Mr.

[9] Although the Board believes the context of the Harassment Clause requires us to read "employee" as pertaining to Durkee Lumber's own employees, we further note that the term, as used in the sentence cited by DCNR, might at best be considered ambigious (i.e. capable of meaning Durkee Lumber's employees alone or the employees of all parties). Such ambiguity, however, must still be construed against DCNR, draftsman of the clause. See, In re Breyer's Estate, 379 A.2d 1305 (Pa. 1977).

Smith, and upon returning, made some crude comments about getting a blanket and champagne for the pair. He went on to say that he would not mention the condoms. Both employees correctly observed that these comments were inappropriate, but neither their conduct during or after the incident or their reports complained that either was intimidated.[10]

In another incident, described by Ms. Batterson at hearing, she was alone with Mr. Durkee when he became enraged, cussed, screamed and raved at Ms. Batterson regarding haul road construction requirements that she had conveyed to him. He said that she had no business in the woods, which was a man's world, and she should not expect them to get along. Ms. Batterson testified that, conscious of being alone with this angry man, she called for backup at the time. However, she did not file any complaint or make any formal report of the incident. In fact, she testified that when the uniformed state forest ranger arrived, Mr. Durkee was calm and ceased his diatribe. Since Ms. Batterson did not indicate that she was intimidated as a result of this incident at or near the time of this episode, or in any way change her working relationship with Mr. Durkee, the Board is not persuaded that this is a sufficient basis for a finding of sexual harassment or intimidation on account of gender, race, creed or color.[11]

The foregoing events, combined with the fact that DCNR never confronted Mr. Durkee with any objections to his conduct and the failure to mention intimidation or discrimination as a reason for terminating the contract in the letter of November 10, 2004, lead us to conclude that DCNR has failed to establish any actual intimidation of its employees by Mr. Durkee. Even

[10] In response to leading questions on direct examination, Ms. Batterson agreed with DCNR's lawyer that she felt intimidated on October 6, 2004, as a result of an exchange between her and Mr. Durkee when they were alone following the remarks about the champagne and condoms. However, the incident report that Ms. Batterson filed at the direction of her supervisor on that date detailed the comments about the champagne and condoms but said nothing at all about any other actions or comments that caused Ms. Batterson to feel intimidated. Because the contemporaneous report did not mention intimidation, and because Ms. Batterson continued to work with Mr. Durkee thereafter, sometimes alone, her late claim of intimidation at the hearing in this matter is not persuasive.

[11] Ms. Batterson and other DCNR employees continued to work with Mr. Durkee as necessary, alone or not, and admirably applied themselves to moving the work of the contract forward.

assuming, arguendo, that the nondiscrimination/sexual harassment clause did somehow apply to Durkee Lumber's conduct toward DCNR employees, the Board finds that DCNR did not carry its burden of proof as a matter of fact that Mr. Durkee's conduct rose to the level of actual discrimination, intimidation or sexual harassment.

For all of the foregoing reasons, the Board finds that DCNR's second basis for termination of Durkee Lumber's contracts, Mr. Durkee's conduct, has no merit. This improper termination of the contract, in turn, leads us to confirm our earlier conclusion that DCNR's early termination of these contracts constituted active interference with Durkee Lumber's performance of same, resulting in DCNR's breach of both contracts. Able Hess, supra.

Damages

In a breach of contract case the general measure of damages is "that the aggrieved party should be placed as nearly as possible in the same position he or she would have occupied had there been no breach." Commmonwealth, Department of Transportation v. Brozzetti, 684 A.2d 658, 665 (Pa. Cmwlth. 1996). Failure to realize expected profits because of a breach of contract is a compensable loss "if there is evidence to establish the loss of profits with a *reasonable certainty* and to show that the loss of profits was a proximate consequence of the wrong and where there is evidence that a loss of profits was within the contemplation of the parties." 16 Summ. Pa. Jur.2d Commercial Law § 6.55 (citing Brozzetti, 684 A.2d 658).

The extent of the proof of damages required to meet the reasonable certainty standard is not absolute:

> "Reasonable certainty," as with most other standards of proof, is a difficult concept to quantify, but Pennsylvania courts have provided guidance as to what the term entails for purposes of assessing damages. At a minimum, reasonable certainty embraces a rough calculation that is not "too speculative, vague or contingent" upon some unknown factor. Conversely, applying the reasonable certainty standard does not preclude an award of damages because of "some uncertainty as to the precise amount of damages incurred." Pennsylvania

> jurisprudence governing the issue is summarized in Aiken Indus., Inc. v. Estate of Wilson, where the Pennsylvania Supreme Court ultimately concluded "that compensation for breach of contract cannot be justly refused because proof of the exact amount of loss is not produced, for there is judicial recognition of the difficulty or even impossibility of the production of such proof. What the law does require in cases of this character is that the evidence shall with a fair degree of probability establish a basis for the assessment of damages."

ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659, 669-670 (C.A. 3 (Pa.) 1998) (quoting Aiken Industries, Inc. v. Estate of Wilson, 383 A.2d 808 (Pa. 1978)) (citations omitted).

Neither Mr. Durkee's testimony nor the other evidence regarding lost profits and damages presented by Durkee Lumber permit the Board to determine, with reasonable certainty, the amount of profit, if any, Durkee Lumber would have made. The evidence presented is too speculative and inconsistent to be credible. Melzer v. Witsberger, 480 A.2d 991, 998 n.9 (Pa. 1984) ("It is beyond dispute that "the demeanor and credibility of witnesses are issues solely for the trier of fact."); Commonwealth v. Lambert, 795 A.2d 1010, 1014 (Pa. Super. 2002) ("[T]he trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.").

As noted by DCNR, Durkee Lumber has made various claims over the course of the litigation expressing different amounts of, and bases for, its lost profits. (Post Hearing Brief of DCNR at p. 52-54). In Durkee Lumber's testimony, project expenses for employees change, as do the number of employees and their wages. (H.T. 508, 510, 521-22). Calculating his lost income, Mr. Durkee testified that he arrived at a value for the different timber by consulting the market reports for northern timber pertaining to the month of the year in question. The trees being cut, however, were located in Pennsylvania where the market report for Appalachian lumber would have been more appropriate. Also, Durkee Lumber's summary of lost income included premiums that allegedly would have been paid by certain customers for certain loads of lumber, but Durkee Lumber presented no evidence to support the amount of timber that would

have qualified for this premium. Furthermore, Mr. Durkee's testimony relating to lumber drying procedures was inconsistent, with costs varying widely depending on whether another company or person dried the lumber or Durkee Lumber dried the lumber in its one kiln, a kiln which Mr. Durkee variously described as being in pieces and being completed. (H.T. 500, 510, 514-15). Mr. Durkee's calculations are further called into question by the fact that he did not visit the contract sites to ascertain the quality of the lumber before bidding. (H.T. 21, 78). To determine the grade of lumber and the quality of veneer that can be extracted from the site, it is important to examine the trees that are available to cut. Not only did Mr. Durkee fail to inspect the timber before valuing it, he was unaware of the trees that had been marked as reserved (and thus unavailable for cutting). Without better establishing the grade and quantities of lumber to be removed from the site, Durkee Lumber cannot properly calculate its value or persuade this Board that its summary of lost income has a firm basis in fact.

To rebut Durkee Lumber's evidence of lost profits, DCNR presented an expert. The expert testified that the plan to cut timber in Pennsylvania and transport it to Vermont where it would be prepared for sale was unlikely to yield a profit. In the expert's opinion, the transportation costs involved would be prohibitive, and he predicted Durkee Lumber would actually lose in excess of $103,000 if the contracts were completed as planned. The expert also distinguished among foreign buyers and the quality and type of timber they purchase, which Mr. Durkee did not address. Other costs for harvesting timber were not included in Mr. Durkee's summary of lost income, including specific costs for the saw mill, the cost of brush cutting and overhead. (Commonwealth Exhibit 23-6 and 23-7).

The Board has weighed DCNR's expert testimony and Durkee Lumber's testimony with respect to the problems confronting Durkee Lumber in attempting to realize a profit. In so doing, the Board has been mindful of the significant differences of the logging operations run by

DCNR's expert and Durkee Lumber. Nevertheless, the Board has determined that an accurate measure of damages for lost profits cannot be calculated with reasonable certainty on the evidence presented. Terletsky v. Prudential Property and Cas. Ins. Co., 649 A.2d 680, 686 (Pa. Super. 1994) ("[A]s a fact finder, it is a judge's prerogative to believe part of a witness' testimony and find him mistaken as to the other part."); Commonwealth v. Passarelli, 789 A.2d 708, 715 (Pa. Super. 2001) ("In determining the credibility of the expert witness, the trier of fact is free to believe all, part, or none of the evidence."). Durkee Lumber has failed to present sufficient credible evidence to establish the amount of lost profit it incurred within a reasonable degree of certainty.

When lost profits as expectation damages cannot be measured with certainty, contract law offers reliance damages:

> While the traditional law of contract remedies implements the policy that goods and services should be consumed by the person who values them most highly, and hence the preference for expectation damages, other theories of damages provide alternative avenues for contract enforcement. This is especially so where an injured party is entitled to recover for breach of contract, but recovery based on traditional notions of expectation damages is clouded because of the uncertainty in measuring the loss in value to the aggrieved contracting party. See Restatement, supra, § 349 cmt. a; 5 Arthur L. Corbin, supra, § 1031, at 188. Thus, where a court cannot measure lost profits with certainty, contract law protects an injured party's reliance interest by seeking to achieve the position that it would have obtained had the contract never been made, usually through the recovery of expenditures actually made in performance or in anticipation of performance.

ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659, 669 (C.A. 3 (Pa.). 1998).

The Pennsylvania Supreme Court has also recognized the availability of reliance damages: "The law makes clear that reliance damages may be available, following the breach of a contract, in order to 'put [a party] back in the position in which he would have been had the contract not been made.' " Shovel Transfer and Storage, Inc. v. Pennsylvania Liquor Control Bd., 739 A.2d 133, 140 (Pa. 1999) (citing Trosky v. Civil Service Commission, City of Pittsburgh, 652 A.2d 813 (Pa. 1995) (quoting restatement (Second) of Contracts, § 344, cmt. a.)). While reliance

damages are available, the expenses made in reliance on the contract must be reasonable. National Controls Corp. v. National Semiconductor Corp., 833 F.2d 491, 499 (C.A. 3 (Pa.) 1987).

In the present case, the Board finds that Durkee Lumber incurred expenses in reliance on the contracts which were reasonable, given the circumstances. First, Durkee Lumber expended $53,000.00 to obtain its letters of credit, required to undertake the work on the contracts. (F.O.F. 116). Second, and admitted as an expense by DCNR, Durkee Lumber expended $23,633.14 for the construction of the haul road on the Circle Game contract in preparation for harvesting that contract's timber. (H.T. 72; Post Hearing Brief of DCNR at p. 53 n.8; F.O.F. 119). Finally, Durkee submitted a partial block payment on that contract of $3,663.00, which now becomes an expense. (F.O.F. 118). In total, Durkee Lumber has incurred reliance damages in the amount of $80,296.14, and the Board will award this amount to Durkee Lumber. Additionally, consistent with the Procurement Code, the Board hereby enters an award for prejudgment interest of six percent per annum on Durkee Lumber's damage award from May 9, 2005, the date Durkee Lumber's claim was filed with the contracting officer, through the date of this Opinion and Order. 62 Pa.C.S. § 1751; 41 P.S. § 202. Thus, Durkee Lumber is awarded a total damage and prejudgment interest award of $93,069.65 ($80,296.14 + $12,773.51).

The Board will not award costs and reasonable attorney's fees to Durkee Lumber in this matter. Among other things, we acknowledge some close factual questions in this case regarding DCNR's notification to Durkee Lumber of its intent to add additional terms to the two timber contracts. We also find, based on the evidence as a whole, that the sexual harassment/intimidation argument asserted by DCNR, although not persuasive for the reasons noted, was not devoid of reasoning or justification given Mr. Durkee's boorish conduct. Because we find DCNR's actions in terminating Durkee Lumber's two timber contracts prematurely to

have some basis in reason, we do not find these actions to be taken in bad faith or in any arbitrary or vexatious manner. Accordingly, the Board will not award Durkee Lumber its attorney's fees or costs expended on this claim. 62 Pa. C.S. § 3935; See also, A.G. Cullen v. SSHE, 898 A.2d 1145, 1164-1166 (Pa. Cmwlth. 2006); DGS v. Pittsburgh Building Company, 920 A.2d 973 990 (Pa. Cmwlth. 2007). 62 Pa. C.S. § 1725(e).

ORDER

AND NOW, this 4th day of January, 2008, it is **ORDERED** and **DECREED** that judgment be entered in favor of Plaintiff, and against Defendant, in the sum of $93,069.65. This sum consists of: $80,296.14 in aggregate reliance damages and $12,773.51 in prejudgment interest. This represents reasonable expenses incurred in reliance upon the following contracts entered into with Defendant: Susquehannock State Forest Timber Stumpage Sale 15-2003BC11, Fire Tower Trail; Susquehannock State Forest Timber Stumpage Sale 15-2003BC01, Circle Game. In addition, Plaintiff is awarded post-judgment interest on the outstanding judgment at the statutory rate for judgments (6% per annum) beginning on the date of this Order and continuing until the judgment is paid in full. Each party shall bear its own costs.

BOARD OF CLAIMS

OPINION SIGNED

_____
Jeffrey F. Smith
Chief Administrative Judge

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