

COMMONWEALTH OF PENNSYLVANIA

JEM HARDWOODS, LLC : BEFORE THE BOARD OF CLAIMS
 :
VS. :
 :
COMMONWEALTH OF PENNSYLVANIA, :
PENNSYLVANIA GAME COMMISSION : DOCKET NO. 4066

FINDING OF FACTS

Parties, Chronology of Events and Procedural History

1. The Claimant, JEM Hardwoods LLC (“JEM”), is a New York state limited liability company with offices located at 16 Riverside Street, Binghamton, New York, of which Jason Repp is the sole member. (Statement of Claim at ¶ 1 and Response to Statement of Claim at ¶ 1; Joint Stipulations of Fact¹ (“Joint Stipulations”) at ¶ 1; Notes of Testimony (“N.T.”) 35)

2. JEM’s business includes the purchase of timber for sale on a commission basis, transport of timber to a sawmill, and sales of various timber products. (N.T. 14-16, 50-52, 55-57, 252-253).

3. The Respondent, the Pennsylvania Game Commission (“PGC”) is an agency of the Commonwealth with offices located at 2001 Elmerton Avenue, Harrisburg, Pennsylvania. 34 Pa. C.S. § 301; Section 202 of the Administrative Code of 1929, (P.L. 177, No. 175) (April 9, 1929), as amended, 71 P.S. § 62; (Statement of Claim at ¶ 2 and Response to Statement of Claim at ¶ 2; Joint Stipulations at ¶ 2).

4. On July 20, 2012, the PGC’s Forestry Division posted a solicitation for bids (“Invitation to Bid”) for purchase of salvage timber situated on 173 acres of State Game Lands No. 159, located in Lebanon Township, Wayne County (the timber sale is referred to throughout the record as the “Alder Marsh” timber sale). (Joint Stipulations at ¶ 4; N.T. 17-18, 99-101, 166-168; Ex. C-1).

5. The majority of the trees in the Alder Marsh timber sale were standing white ash trees, which are currently under attack statewide and nationally by a pest known as the emerald

¹ The Joint Stipulations are reproduced identically in both JEM and the PGC’s Pre-Trial Memorandums.

ash borer. Other trees for sale in the Alder Marsh timber sale were blown down by storm. Some of the trees were suitable for saw timber and others only for pulpwood. (N.T. 18-20, 56-57, 188-190; Exs. C-1, C-13, C-20)

6. JEM, as well as three other companies, bid on the Alder Marsh timber sale. (Joint Stipulations at ¶ 6; N.T. 18-24, 110-111; Exs. C-2, C-3, C-14, C-15, C-16, C-17, C-18, C-19).

7. On September 10, 2012, when the PGC opened the bids for the Alder Marsh timber sale, Walczak Lumber Company, Inc. (“Walczak”) was the high bidder (at \$204,699) by a wide margin over JEM, the second highest bidder (at \$90,834). A schedule of bids listing Walczak as high bidder was published on the PGC’s website. (Joint Stipulations at ¶¶ 7-9; N.T. 24-26, 69, 109-111, 119-121; Exs. C-2, C-3, C-14, C-15, C-16, C-17, C-18, C-19).

8. After the bid opening, Walczak orally indicated that it would not honor its bid because of a mathematical error in its estimate. (Joint Stipulations at ¶ 10; N.T. 60-61, 69-76, 115-125; Exs. C-3, C-8, C-15).

9. After Walczak indicated it would not honor its bid, the PGC called JEM on September 15, 2012 and asked whether JEM would be interested in the Alder Marsh timber sale contract at its bid price. Mr. Repp indicated that JEM would still be interested in the contract. (N.T. 25-28, 60-61, 74-75, 115, 124-127; Exs. C-3, C-4)

10. During the September 15, 2012 call, Dave Gustafson (PGC’s Forestry Division Chief) stated that the PGC would send a timber sale agreement document² to JEM for signature and return. (N.T. 25-28, 33-34, 39-40, 60-61, 95-103, 124-127, 134-137; Exs. C-3, C-4, C-9, C-15; Findings of Fact (“F.O.F.”) 30-40, 46).

11. On October 3, 2012, the PGC sent two unsigned copies of the timber sale agreement document to JEM (which JEM received on October 5, 2012) with instructions to sign and return the document to the PGC along with a performance bond prior to October 26, 2006.³ (Joint Stipulations at ¶14; N.T. 33-34, 39-40, 74-82; Ex. C-4).

12. By October 8, 2012, Walczak had again changed its mind and aggressively sought to obtain the contract for the Alder Marsh timber sale by demanding that the PGC move forward

² We note here, and that, at several other places in the record, the parties refer to the unsigned timber sale agreement document and/or the potential timber sale as the “timber sale agreement” or the “contract.” However, whether a contract existed, and whether the execution of the written timber sale agreement document was essential to the formation of a contract, are among the legal issues in dispute.

³ This letter conflicts with an earlier letter from the PGC to JEM, which instructed JEM to sign and return the timber sale agreement by October 29, 2006. (Joint Stipulations at ¶ 12-13). This date discrepancy plays no role in this matter.

with the original high bid, insinuating that it was prepared to litigate over the issue. Walczak also attempted to “work around” the PGC by offering to “buy” from JEM the Alder Marsh contract at a \$51,000 premium to JEM’s bid—which offer JEM refused. (N.T. 36-40, 61-62, 76-77, 136-142, 178-181).

13. On October 10, 2012, following consultation with its legal counsel, the PGC informed JEM by telephone call that it would not execute any contract with JEM for the Alder Marsh timber sale, as JEM was no longer the high bidder. (Statement of Claim at ¶ 17 and Ex. H and Response to Statement of Claim at ¶ 17; Joint Stipulations at ¶ 18; N.T. 41-44, 61-62, 138, 140-142, 156-158, 178-179; Ex. C-19).

14. On October 11, 2012, Mr. Repp, the sole owner/member of JEM, signed the timber sale agreement document he had received.⁴ On October 12, 2012, JEM returned the timber sale agreement forms signed by Mr. Repp to the PGC, together with a treasurer’s check in the amount of \$40,000 in lieu of a performance bond (as permitted by the terms of the timber sale agreement document). This signed document and treasurer’s check were accompanied by a letter from JEM’s lawyer indicating JEM’s intent to proceed with the purchase. (Statement of Claim at ¶ 16 and Ex. G and Response to Statement of Claim at ¶ 16; Joint Stipulations at ¶ 19; N.T. 41-45, 145-146; Ex. C-6; Board Finding).

15. On October 15, 2012, the PGC’s legal counsel sent a letter to JEM and reiterated that the PGC planned to execute a contract with Walczak. The letter explained the PGC’s reasoning: while execution of the contract with either JEM or Walczak invited litigation from the disappointed bidder, the Walczak bid conferred upon the PGC an economic benefit. (Statement of Claim at ¶ 17 and Ex. H and Response to Statement of Claim at ¶ 17; Joint Stipulations at ¶ 20; N.T. 178-179).

16. A written contract for sale of the Alder Marsh timber was eventually executed by the PGC with Walczak. (N.T. 86-87, 140-142; Exs. C-11, C-16, C-19).

⁴ Mr. Repp testified that he had signed the timber sale agreement forms on an earlier date and faxed a signed copy to his surety in the process of attempting to obtain a performance bond. (See, N.T. 40-41). However, the date accompanying Mr. Repp’s signature on the timber sale agreement document submitted into evidence is October 11, 2012, and no copy of an earlier signed timber sale agreement document appears in the record. The Board finds that the preponderance of credible evidence indicates that Mr. Repp signed the timber sale agreement document on October 11, 2012. (Statement of Claim at ¶ 16 and Ex. G and Response to Statement of Claim at ¶ 16; Joint Stipulations at ¶ 19; N.T. 41-45, 145-146; Ex. C-6; Board Finding).

17. On November 27, 2012, JEM's new attorney⁵ wrote a letter to the PGC demanding performance of what JEM considered to be a contract for sale of the Alder Marsh timber or damages for breach of same. The PGC sent no response to the letter of November 27, 2012 from JEM's attorney. (N.T. 46-47; Ex. C-7).

18. On January 8, 2013, well within 135 days of JEM's attorney's letter of November 27, 2012, JEM filed the instant Statement of Claim with the Board of Claims ("Board") seeking damages for breach in the amount of \$140,000. On February 1, 2013, the PGC filed a response to JEM's claim. (B.O.C. Docket No. 4066; Statement of Claim; Response to Statement of Claim).

Nature of Claim and Positions of the Parties

19. The parties presented arguments concerning contract formation, breach, and damages, as well as the propriety of the PGC's decision to consummate a contract for the Alder Marsh timber sale with Walczak. (Claimant's Post-Hearing Brief; Respondent's Post-Hearing Brief; Claimant's Response to Respondent's Post Hearing Brief; Board finding).

20. Despite the PGC's refusal to execute a written contract with it, JEM contends that a contract between the parties was formed by operation of common law principles of offer and acceptance, with JEM's bid serving as offer and the words and actions of the PGC, acting through its Forestry Division Chief, David Gustafson, serving as acceptance prior to (and not intending to require) the execution of any writing. JEM argues, in the alternative, that the necessity of a written agreement and signatures to consummate the contract is ambiguous in the bid documents and thus, pursuant to the rule of contra proferentum, should be construed against the drafter, the PGC. (Claimant's Post-Hearing Brief).

21. The PGC denies that a contract was formed for several reasons. First and foremost, the PGC contends that entry into a written agreement was intended and necessary in order to form a contract in this case. Second, the PGC asserts that Mr. Gustafson alone lacked authority to enter the PGC into any such contract. Finally, the PGC argues that the elementary requisite of contract formation, a meeting of the minds, did not occur because the parties held materially different understandings of what was being bought and sold. (Respondent's Post-Hearing Brief).

⁵ The November 27, 2012 letter was written by JEM's current counsel while the letter of October 12, 2012 was written by a different attorney. (Compare Statement of Claim at ¶ 16 and Ex. G to Ex. C-7 and Response to Statement of Claim at ¶ 16).

Contract Formation Issue

22. Section 724 of the Game and Wildlife Code provides as follows:

The Commission may dispose of, by lease, sale or otherwise, timber . . . on . . . lands to which it has title.

34 Pa.C.S. §724.

23. Section 302(f) of the Game and Wildlife Code provides as follows:
§ 302. Director

(f) Execution of contracts, leases and agreements. – the director shall represent the commission in the execution of land purchase contracts and in the execution of leases and other similar agreements.

34 Pa.C.S. §302(f).

24. The PGC Forestry Manual provides as follows:

PERSONNEL

- I. Central Office Forestry Staff

The Forestry Division Chief is responsible . . . for all commercial timber sale bidding and timber sale agreement execution, amendments, etc.

(Ex. C-12 at p. 10).

25. Mr. Gustafson, the Forestry Division Chief at all times relevant to this case testified that his job duties included, as a core function, timber sales and timber sale administration. (N.T. 95-103).

26. The Invitation to Bid stated as follows:

Removal of timber to be subject to the terms, conditions and stipulations included in the Timber Sale Agreement.

(Exs. C-1, C-2).

27. The Invitation to Bid further stated, in relevant part, as follows:

ATTACHED IS CERTIFIED, CASHIER'S OR TREASURER'S CHECK OR MONEY ORDER, [] I understand that it will be forfeited as fully liquidated damages upon my failure within 45 days after presentation to accept and execute the contract and provide a bond as required.

(Exs. C-1, C-2) (emphasis original).

28. Despite references in portions of the Invitation to Bid to a "Timber Sales Agreement," no such document or other contract form was included in the Invitation to Bid. By the terms and structure of the bid materials, it is apparent such document was to be provided for execution after a high bidder was determined. (N.T. 21-22, 112-115, 173-174; Ex. C-1; F.O.F. 26-27; Board Finding).

29. The Invitation to Bid stated that the bid bond would be subject to forfeiture as liquidated damages for a bidder's failure to "accept and execute" (emphasis added) a contract and provide a performance bond in a timely manner. This indicates that execution of a written agreement, to be provided after the opening of bids, was contemplated for the creation of a contract for the Alder Marsh timber sale in the bid documents. (N.T. 21-22, 112-115, 171-173; Exs. C-1, C-2; F.O.F. 26-28; Board Finding).

30. On September 15, 2012, after being informed of Walczak's intent to default on its bid, Mr. Gustafson called the second highest bidder, JEM, to pursue a contract with it. (N.T. 25-28, 126-127, 129-131).

31. Mr. Repp's testimony about his recollection of the September 15, 2012 phone conversation with Mr. Gustafson is, in pertinent part, as follows:

You know, he said to me that Walczak's had backed out from their bid. The same thing I heard, they made a mathematical error in their numbers and couldn't honor the bid and said, are you interested at the price that you bid? I said absolutely, send me the paperwork. As far as I was concerned right then, I was done. I mean, it was just a matter of getting it finalized, you know, just the normal jargon that has to be done.

(N.T. 25-26, 126-127) (emphasis supplied).

32. Mr. Repp further testified about his conversation with Mr. Gustafson as follows:

...he said to me before we got off the phone was, you'll be seeing the contract really soon, probably in the next three to five business days. He said I have to

send it up to Mr. Harris. He will execute it out to you. I said that's great. I had said to Mr. Gustafson that the sooner I get it, the faster I want to get onto this because the last thing I want to do is work in the middle of the salvage job in three feet of snow. It's pretty hard to find trees that are blown over and it becomes even more dangerous even and more difficult at that point. He agreed. He was going to get right on it.

(N.T. 25-29 (emphasis supplied)).

33. Asked by the Board to further explain the nature of the conversation, Mr. Repp testified as follows:

A. ... [Mr. Gustafson] said I'm calling you to see, because you're the next bidder in line, if you are still interested in that bid for your price. I said absolutely. He said okay. He said that will be good. He said I will let Mr. Harris know, there should be the final paperwork to you in, I would say, no more than three to five business days.

HEARING EXAMINER

So he told you that paperwork was going to be sent to you—

A. Yes.

HEARING EXAMINER

—or a contract was going to be -? Did he use the word contract, do you recall?

A. I believe he did, yes.

HEARING EXAMINER

So he said a contract would be sent to you?

A. Yeah, within three to five business days.

(N.T. 60-61).

34. Mr. Gustafson, who was present during Mr. Repp's testimony before the Board, indicated his general agreement with Mr. Repp's recollection of the September 15, 2012 phone call. (N.T. 126-127).

35. Both Mr. Repp's and Mr. Gustafson's testimonies regarding the September 15, 2012 phone call are consistent in that they acknowledge that Mr. Gustafson inquired as to whether JEM was still "interested" in purchasing the Alder Marsh timber at JEM's bid price and that Mr. Gustafson stated the PGC would have a timber sale agreement document (i.e. "the paperwork" and/or "the contract") sent to JEM promptly. (N.T. 25-28, 60-61, 126-127; F.O.F. 30-34).

36. During the initial conversation described between Mr. Gustafson and Mr. Repp, Mr. Gustafson never stated that JEM's bid (or "offer" as portrayed by counsel for JEM) was "accepted," that the sale to JEM was a final or "done" deal, that the "paperwork" to be sent to Mr. Repp was merely a formality, or made any other statement to this effect. To the contrary, after Mr. Gustafson inquired if JEM's bid was still good, he simply stated that a timber sale agreement document would be sent to Mr. Repp promptly for JEM to execute and return. (N.T. 25-28, 60-61, 126-127; F.O.F. 30-35; Board Finding).

37. On September 25, 2012, Mr. Gustafson transmitted two copies of the timber sale agreement document to Warren Harris, the Regional Forester responsible for the Alder Marsh site by way of a memorandum dated September 19, 2012 directing Mr. Harris to "obtain the necessary signatures, bond and other details and return both copies to us as promptly as possible."⁶ This memorandum also indicated that JEM had "been advised that the contract must be executed and an acceptable performance bond provided by October 26, 2012." (Joint Stipulations at ¶ 11; N.T. 75-78, 82-83, 119-121, 126-128; Ex. C-9).

38. On September 25, 2012, Mr. Gustafson also sent a letter directly to Mr. Repp that stated as follows:

Due to Walczak Lumber defaulting on their bid, a contract will be prepared in your favor. In the near future, Warren Harris, Regional Forester, will present the contract to you for execution.

The executed contract and an acceptable Performance Bond must be returned to the Commission by October 29, 2012.

(Joint Stipulations at ¶¶ 12-13; N.T. 29-32, 77-78, 127-129; Ex. C-3 (emphasis supplied)).

⁶ Although the memorandum was dated September 19, 2012, it appears from Mr. Gustafson's testimony and reference to Exhibit C-15 that the memo and accompanying contracts were not actually sent to Mr. Harris until September 25, 2012. (N.T. 119-121; C-15; Board Finding).

39. On October 3, 2012, Mr. Harris sent the two copies of the unsigned timber sale agreement to JEM with a letter that stated as follows:

Attached are two copies of the Alder Marsh Salvage timber sale contract, TSA #159-12-01. Please have your president or vice president sign both copies and your secretary or treasurer witness the signatures. The name of the individual signing the contract must be typed above or below the signature. Identify whether the signer is the President, Vice President, Secretary or Treasurer. If the Attestee is an officer, that should be identified also.

Please fill in the payment plan “A” or “B” portion of the contract on Page 1 and the “Bond Information” under item 32 on page 9.

Thank you for your attention to these details, and please return both copies to me, along with an acceptable performance bond before October 26, 2012.

(Joint Stipulations at ¶ 14; N.T. 33-34, 81-82; Ex. C-4).

40. The context in which Mr. Gustafson and/or Mr. Harris used the term “contract” in their communications with Mr. Repp indicate they were using the term to describe the unsigned timber sale agreement document. (N.T. 25-28, 60-61, 75-78, 126-128; Exs. C-3, C-9; F.O.F. 30-39; Board Finding)

41. On October 5, 2012, Mr. Repp received the two copies of the unsigned timber sale agreement document and Mr. Harris’s October 3, 2012 letter. (Joint Stipulations at ¶ 14; N.T. 33-34, 39-40; Ex. C-4).

42. Although the specific date is unclear, it appears that by sometime in late September or early October, and certainly no later than October 8, 2012, Walczak experienced its second change of heart and decided to strongly pursue the timber at the Alder Marsh site. As set forth above, Walczak demanded that its bid be honored and characterized its earlier statements that it would not honor its high bid as a “miscommunication.” (N.T. 36-40, 76-77, 136-140, 178-182; compare Ex. C-8).

43. Mr. Gustafson consulted PGC counsel and, on October 10, 2012, called Mr. Repp and communicated the PGC’s decision to take Walczak’s bid and reject JEM’s. He also told Mr. Repp that the PGC would not execute the timber sale agreement it had sent to JEM. (N.T. 41-46, 61-62, 156-158, 178-179).

44. After the PGC had communicated to Mr. Repp that the PGC was rejecting JEM's bid and that it would not execute the timber sales agreement document in JEM's possession, Mr. Repp signed the timber sale agreement document on October 11, 2012 and returned it to the PGC on October 12, 2012. (Statement of Claim at ¶ 16 and Ex. G and Response to Statement of Claim at ¶ 16; Joint Stipulations at ¶ 19; N.T. 41-46; Ex. C-6; F.O.F. 14).

45. After being told that the PGC intended to select Walczak's bid and reject JEM's, and JEM's subsequent execution and return of the timber sale agreement document to the PGC, the exchange of correspondence described at Findings of Fact 14, 15 and 17 ensued. (Statement of Claim at ¶¶ 16-17 and Exs. G-H and Response to Statement of Claim at ¶¶ 16-17; Joint Stipulations at ¶¶ 19-20; N.T. 41-46, 178-179; Exs. C-6, C-7; F.O.F. 14, 15, 17).

46. Because, inter alia: during the September 15, 2012 conversation described above between Mr. Gustafson and Mr. Repp, Mr. Gustafson never stated that JEM's bid (or "offer" as portrayed by counsel for JEM) was "accepted," that the sale to JEM was a final or "done" deal, that the "paperwork" to be sent to Mr. Repp was merely a formality, or made any other statement to this effect, but instead inquired if JEM's bid was still good and simply stated that a timber sale agreement document would be sent to Mr. Repp promptly for JEM to execute and return; and because the Invitation to Bid stated that the bid bond would be subject to forfeiture as liquidated damages for a bidder's failure to "accept and execute" a contract and provide a performance bond in a timely manner, which indicates that execution of a written agreement (to be provided after the opening of bids) was contemplated for the creation of a contract for the Alder Marsh timber sale in the bid documents; and because Mr. Repp's own words and actions indicate he understood that a written agreement was intended and required in order to form a binding contract for the sale of the Alder Marsh timber (which words and actions included his immediate request to send him "the paperwork" and his subsequent acts of signing and returning the timber sale agreement document after he was told his bid was rejected), we find that both parties manifested an intent that a written timber sale agreement was required to form a contract between the two. (Joint Stipulations ¶¶ 12-13; N.T. 21-22, 25-34, 41-46, 60-62, 75-78, 90-93, 112-115, 126-128, 134-137, 145-146, 156-158, 171-174, 178-179, 181-182; Exs. C-1, C-2, C-3, C-4, C-6, C-7, C-9; F.O.F. 9-11, 14, 26-41, 45; Board Finding).

47. 62 Pa. C.S. § 521 states as follows:

An invitation for bids, a request for proposals or other solicitation may be canceled, or any or all bids or proposals may be rejected, at any time prior to the time a contract is executed by all parties when it is in the best interests of the Commonwealth. Bids may be rejected in part when specified in the solicitation.

The reasons for the cancellation or rejection shall be made part of the contract file.

62 Pa. C.S. § 521.

48. It is clear that Mr. Gustafson informed Mr. Repp on October 10, 2012 that JEM's bid was being rejected in favor of Walczak's. It is also clear from the evidence that a written timber sale agreement for the Alder Marsh timber has never been executed by both JEM and the PGC. (Statement of Claim at ¶ 17 and Ex. H and Response to Statement of Claim at ¶ 17; Joint Stipulations at ¶ 20; N.T. 41-44, 61-62, 157-158, 178-179; Ex. C-6 at p. 13; F.O.F. 13, 15, 43).

49. Mr. Repp testified he believed that, under the terms of the Alder Marsh Invitation to Bid and the timber sale agreement, the purchaser of the Alder Marsh timber would have been entitled not only to trees specifically marked for removal, but also to blown-down trees which were not specifically marked for removal or otherwise explicitly reserved from sale. Mr. Repp essentially believed JEM, as purchaser, would have been entitled to all unmarked blown-down trees at no additional cost. (N.T. 251-260, 286-289; Board Finding).

50. On the other hand, Mr. Gustafson and Mr. Harris of the PGC both testified that pursuant to the terms of the Alder Marsh timber sale Invitation to Bid (and timber sale agreement document), the purchaser would only be entitled to those blown-down trees that were marked for removal as part of the contract price. They further testified that unmarked trees may or may not have been sold to the bidder, but that such sale and removal was to be made by decision of the forester on site and, in any event, would only be sold for additional payment above and beyond the original contract price. (N.T. 299-308, 314-319, 324, 326-331).

51. JEM presented the testimony of Robert Hobbes, Jr., an independent consulting forester, on the issue of damages. Although Mr. Hobbes initially testified that a salvage sale recovery would include a number of blown-down but unmarked trees, he also testified on cross-examination that the removal of such trees would be subject to the "interpretation of the procurement forester once the sale is going on." When recalled to the stand, Mr. Hobbes agreed with Mr. Gustafson that unmarked trees were not included in the original contract price, and removal of such trees was instead to be negotiated with the forester in charge at an additional price. (N.T. 185, 212, 218-219, 222-225, 332-335).

52. The testimony of the PGC's witnesses concerning unmarked trees is also confirmed by the terms in the timber sale agreement and by provisions for the sale of "extra trees" in the PGC Forestry Manual entered into evidence by JEM. (Ex. C-1; Ex. C-12 at 118-119).

53. Based partially upon the belief that the buyer would be entitled to blown-down trees not specifically designated for removal, Mr. Repp assumed that beyond the quantities of sawtimber indicated in the Invitation to Bid, he would recover an additional 15%, and that beyond the quantities of pulpwood indicated, he would recover an additional 30%. (N.T. 251-258).

54. Mr. Repp's further testimony as to the additional value of these unmarked fallen trees confirms the foregoing difference of understanding between buyer and seller as to these unmarked trees to be material and indicates that there was no "meeting of the minds" as to what was being offered for sale between the two parties. (Compare N.T. 286-289 to N.T. 299-308, 314-319, 324, 326-331; F.O.F. 49-53).

CONCLUSIONS OF LAW

1. Under the Commonwealth Procurement Code (“Procurement Code”), 62 Pa. C.S. §§ 101-4604, the Board has exclusive jurisdiction to arbitrate claims arising from a contract entered into by a Commonwealth agency in accordance with [the Procurement Code] and filed with the Board in accordance with Section 1712.1 [of the Procurement Code] (relating to contract controversies).” 62 Pa. C.S. § 1724(a)(1).

2. Further, the Board has exclusive jurisdiction to determine whether or not a contract has been entered into between a private entity and a Commonwealth agency. Accordingly, we have jurisdiction to determine if an enforceable contract exists here between JEM and the PGC. Scientific Games Int’l, Inc., v. Dep’t of Revenue, 66 A.3d 740, 759 (Pa. 2013); Hanover Ins. Co. v. State Workers’ Ins. Fund, 35 A.3d 849, 852 (Pa. Cmwlth. 2012); Dep’t of Gen. Servs. v. Limbach Co. and Penn Transp. Servs., Inc., 862 A.2d 713, 716-717 (Pa. Cmwlth. 2004).

3. It is within the purview of the Board, acting as finder of fact, to draw all reasonable inferences from the evidence presented at trial. Barylak v. Montgomery County Tax Claim Bureau, 74 A.3d 414, 417 (Pa. Cmwlth. 2013); Warner-Vaught v. Fawn Twp., 958 A.2d 1104, 1109 (Pa. Cmwlth. 2008); Ellis v. City of Pittsburgh, 703 A.2d 593, 594 (Pa. Cmwlth. 1997); see also, Wayne Knorr, Inc. v. Dep’t of Transp., 973 A.2d 1061, 1081 (Pa. Cmwlth. 2009) (Board’s evidence of damages may consist of probabilities and inferences as long as the amount is shown with reasonable certainty); A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ., 898 A.2d 1145, 1161 (Pa. Cmwlth. 2006) (same).

4. As the finder of fact, the Board is charged with the duty of determining the credibility of evidence and resolving conflicting testimony. It may believe all, part, or none of the testimony of any witness. The Board’s findings need not be supported by uncontradicted evidence, so long as they are supported by substantial evidence. Wayne Knorr, Inc. v. Dep’t of Transp., 973 A.2d 1061, 1078 (Pa. Cmwlth. 2009); Dep’t of Gen. Servs. v. Pittsburgh Bldg. Co., 920 A.2d 973, 989 (Pa. Cmwlth. 2007); A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ., 898 A.2d 1145, 1155 (Pa. Cmwlth. 2006); Commonwealth v. Holtzapfel, 895 A.2d 1284, 1249 (Pa. Cmwlth. 2006); Miller v. C.P. Centers, Inc., 483 A.2d 912, 915 (Pa. Super. 1984).

5. Although not dispositive, the Board agrees with JEM that Mr. Gustafson was legally authorized to enter into a contract for the sale of the Alder Marsh timber on behalf of the PGC. (34 Pa. C.S. §§ 304(f), 724; Ex. C-12, Forestry Manual, at p. 10; F.O.F. 22-24).

6. Pennsylvania law makes clear that a contract is created where there is mutual assent to the terms of a contract by the parties with the capacity to contract. Shovel Transfer & Storage, Inc. v. Pennsylvania Liquor Control Bd., 739 A.2d 133, 136 (Pa. 1999). In order for a

contract to be formed, there must be an offer, acceptance, and an exchange of consideration. Jenkins v. County of Schuylkill, 658 A.2d 380, 383 (Pa. Super. 1995).

7. It is for the Board, acting as finder of fact, to determine the intention of the parties to contract as demonstrated by the evidence. In re Estate of Hall, 731 A.2d 617, 621 (Pa. Super. 1999) (affirming trial court's finding that parties did not intend to be bound by contract); compare, Johnston v. Johnston, 499 A.2d 1074, 1076 (Pa. Super. 1985) (parties agreed to be bound by in-court settlement agreement).

8. As a general rule, where the requisites of contract formation have been met, signatures are not required for the formation of an enforceable contract unless such signing is expressly required, prescribed by law or intended to be required by the parties. Shovel Transfer & Storage, Inc. v. Pennsylvania Liquor Control Bd., 739 A.2d 133, 136 (Pa. 1999)

9. The Board does not take Shovel Transfer to mean, as JEM suggests, that an explicit provision requiring signatures is necessary to prove that the parties intended to require a signed writing to create an enforceable contract. We may determine that the parties intended to require a signed document to create an enforceable contract from the words and actions of the parties. Essner v. Shoemaker, 143 A.2d 364, 366 (Pa. 1958) (no contract existed where parties intended for provisions discussed at meeting to be reduced to writing and sent to attorneys for approval); see also, Onyx Oils & Resins, Inc. v. Moss, 80 A.2d 815, 816-817 (Pa. 1951).

10. Under the basic principles of contract interpretation, the entire contract should be read as a whole and in a manner to give effect to all its provisions. See e.g., Harrity v. Continental-Equitable Title & Trust Co., 124 A. 493, 494-495 (Pa. 1924); Pritchard v. Wick, 178 A.2d 725, 727 (Pa. 1962); Capitol Bus Co. v. Blue Bird Coach Lines, Inc., 478 F.2d 556, 560 (3d Cir. 1973).

11. Although not stated as clearly and explicitly as it could have been, the language in the Invitation to Bid, which includes a requirement that the bidder "accept and execute the contract" to avoid forfeiture of its bid bond, indicates that execution of a written timber sales agreement document was contemplated by the Invitation to Bid and intended in order to create an enforceable contract. (Exs. C-1, C-2; Conclusions of Law ("C.O.L.") 7-10).

12. Because we have found, as a matter of fact, that the parties' intended that an execution of a written timber sale agreement was necessary to create an enforceable contract; and because no such written timber sale agreement for the Alder Marsh timber was ever executed by both parties, no such contract existed between the PGC and JEM. (C.O.L. 7-11).

13. The sale of timber from the Alder Marsh site constituted a sale of personal property. Zitney v. Appalachian Timber Prods., 72 A.3d 281, 288 (Pa. Super. 2013).

14. Because the Alder Marsh timber sale involved the disposal, by a Commonwealth agency, of personal property (which is included in the term "supplies"), this sale or proposed sale

was subject to the provisions of the Commonwealth Procurement Code. 62 Pa. C.S. §§102 and 103.

15. Section 521 of the Procurement Code states as follows:

An invitation for bids, a request for proposals or other solicitation may be canceled, or any or all bids or proposals may be rejected, at any time prior to the time a contract is executed by all parties when it is in the best interests of the Commonwealth. Bids may be rejected in part when specified in the solicitation. The reasons for the cancellation or rejection shall be made part of the contract file.

62 Pa. C.S. §521.

16. Because we have found, as a matter of fact, that Mr. Gustafson informed Mr. Repp on October 10, 2012 that JEM's bid was being rejected in favor of Walczak's, and because a written timber sale agreement for the Alder Marsh timber has never been executed by both JEM and the PGC, there is no contract between the two for sale of the Alder Marsh timber. (C.O.L. 8, 13-15).

17. It is essential to the enforcement of an informal contract (e.g. unsigned document) that the minds of the parties should meet upon all the terms as well as the subject matter. If anything is left open for future consideration, the informal paper cannot form the basis of a binding contract. Isenbergh v. Fleisher, 145 A.2d 903, 907 (Pa. Super. 1958) (citing Onyx Oils & Resins, Inc. v. Moss, 80 A.2d 815, 817 (Pa. 1951)); see also, Quiles v. Fin. Exch. Co., 879 A.2d 281, 284 (Pa. Super. 2005).

18. Because the Board has found, as a matter of fact, that the parties bore materially different understandings of what the PGC was selling in the Alder Marsh timber sale, the Board concludes that the parties did not reach the requisite meeting of the minds necessary to form a binding contract prior to resolving these differences by executing a written timber sale agreement. (C.O.L. 17).

19. Because the parties failed to reach a meeting of the minds with respect to the terms of the Alder Marsh timber sale and no written agreement was executed by the parties, no enforceable contract can be found between JEM and the PGC. (C.O.L. 17-18).

20. Because no contract exists between JEM and the PGC for sale of the Alder Marsh timber, the Board concludes that no recovery is available to JEM on its claim before the Board under Section 1724 of the Procurement Code, 62 Pa. C.S. § 1724. (C.O.L. 12, 13-16, 17-19).

DISCUSSION

In September 2012, JEM Hardwoods, LLC (“JEM”), bid for the purchase of salvage timber on state game land (the “Alder Marsh” timber sale). The bid results, as tabulated on September 10, 2012 by the Forestry Division of the Pennsylvania Game Commission (“PGC”), the owner of the salvage timber, showed Walczak Lumber Company, Inc. (“Walczak”) as the highest bidder (at \$204,699) by a wide margin over JEM, the second highest bidder (at \$90,834). However, shortly after the bids were opened and tabulated, Walczak indicated that it would not honor its bid.

On September 15, 2012, after being advised that Walczak would not honor its bid, the PGC called JEM to inquire as to whether or not it was still interested in the Alder Marsh timber sale at its bid price. JEM indicated that it was, and the PGC’s Forestry Division Chief, David Gustafson, indicated that the PGC would send out a written form of agreement for the Alder Marsh timber sale to JEM for execution. JEM received the unsigned timber sale agreement document by mail on October 5, 2012.

By October 8, 2012, however, Walczak had again changed its mind. Walczak then contacted the PGC and demanded that the PGC execute a contract for the Alder Marsh timber sale with Walczak.

Following consultation with its legal counsel, the PGC opted to obtain for itself the economic benefit of Walczak’s higher bid. Accordingly, on October 10, 2012, the PGC called and informed JEM it would not execute a timber sale agreement with JEM but would instead contract with Walczak for the Alder Marsh timber sale.

On October 11, 2012, Jason Repp, the sole owner/member of JEM, signed the timber sale agreement document he had received and sent it back to the PGC on October 12, 2012. This was

accompanied by a letter from JEM's attorney indicating its intent to proceed with the purchase. On October 15, 2012, the PGC's legal counsel responded to JEM's attorney and reiterated that the PGC planned to execute a contract for the Alder Marsh timber sale with Walczak.

On November 27, 2012, JEM's new attorney wrote a letter to the PGC demanding performance of what JEM considered to be a contract for sale of the Alder Marsh timber to JEM or damage for breach of same. The PGC sent no response to JEM's November 27, 2012 letter. On January 8, 2013, well within 135 days of the November 27, 2012 letter from JEM's attorney, JEM filed its instant claim with the Board of Claims ("Board").

Despite the PGC's refusal to execute a written contract with it, JEM claims that a contract nonetheless existed between it and the PGC based upon common law principles, and that the PGC breached this contract by refusing to sell the Alder Marsh timber to JEM. More specifically, JEM argues that its bid constituted an offer, and that this offer was accepted by PGC's Forestry Division Chief, David Gustafson, through his words and actions communicated to Mr. Repp (JEM's owner) prior to the execution of any writing.

The PGC denies that a contract was formed between it and JEM for several reasons. First and foremost, it contends that entry into a written agreement was intended and necessary to form a contract in this case. It also argues that Mr. Gustafson did not have authority to enter the PGC into any such contract. Finally, it asserts that the elementary requisite of contract formation, a meeting of the minds, did not occur between JEM and the PGC.

To begin with, we find no merit to the PGC's argument that Mr. Gustafson had no authority to bind the PGC to a timber sales agreement of the type here at issue. The statutory analysis and PGC documents provided to the Board establish otherwise. See e.g. 34 Pa. C.S. §§

302(f) and 724, as well as the PGC Forestry Manual (Ex. C-12 at p. 10). However, our agreement with JEM ends here.

After careful consideration of the testimony and documentation presented at hearing in this matter, the Board concludes that no contract for the Alder Marsh timber sale was formed between JEM and the PGC. The Board so concludes because no written agreement was ever entered into by both parties and because the weight of evidence establishes that the parties intended execution of a formal, written timber sales agreement in order to form a contract between the two. That is to say, the PGC's communication to JEM subsequent to JEM's bid never indicated an unconditional acceptance of said bid, but was instead comprised of statements that the PGC would mail JEM a timber sale agreement document for JEM to sign and return to the PGC. Moreover, while the bid documents could have been much more explicit, the language there too (requiring, inter alia, that the bidder "accept and execute" the timber sale agreement) also indicates the intent that a written agreement be executed to form the contract. These factors show the PGC's intent to require a formal written agreement to consummate the sale. Moreover, Mr. Repp's testimony and actions (including his immediate response requesting Mr. Gustafson to send him "the paperwork," and his subsequent execution and return of the timber sales agreement even after being told that the PGC was rejecting his bid) also confirm to the Board that he understood at the time that execution of this document was needed to consummate the agreement, despite his current assertions to the contrary.

We also agree with the PGC that there was no meeting of the minds between the PGC and JEM as to all the material terms of the sale. The testimony at hearing established that there was material disagreement between the parties as to exactly what was being bought and sold. In JEM's eyes, the timber it was purchasing in the Alder Marsh sale included a significant number

of fallen trees that were not marked for removal (nor included in the timber tabulation set forth in the Invitation to Bid). The PGC's witnesses testified that unmarked fallen trees were not included in the sale and could only be removed on an ad hoc basis upon both the approval of the forester on duty and additional payment to the PGC for the additional trees removed. Mr. Repp's testimony further establishes this difference to be of material value. Accordingly, the existence of such a fundamental disagreement indicates that no "meeting of the minds" ever occurred on the terms of the proposed timber sale between JEM and the PGC.

Finally, we believe it evident that the sale of timber from the PGC's forest land is the sale of personal property and constitutes a "disposal" of "supplies" therefore making this sale subject to, and covered by, the provisions of the Commonwealth Procurement Code. See 62 Pa. C.S. § 101 et. seq. We also believe that Section 521 of the Procurement Code makes it clear that the PGC was free to reject JEM's bid at any time prior to execution (by both parties) of a written contract for sale of the Alder Marsh timber. 62 Pa. C.S. § 521. Because this is what happened here (i.e. the PGC rejected JEM's bid before a contract document was executed between the two) there is/was no contract between JEM and the PGC for sale of the Alder Marsh timber.

Although the Board finds the PGC's contracting steps, procedures and forms less explicit and well-defined than they could be, and its actions here less than exemplary, the end result of this claim is dictated by the law of contracts. Accordingly, because JEM has failed to establish that a contract was formed between JEM and the PGC for sale of the Alder Marsh timber, the Board finds in favor of the PGC on the claim before us. No award is made to JEM.

ORDER

AND NOW, this 25th day of November, 2014, it is **ORDERED, ADJUDGED** and **DECREED** that judgment is entered in favor of the respondent, Commonwealth of Pennsylvania, Pennsylvania Game Commission, and against the claimant, JEM Hardwoods, LLC. No award is made to JEM Hardwoods, LLC on the claim in this matter. Each party shall bear its own costs and attorneys' fees.

BOARD OF CLAIMS

OPINION SIGNED

Jeffrey F. Smith
Chief Administrative Judge

Harry G. Gamble, P.E.
Engineer Member

Andrew Sislo
Citizen Member