
ALBERTA PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – September 14, 2018

IN THE MATTER OF sections 121 and 124 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 211, 213, 228, and 235 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an appeal filed by Athabasca Minerals Incorporated with respect to the decision by the Director, Provincial Approvals Section, Alberta Environment and Parks, to award RFP 16TDROLR806 (Coffey Lake Gravel Pit Tender) to Mikisew North Limited Partnership.

Cite as: *Athabasca Minerals Incorporated v. Director, Provincial Approvals Section, Alberta Environment and Parks, re: Mikisew North Limited Partnership* (14 September 2018), Appeal No. 18-0007-D (A.P.L.A.B.).

BEFORE:

Ms. Marian Fluker, Acting Appeals Co-ordinator.

SUBMISSIONS BY:

Appellant: Athabasca Minerals Incorporated.

Contract Holder: Mikisew North Limited Partnership.

Director: Mr. Wayne Holland, Regional Approvals Manager, Alberta Environment and Parks.

EXECUTIVE SUMMARY

In 2015, Alberta Environment and Parks (AEP) issued a tender to Mikisew North Limited Partnership (Mikisew) for the Coffey Lake Gravel Pit.

Athabasca Minerals Incorporated (Athabasca Minerals) appealed AEP's decision to the Public Lands Appeal Board (Board) on the basis AEP erred in the determination of a material fact on the face of the record.

The Board asked Athabasca Minerals, Mikisew, and AEP to provide further explanations on the tendering process in order to determine whether the appeal was filed after the legislated appeal period had passed.

The Board received submissions from Athabasca Minerals, Mikisew, and AEP on the tendering process. Based on the submissions received and a review of the applicable legislation, the Board found the decision to issue the tender to Mikisew was not an appealable decision, as the decision on whether the surface material lease would be issued to Mikisew for the Coffey Lake Pit had not yet been made by AEP. Therefore, the issue of the lateness of the appeal was moot.

The Board dismissed the appeal.

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I. BACKGROUND

[1] On May 16, 2018, Athabasca Minerals Inc. (the “Appellant”) filed a Notice of Appeal with the Public Lands Appeal Board (the “Board”) appealing the decision by the Director, Approvals and Disposition Services Unit, Alberta Environment and Parks (the “Director”) to award tender RFP 16TDROLR806 (Coffey Lake Gravel Pit Tender) (the “Tender”) to Mikisew North Limited Partnership (“Mikisew”) in December 2015. Once the terms of the tender were met, Mikisew would be issued Surface Material Lease SML 160083 (the “SML”). The Appellant alleged the Director erred in the determination of a material fact on the face of the record.

[2] On May 18, 2018, the Board acknowledged receipt of the Notice of Appeal and notified the Director of the appeal. The Board noted the timing of the appeal may have been outside the legislated time limits and asked the Director to provide clarification on when the SML was issued.

[3] On May 18, 2018, the Appellant notified the Board it did not receive a formal notification of the bid closure and the awarding of the contract for Request for Proposal 16TDROLR806 (“RFP”). The Appellant explained the normalization of bids occurs after bid opening, and there are various steps required to ensure a leading bidder is fully compliant with the RFP, including whether deficiencies and risks have been assessed and priced against other bidders’ submissions, and whether the contract terms have been fully negotiated. The Appellant stated if no formal notification was issued to declare the bid closure or the contract award, then the appeal deadline was not exceeded. The Appellant noted the Coffey Lake gravel pit is still unopened, and there was no record of when the contract was ratified.

[4] On May 28, 2018, the Director notified the Board the contract was awarded in December 2015 to Mikisew, but no SML or other disposition has been granted.

[5] On June 4, 2018, the Board asked the Appellant, Mikisew, and the Director (collectively, the “Participants”) to respond to the following questions:

1. Is the decision to award a tender to Mikisew appealable under the *Public Lands Act*, R.S.A. 2000, c. P-40 (“PLA”) and the *Public Lands Administration Regulation*, Alta. Reg. 187/2011 (“PLAR”)?
2. If the decision to award a tender is appealable, was the Notice of Appeal filed in time?
3. Is the tender process an application for a disposition, or is there a subsequent process that must be followed once the tender is awarded? For example, after the tender is awarded, does the winner of the tender have to submit an application for a disposition before an SML is granted?
4. If there is a subsequent process that must be followed, was the Appellant’s Notice of Appeal filed prematurely?

[6] Responses were received from the Participants between June 11 and July 5, 2018.

II. SUBMISSIONS

A. Appellant

[7] The Appellant said it filed the appeal in the public interest to remedy various non-compliances in the Tender award to Mikisew. The Appellant said the Tender was awarded without the required Conservation Reclamation Business Plan and included an inadequate First Nations consultation process. The Appellant stated regional stakeholders are impacted due to a delay in the issuance of a disposition after two years.

[8] The Appellant said it is expected a disposition would be issued in a timely manner when a tender award is compliant. The Appellant stated that, rather than waiting for a disposition to be issued before filing an appeal, it requested the Board consider the appeal at this time. The Appellant said this would enable the situation to be remedied, if the appeal was successful, rather than risk losing potentially another year or more in the process.

[9] The Appellant argued there is a perceived or actual bias in the tender process given Alberta Environment and Parks (“AEP”) is the project proponent who awarded the contract to Mikisew and is also the regulatory agency for approving the Coffey Lake Pit.

[10] The Appellant stated the First Nations consultation process conducted by Mikisew was inadequate. The Appellant argued that, since the Coffey Lake area is important to the Fort McKay First Nation and adverse effects due to development could impact their Treaty Rights

and traditional use of Crown lands, delegating the Crown's responsibility for First Nations consultation to an inexperienced third party was not in the public interest.

[11] The Appellant argued the decision to award a tender should be appealable given the following:

1. section 211(a) of PLAR deals with the issuance, renewal, amendment, or suspension of a disposition issued under the PLA;
2. the process of obtaining a disposition in this case is linked to the Tender as the awarded contractor was required to properly complete the requisite work that leads to a disposition;
3. the Tender documents stipulated various requirements to obtain a disposition, including the contractor was to have 10 years' experience. (The Appellant noted Mikisew only had three years' experience, resulting in (a) difficulty in getting the Conservation and Reclamation Business Plan approved which caused delays in issuance of a disposition; (b) a breakdown in understanding and recognizing stakeholder consultation levels, particularly with respect to the Fort McKay First Nations; and (c) untimely ratification of road use agreements with the Regional Municipality of Wood Buffalo and Imperial Oil Ltd.)

[12] The Appellant believed the Notice of Appeal was filed in time since it did not receive formal confirmation of the awarded Tender and did not receive formal rejection of its proposal. The Appellant said it acted in a timely manner when deficiencies in the Tender requirements and non-compliance became known.

[13] The Appellant believed it was in the public interest for the Board to review and give consideration to the Appellant's bid submission. The Appellant noted no disposition had been issued for the Coffey Lake Pit, and the acceptance of a non-compliant tender or a tender with non-compliances are contributing factors to the current situation of delay and lack of progress.

[14] The Appellant explained the application for a disposition is a critical deliverable in the Tender. The Appellant said a successful tender process and award required preparation for an ensuing application for a disposition which included an approved Conservation and Reclamation Business Plan and an adequately completed First Nations consultation. The Appellant argued a repeatedly unsuccessful application for a disposition should be a reason to reconsider the tendering process and basis of the award.

[15] The Appellant stated if the SML had not yet been approved, it does not make sense to wait for a disposition before filing an appeal. The Appellant argued this would not be in the public interest given the impending closure of the Susan Lake Public Pit and the need for a timely and smooth transition to the Coffey Lake Pit.

[16] The Appellant noted the delays in the opening of the Coffey Lake Pit and asked the Board to allow the appeal to move forward based in the public interest.

B. Mikisew

[17] In response to the third question, Mikisew stated it was awarded the contract for the management of the Coffey Lake Gravel Pit, and its application for the SML is currently in the submission process for approval.

[18] Mikisew said it did not have the authority to respond to the other three questions.

C. Director

[19] The Director noted the Notice of Appeal relates to the awarding of a contract to Mikisew. He stated there is currently no Surface Materials Lease or any other public lands disposition related to the tender.

[20] The Director said the tender process is not an application for a disposition. He explained that following the awarding of the contract, the successful bidder is required to submit an application for a Surface Materials Lease under which the pit would be operated.

[21] The Director stated the application for the SML is within the approvals process with no decision made regarding its approval.

D. Rebuttal

[22] The Appellant stated the contract was improperly awarded in December 2015 given: (1) Mikisew did not have the requisite 10 years' experience stipulated in the RFP; (2) bid opening in December 2015 did not constitute bid compliance; (3) proper normalization of tenders for deficiencies and risks was not a proper basis for awarding the contract; and (4) the RFP was not formally closed by AEP.

[23] The Appellant said Mikisew's inexperience further impacted the validity of the Tender and contributed to the lack of progress in the issuance of a disposition. The Appellant noted Mikisew requested changing its management fee after the award of the contract even though the RFP stipulated a firm price. The Appellant also noted the RFP required a conservation and reclamation business plan, but none have been approved to date.

[24] The Appellant said the inexperience of Mikisew impacted regional stakeholders, including improper recognition of First Nations stakeholder consultation requirements, particularly with Fort McKay First Nation.

[25] The Appellant stated the RFP stipulated target dates shortly after the Tender was awarded, requiring Mikisew provide the conservation and reclamation business plan, conduct stakeholder consultation, provide details regarding the access road, and hold meetings with stakeholders, but there has been little progress. The Appellant said this has created frustration for the industry stakeholders with the uncertainty of opening the Coffey Lake Pit, creating instability with aggregate supply and pricing for regional construction opportunities due to continued delays.

[26] The Appellant said that, given it has been two years since the tender was issued and no approved conservation and reclamation business plan has been submitted, the requirements of the RFP objectives and the timely issuance of a disposition have not been met. The Appellant stated with a prolonged unsuccessful application for the Coffey Lake Pit, which is in the public interest, the appeal should be considered under section 211(a) of PLAR.

[27] The Appellant submitted it is in the public interest to look at the merits of the appeal, given Mikisew's lack of progress to obtain a disposition, fulfill the stipulated RFP obligations, satisfy stakeholders' concerns, and prepare the Coffey Lake Pit for timely operation. The Appellant added the prolonged uncertainty with the Coffey Lake Pit warrants a recommendation to revisit the Tender award.

III. ANALYSIS

[28] The issue before the Board is whether the issuance of the Tender to Mikisew is appealable given the terms of the RFP have not yet been satisfied. The Board's jurisdiction to hear appeals is provided for under the PLA and PLAR. The only matters that can be appealed to the Board are identified under section 211 of PLAR.¹

[29] The Appeal was filed with respect to a tender issued to Mikisew to operate the Coffey Lake Pit. As of yet, no work has started at the site. Both the Director and Mikisew confirmed the SML has not been issued to Mikisew for the site. Mikisew explained it was in the process of filing the application for the SML. As no SML has been issued, no work can be done at the site.

[30] When looking at the types of Director's decisions that can be appealed, section 211 of PLAR does not make any reference to decisions regarding the issuance of tenders. However, once an SML is issued, section 211(a) of PLAR provides a directly affected person the right to file an appeal of the decision to issue the SML.

¹ Section 211 of PLAR provides:

"The following decisions are prescribed as decisions from which an appeal is available:

- (a) the issuance, renewal, amendment or suspension of a disposition issued under the Act;
- (b) the rejection of an application under the Act for a disposition,
- (c) a refusal to issue a disposition or to renew or amend a disposition applied for under the Act;
- (d) the imposition or variation under the Act of a term or condition of a disposition;
- (e) a deemed rejection under section 15(1);
- (f) an order under section 35(1) to vacate vacant public land;
- (g) a refusal under section 43(1) of the Act;
- (h) an enforcement order, a stop order or an administrative penalty;
- (i) a removal under section 69(2)(f)(iii) of the Act;
- (j) an order under section 182;
- (k) a refusal to admit, or a requirement to remove, a pet animal under section 194(2);
- (l) an order under section 201(b) to vacate a public land recreation area;
- (m) an order under section 204(1) to vacate a campsite;
- (n) an order under section 205."

[31] As explained by the Participants, the awarding of a contract after a successful bid tender is only the first step in being able to conduct business at the site. The winner of the tender must then complete an application for a surface materials lease, and only after the Director is satisfied with the proposed plans as required in the application, will the surface material lease be granted and work can begin at the site.

[32] The decision being appealed is only at the stage where the Tender has been issued. No disposition has been awarded that actually allows use of the public lands. There is only a decision that could be appealed when a disposition has been granted.

[33] At this stage, where only the Tender has been awarded and not the SML, the decision is not appealable under section 211 of PLAR and, therefore, the Board must dismiss the appeal.

[34] The Appellant will have to be diligent in tracking when the SML is issued to Mikisew. Should the Appellant choose to appeal the SML when it is issued, the appeal period is relatively short. Since the Appellant has expressed interest in the progress of the SML, the Board suggests the Director notify the Appellant when the SML is issued.

IV. CONCLUSION

[35] The Board finds the Notice of Appeal is not within the Board's jurisdiction. Therefore, the appeal is dismissed.²

Dated on September 14, 2018, at Edmonton, Alberta.

"original signed by"
Marian Fluker
Acting Appeals Co-ordinator

² After the closing of submissions, the Board was advised by the Appellant that the Tender awarded to Mikisew has been cancelled by AEP. The Board understands from the Appellant the Tender has been re-opened to bidding.