

March 7, 2016

The Honourable Bill Mauro
Minister of Natural Resources and Forestry
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Dear Minister Mauro:

Re: The MNR's right and ability to rescind all contracts for the proposed hydro-electric generating station at the Bala falls, without paying costs or penalty

Summary

In a May 14, 2015 letter Deputy Minister Bill Thornton wrote to then Chief of Staff Stevie O'Brien, to provide analysis and guidance on the following:

- 1) Whether the proponent for the proposed hydro-electric generating station at the Bala falls would **fulfil the obligations they have** due to the MNRF's procurement process.
 - This procurement process included the 2005 release of a well-worded RFP and the prospective proponent responding with a Proposal and being selected based on the MNRF's weighted point-system evaluation of this Proposal.
- 2) The MNRF's ability to **rescind the proponent's contracts** without cost or penalty if the proponent is found to not be honouring their obligations.

It appears that the Deputy Minister's analysis was **inadvertently based on an early draft version of the MNRF's RFP** – and not the released version. As a result, **the analysis reached an incorrect conclusion.**

As detailed below, careful reading of the provisions of the **Issued RFP** shows that due to the proponent's decisions to not honour their obligations, the MNRF could rescind all contracts without paying any costs or penalties to the proponent.

Detail

- 1) Reference will be made below to the following documents:
 - a) Deputy Minister Bill Thornton's May 14, 2015 letter.
 - Referred to below as the "**Letter**".
 - b) The **Draft RFP** from which DM Thornton's Letter quoted paragraphs.
 - The proposal submission date (on page 13) is a week earlier than for the Issued RFP.
 - I have added some red boxes to highlight Sections of interest.
 - c) The **Issued RFP**.
 - I have added some red boxes to highlight Sections of interest.

d) A June 24, 2008 letter from the MNR's District Manager to the Township of Muskoka Lakes.

2) Ability to Rescind Contracts

a) Draft RFP

The Letter starts (*"Revisiting the Applicant's Proposal"*) by quoting a single paragraph "clause (C)" from page 4 of the **Draft RFP**, which is entitled *"MNR May Seek Clarification and Incorporate Response into Proposal"*, as follows:

"The MNR reserves the right to seek clarification of Proposals after the Proposal Submission Deadline. The Applicant shall be required to provide such clarification in writing as and when requested by the MNR or else the Proposal may be disqualified. The response received by the MNR from an Applicant shall, if accepted by the MNR, form an integral part of that Applicant's Proposal. In the event that the MNR receives information at any stage of the evaluation process which results in earlier information provided by the Applicant being deemed by the MNR to be inaccurate, incomplete or misleading, the MNR reserves the right to revisit the Applicant's proposal in its entirety."

As is clear from this paragraph, and as presented in the Letter, the Draft RFP:

- **Only** considered inaccurate or misleading information **received as a result of the MNR requesting additional information.**
- Only provided the remedy of **disqualifying Applicants, so this is a very weak and short-sighted provision.**
- The Draft RFP included an additional provision in Section 2.0 i. g. to **disqualify Applicants** due to misrepresentations, inaccurate, or misleading information.

b) Issued RFP

In the **Issued RFP**, this provision was significantly strengthened to be three paragraphs in Section 4.3.3 on page 17. Reading these three paragraphs in context shows that the MNR chose to expand their options for dealing with deficient proposals. The first two paragraphs deal with additional information submitted, but the last of the three paragraphs is the most relevant, and reads:

"Proponents should note that the Ministry, in addition to any other remedies it may have at law or in equity, reserves the right to rescind any contract awarded to a proponent in the event that the Ministry determines that the proponent made a misrepresentation or provided any inaccurate, misleading or incomplete information in its proposal or during contract negotiations."

This is clearly worded to:

- Apply to **all** information provided in a Proposal, not requested supplementary information.
- Extend to **after** the procurement process, as it refers not to disqualifying Applicants, but instead the longer-term actions of "any contract awarded".
- This demonstrates a mature procurement process, experienced to know that **inaccurate, misleading, or incomplete information may not become apparent until after the procurement process is completed** and a successful Applicant selected.

c) Ten years later

While it is now more than ten years after this Proposal was submitted, **the proponent is still withholding information which shows that they indeed provided “inaccurate, misleading or incomplete information in its proposal”**, as detailed below.

- Such wilful manipulation of the procurement process must not result in subverting the RFP’s clear requirements for Bala of continued recreation and tourism, as it appears the current plan would result in an unacceptably dangerous and deadly situation.
- For example, the public has not yet been informed where the downstream safety boom would be. While this requires approval by the MNRF and Transport Canada, the extent of this would be based on tailrace flow information provided by proponent.
 - As the fast and dangerous water exiting their proposed generating station would extend hundreds of feet down the Moon River, either this downstream safety boom would negatively impact marine navigation, or dangerous water would be outside of the safety boom. Either way, the proponent should have conveyed information on the downstream safety boom to the public by now.

d) In summary

Therefore the Letter’s conclusions that “clause (C)“:

- Only applied to supplementary information **is not correct for the Issued RFP.**
- Is no longer applicable cannot be correct as the proponent is still **wilfully withholding information in the hope of not being caught reneging on their important and formal commitments** which they made 10 years ago.

3) Deliverables

a) Draft RFP

The next section of the Letter is “*Deliverables Sought by the RFP*”, and cites the Section “*Description of Deliverables*” which begins on page 5 of the Draft RFP which:

- Lists “*three key components that the bidder should be aware of*”.
- Then lists four items A through D (the number mismatch again showing the Draft RFP was not the final, proof-read, approved, and Issued RFP).

While the Letter details these as if they were the core of the RFP, in the Issued RFP this Section was significantly changed with Section 2.2 which begins on page 7 and provides only an overview of the requirements of the work sought.

- For example, in the Issued RFP, *Section A. entitled “Development of Waterpower Opportunity”* only states: “*The selected proponent(s) will be required to complete at their expense a legal survey of the area to be included in the Lease Agreement attached as Appendix A to the RFP*”.

Clearly, only requiring that a survey drawing be provided shows this “Deliverables” Section is not a core part of the Issued RFP, so the Letter was incorrect in emphasizing it as such.

b) Issued RFP

What *is* the core part of the Issued RFP is the added Part 3, which is five pages in length, beginning on page 10. This details the three Categories of *Rated Criteria* which the MNR would use for assessing proposals and expands on the text that follows the items A through D in the Draft RFP.

- The **Draft RFP allotted 20 points** for each of the three Categories, however the **Issued RFP raised the weighting of Category 2 “Technical and Feasibility of Project” to 50 points**, showing these Category 2 Criteria were of the highest importance.

While most Category 2 Criteria were unchanged from the Draft RFP to the issued RFP, there was **one** very significant addition that was **specific to only the Bala proposed project**, and is on page 13 of the Issued RFP, as follows:

“For the North Bala Dam, demonstrate consideration of the extensive aesthetic, recreational, social and economic (i.e. tourism) values in the area of the proposed development.”

In summary, it is very significant that this Category was changed for the Issued RFP, as follows:

- To be worth 50 rather than 20 points, emphasizing the MNR’s priorities to prospective proponents and requiring the MNR’s evaluation of proposals to give the highest weighting to the resulting Proposal commitments.
- As only one addition was made to this Category, and as this addition only applied to Bala, demonstrates that the MNR’s goal was not just to select a proponent that could construct a generating station, but that proposals for Bala had to demonstrate special consideration for its unique requirements.

c) The proponent’s Proposal

In response, on page 41 of their 2005 Proposal, the proponent included the commitment that their proposed project would:

“not generally diminish the public’s enjoyment of the area for swimming, boating, fishing ...”

Equally important to this commitment is that the proponent continued to acknowledge the importance of such recreational activities and that these could continue. For example, in their 2009 Environmental Screening/Review report, the proponent states in:

- Section 2.2.4.1 that: *“A variety of activities occur within the vicinity of the proposed project site. These include a range of recreational activities such as aquatic sports (boating, fishing, swimming) and snowmobiling.”*
- Section 2.2.5.10 that: *“Lake Muskoka (upstream of North Bala Dam) and Moon River (downstream of North Bala Dam) are popular boating, swimming, scuba diving and recreational fishing areas. The land alongside the falls is used for recreation and a number of benches are provided for public use. Many of these recreational uses take place at the base of Bala Falls.”*
- Section 6.3.1 that: *“Figure 6.5 illustrates all areas which will be restricted from public access (via signage and floating safety booms) during operation of the facility.”* This Figure shows that only a small area extending less than 25’ from their proposed tailrace would be dangerous and restricted from public access.

In addition, the proponent’s 2012 Addendum to their Environmental Screening/Review report for their current Alternative 1A proposal confirmed in

Table 6.1 that compared to their 2009 Option 2 plan, the impacts to in-water recreation for their proposed Alternative 1A would either be none or positive.

d) **The MNRF acknowledged all the proponent's commitments were important**

The MNRF has confirmed that the purpose of the RFP was not simply to select a proponent to develop the site. For example, a June 24, 2008 letter from Andy Heerschap, MNR District Manager, Parry Sound District, to the Township of Muskoka Lakes, states that:

"Swift River Energy was chosen as the Applicant of Record based on the merits of the RFP document submitted."

And

"I can assure you that MNR will continue to work with Swift River Energy to help ensure they meet their EA and public consultation requirements, and meet their commitments to the public as identified in their North Bala dam proposal released on July 5, 2005."

This shows that the MNRF realized the importance of recreational activities safely continuing in the area of the proposed generating station, and the proponent agreed to this in their 2005 proposal, and confirmed this in 2009, and confirmed it again in 2012.

4) **Costs**

The Letter did not address the very strong provisions in the Issued RFP concerning costs. For example in the **Issued RFP**:

- a) Section 1.3 (page 5) states: *"The Ministry makes no guarantee of the value or volume of work to be assigned to the successful proponent."*
- b) Section 2.2 C. (page 9) notes that the selected proponent will need to complete an environmental assessment. And Section 4.1.6 (page 15) *Parties Shall Bear Their Own Costs* notes that: *"The parties will bear their own costs associated with or incurred through this RFP process, including any costs arising out of or incurred in ... activities related to complying with the requirements of the RFP"*. This exact text is repeated in Section 4.6 (iv) (page 19), this repetition emphasizing the provision.
 - That is, the MNR clearly stated that the environmental assessment was a required activity and therefore a cost the proponent would need to bear.
- c) Section 4.6 (ii) (page 19) states: *"neither party shall have the right to make claims against the other with respect to award of contract, failure to award a contract or failure to honour a proposal."*

That is, in addition to clearly stating that the MNRF could rescind any contracts awarded, the MNRF's RFP was clear that the proponent would have to bear their own costs, for example, of the environmental assessment process.

Conclusion

- 1) The Ministry of Natural Resources and Forestry initiated this procurement process in 2005 with a well-written Request for Proposals which made it clear that:
 - a) The proponent had to bear all costs associated with pursuing this opportunity.
 - b) Continued in-water recreation in the area was a requirement.
 - c) The MNRF could rescind any contracts if the proponent's Proposal provided inaccurate or misleading information.
- 2) The proponent's 2005 Proposal did clearly state that in-water recreation could safely continue in the area, and they confirmed this in 2009, and again in 2012.
- 3) We request that before any further approvals are granted, the MNRF require the proponent to show that in-water recreation in the area could safely continue.
- 4) If the proponent cannot show the proposed hydro-electric generating station could be operated safely, then the MNRF;
 - a) Must enforce their well-worded and well-justified RFP, by rescinding any contracts awarded, and not issuing any further approvals.
 - b) Would not need to pay any costs or penalty to the proponent, as the proponent agreed to this during the procurement process.

We look forward to your response to the points made above.

Sincerely,



Mitchell Shnier, on behalf of SaveTheBalaFalls.com

Cc: The Honourable Glen Murray, Minister of the Environment and Climate Change, GMurray.mpp@liberal.ola.org
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