

**IN THE MATTER OF THE *COMMERCIAL ARBITRATION ACT*, R.S.C. 1985, c. 17**

**AND IN THE MATTER OF AN ARBITRATION UNDER  
AN ENVIRONMENTAL AGREEMENT dated March 8, 2000**

BETWEEN:

**ENVIRONMENTAL MONITORING ADVISORY BOARD  
("EMAB")**

Claimant

- and-

**DIAVIK DIAMOND MINES INC.  
("DDMI")**

Respondent

- and-

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA  
as represented by the Minister of Indian Affairs and Northern Development  
("Canada")**

Party

- and-

**THE GOVERNMENT OF THE NORTHWEST TERRITORIES  
as represented by the Minister of Resources, Wildlife and Economic Development  
("GNWT")**

Party

## **SUPPLEMENTAL AWARD**

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[1] I issued an Award in this matter January 16, 2011. By letter dated January 19, 2011, EMAB requested clarification as to the amount DDMI is entitled to deduct from its contribution to EMAB in the fiscal years 2009-10 and 2010-11 pursuant to that Award. I requested written submissions from the parties to address the issues of my authority or jurisdiction to deal with the request and the merits of the request. EMAB and DDMI made written submissions in accordance with an agreed schedule. Both Canada and GNWT advised they would not provide input regarding EMAB's request.

[2] In its Reply submission, EMAB noted that its clarification request "relates only to par. 76 of the Award, namely the quantum of the reduction of DDMI's contribution to fund EMAB's costs during the 2009-11 budget period."

[3] The Notice of Dispute that started these proceedings states that EMAB and DDMI have failed to resolve a disagreement with respect to the interpretation of Article 4.8(g) of the EA<sup>1</sup> concerning EMAB's ability to carry over funds and interest from a previous budget period.

[4] The basic question before me was which party, under the terms of the EA is entitled to have, hold or keep funds in EMAB's hands that are not used in a budget period. My conclusion was that it is DDMI, the funder, rather than EMAB, the funded entity. I found that EMAB's unexpended funds and interest as at March 31, 2009 totalled \$370,867.

[5] Paragraph [76] of my Award, which EMAB submits requires clarification, is as follows:

**I conclude** in the current circumstances the application of unexpended funds and accumulated interest does result in a reduction in DDMI's contribution for the two years of the budget period. As noted at paragraph [21], the reduction claimed by DDMI results in a balance of unexpended funds and interest of \$70,867. Assuming no budget calamities, that amount should be available to apply to fund EMAB's costs in a succeeding budget period.

[6] Paragraph [21] reads:

DDMI notes that when it decided to reduce its contributions by \$300,000 it was not known what the exact amount of the unexpended funds would be, but that it would be at least \$300,000. It submits that the balance of \$70,867 will result in an unexpended contribution of that amount as at March 31, 2011 and it should be applied (along with any other unexpended funds) to fund EMAB's costs in the succeeding budget period.

## Jurisdiction

[7] EMAB makes its clarification request pursuant to Article 33 of the Commercial Arbitration Code which states:

(1) Within thirty days of receipt of the award...

(a) a party...may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature;

(b) if so agreed by the parties, a party...may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

[8] EMAB's request was made within time. There can be no doubt that under Article 33 I have jurisdiction to consider the request. See *Relais Nordik Inc. v Secunda Marine Services Ltd.*<sup>2</sup>

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<sup>1</sup> Abbreviated references in this document have the same definitions assigned to them in the January 16, 2011 Award.

referred to by both EMAB and DDMI which at paragraph 16 states that “so long as the arbitral tribunal has not decided the request for correction, that tribunal is still seized of the matter.”

[9] A precondition for a request under Article 33(1)(b) is that the parties agree to the request. DDMI does not agree.

### **The Nature of EMAB’s Request**

[10] Does EMAB request, in substance, that I correct an error in computation, any clerical or typographical error or any errors of a similar nature? If no, then I have no jurisdiction to consider the merits of EMAB’s request, since I am *functus*. If yes, I may have jurisdiction, but is the request justified? If it is justified, what is the result on the merits?

[11] EMAB does not take issue with my finding that at March 31, 2009 it had unexpended funds and interest totalling \$370,867 or that DDMI is entitled to reduce the amount of its contributions.

[12] EMAB does not suggest that there is a “clerical or typographical error” in need of correction. It does suggest that there is an error in computation. DDMI submits that my jurisdiction to correct an error in computation is narrow, extending only to errors that are the result of miscalculations, the use of wrong data in calculations or the *omission of data* in calculations. EMAB says that I failed to have regard to data, namely the amounts of unexpended funds which EMAB had already budgeted to apply to its costs. In other words, EMAB submits that I have misapprehended or ignored some of the evidence before me.

### **Conclusion Regarding the Alleged Error in Computation**

[13] I do not agree that there has been an “error in computation” even if the term is defined to include omission of data in computation or failing to regard data in computations.

[14] Accounting terminology used in relation to non-profit organizations does not call excess revenue over expenses “profit”, but rather, “UNA”. EMAB appears to characterize its UNA as something that it can “contribute” to, or allocate at will within, its budget. However, that is not what the EA contemplates or permits. UNA is to be applied to EMAB’s costs.

[15] EMAB’s 2009-11 budget forecast shows revenue of \$112,300 in the first year and \$104,400 in the second year to come from partnership income or “EMAB contribution from unrestricted assets”. As I stated in my Award, unexpended contributions are to be applied to EMAB’s costs and not characterized as other revenue such as partnership income (which EMAB seeks for variable projects).

[16] The 2009-11 budget forecast notes that “EMAB will make best efforts to develop partnership arrangements to cover project expenses and is prepared to contribute its unrestricted net assets to projects on a case-by-case basis.” “Projects”, as described in the work plan, appear to be those activities shown in the budget under the heading “Variable” and are said to be “composed of activities in support of our main initiatives.”

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<sup>2</sup> [1990] F.C.J. No. 349 (T.D.)

[17] EMAB knew of DDMI's intention to reduce its contribution by \$150,000 in each of the 2009-11 budget years. In 2009-10, EMAB used \$203,320 of its unexpended contributions and earned interest. As at March 31, 2010, EMAB had \$167,547 of unexpended contributions and earned interest.

[18] All of this information was available to me, and considered, before reaching my conclusions and writing my Award. Accordingly, I do not find that there has been an error in computation or the request to be justified.

[19] I make no change to the Award.

The place of this arbitration is Yellowknife, Northwest Territories.

Dated at Calgary, Alberta, February 24, 2011.



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Jim McCartney  
Arbitrator