

Justification for incremental compensation

1. As requested by Muskrat Falls Corporation (“Muskrat Falls”) on 21 March 2016 (LTR-MFG001-0014), Astaldi Canada Inc. (“Astaldi”) submits its justification for additional compensation, currently aggregating to \$785,500,000, with associated schedule relief.
2. Astaldi’s primary claim in this regard is that the contract is void or voidable for the reasons stated in detail below, and that compensation must now be made to Astaldi for the reasonable value of the work on the basis of *quantum meruit*.
3. Astaldi’s secondary and alternative position is that even under the present contract Astaldi is entitled to compensation and time extension on the following grounds:
 - a) **Annex A:** Time at large;
 - b) **Annex B:** Labour market conditions;
 - c) **Annex C:** Overbreak in powerhouse excavation and delayed Integrated Cover System (“ICS”) redesign approval;
 - d) **Annex D:** 2014 – 2015 winter work;
 - e) **Annex E:** Labour wage escalation;
 - f) **Annex F:** Compensation for incremental cost of construction management;
 - g) **Annex G:** Shift gap;
 - h) **Annex H:** Sanitary services;
 - i) **Annex I:** High angle rescue service;
 - j) **Annex J:** Lack of accommodation for Astaldi personnel;
 - k) **Annex K:** Poor quality Muskrat Falls stockpile;

- l) **Annex L:** Site blockade;
- m) **Annex M:** Compensation of subcontractor staff.

- 4. Each of these headings is developed more fully in a corresponding Annex.
- 5. Nalcor Energy (“Nalcor”) and Muskrat Falls have been aware of the order of magnitude of Astaldi’s claims for additional compensation since at least October, 2015, when Astaldi presented Muskrat Falls with its Cost and Productivity Analyses estimating the additional compensation required at that time (not including some of the ongoing entitlements detailed below) to be in the range of not less than \$743,000,000 (**Attachment 1**).
- 6. In view of the contract formation issues, both Nalcor and Muskrat Falls are necessary parties to all claims and disputes. Astaldi reserves the right on its own behalf and on behalf of its parental and third party guarantors to vary or modify its claims and seek necessary and appropriate ancillary relief, including injunctive and other interim relief.

1.0 Nalcor’s misrepresentations render the contract voidable

- 7. Nalcor procured the contract by misrepresentation, rendering it void or voidable. These misrepresentations were compounded following the Limited Notice to Proceed (“LNTP”) which expressly provided for an element of good faith. Good faith was absent from Nalcor’s conduct in the negotiations leading up to execution of the final contract.
- 8. Nalcor led Astaldi to believe that its labour productivity assumptions were reasonable and would permit Astaldi to complete the project within the maximum reimbursable cost of labour (“LMAX”) stated in the eventual contract. It has now come to light that Nalcor and Muskrat Falls were at all times aware that Astaldi’s labour productivity assumptions were unachievable and that Astaldi would not be able to complete the project within LMAX. Nalcor’s misrepresentations strike at the heart of the parties’

bargain. As a result, the entire contractual structure erected by Nalcor is voidable and Astaldi must be compensated on a *quantum meruit* basis.

9. On 28 September 2012, SNC-Lavalin Inc., on behalf of Nalcor, issued an invitation to bidders, identified as Request for Proposal No. CH0007. In responding to Nalcor's Request for Proposal in April 2013, Astaldi based its labour productivity estimates on factors such as weather; the planned use of the ICS; Astaldi's planned means, methods and techniques; and the use of advanced formwork and construction machinery. Astaldi verified its projected labour productivity estimates against the best available historical information. Astaldi's tender estimate of 6.12 manhours per cubic metre was consistent with the average labour productivity on twelve other projects performed by Astaldi around the world.
10. Following proposal submittal in April, 2013, Nalcor asked Astaldi for further and new details and performed a detailed analysis of Astaldi's quotation, with particular regard to the labour component.
11. In May 2013, Nalcor asked Astaldi to delete a contractual provision which would make the unavailability of qualified manpower a force majeure event. Astaldi responded that this provision was important because Astaldi was unable, at that time, to evaluate the effects of unavailability of qualified labour. Astaldi eventually acquiesced in Nalcor's request, relying on representations by Nalcor that the availability of qualified manpower would not be a concern on this project. Nalcor made these representations despite having material information in its exclusive possession, including the 2008 University of Calgary study commissioned by Nalcor as to the achievable labour productivity in Newfoundland and Labrador. In fact, Nalcor had identified labour productivity as the project risk most difficult to mitigate.¹

¹ It was only in April of 2014, in a Steering Committee meeting, that Nalcor disclosed that it had identified labour productivity as the project risk most difficult to mitigate.

12. Nalcor and its consultant, SNC Lavalin, had meetings with Astaldi and undertook a detailed, line-by-line review of Astaldi's bid. Astaldi shared its labour productivity assumptions with Nalcor during the bid review process on an open-book basis, as part of the good-faith negotiation mandated by the Limited Notice to Proceed (discussed below). Nalcor failed to reciprocate. Nalcor and Muskrat Falls knew that Astaldi's fundamental labour productivity estimates were unachievable on this project. In these circumstances, silence and half-truth amount to misrepresentation.² Even if Nalcor merely stated that the requisite manpower was available, but made no qualifications as to the quality of that labour (when Nalcor was in possession of such material information), such failure to qualify the statement constitutes a misrepresentation by Nalcor.³
13. Nalcor's failure to notify Astaldi that the assumed productivity could not be, or might not be met amounts to misrepresentation.⁴ As stated by the Manitoba Court of Appeal:⁵

A representation might be literally true but practically false, not because of what it said, but because of what it left unsaid. In short, because of what it implied. This is as true of an innocent misrepresentation as it is of a fraudulent misrepresentation.

14. Having reviewed in detail all of Astaldi's labour assumptions underlying its tender price, and having established and imposed the applicable collective agreement respecting project labour, Nalcor's silence implied that Astaldi's labour productivity assumptions were achievable. The Ontario Court of Appeal has made it clear that

² *Meridian Credit Union Ltd. v. Baig*, 2016 ONCA 150.

³ *Alevizos v. Nirula*, 2003 MBCA 148, at para 20, citing Halsbury's Laws of England, 4th ed. reissue (London: Butterworths, 1998), Volume 31, para 748; *Opron Construction Co. v. Alberta* (1994), 151 A.P.R. 214 (Q.B.), at para 517.

⁴ *Alevizos v. Nirula*, 2003 MBCA 148.

⁵ *Alevizos v. Nirula*, 2003 MBCA 148, at para 24, citing *Curtis v. Chemical Cleaning & Dyeing Co.*, [1951] 1 All E.R. 631 (Eng. C.A.).

silence can amount to a misrepresentation, particularly where one of the parties, Nalcor in this case, is in a much better position to access the relevant information.⁶

15. Full particulars of the material information withheld by Nalcor and Muskrat Falls remain within their exclusive knowledge. Nalcor persists in a pattern of strategic non-disclosure. In response to Astaldi's recent Access to Information Request for the above mentioned University of Calgary study, Nalcor provided limited and incomplete disclosure, on the basis that such disclosure would reveal information contrary to Nalcor's current bargaining position with Astaldi:

Nalcor is currently involved in commercial negotiations with respect to aspects of the Lower Churchill Project. **In order to obtain the best possible outcome for Nalcor**, and therefore, the province of Newfoundland and Labrador, Nalcor must be able to maintain its best negotiation position. **Premature disclosure of the requested information will prejudice the financial interests of Nalcor Energy and will place Nalcor at a significant disadvantage in those negotiations.**

[Emphasis added]

16. In light of Nalcor's persistent, strategic non-disclosure, Astaldi reiterates its 1 February 2016 written demands that Nalcor and Muskrat Falls take all necessary, affirmative steps to ensure preservation of all potentially relevant evidence, including all electronically-stored information of any nature and kind whatsoever. Should this matter proceed, Astaldi will require proof that Nalcor and Muskrat Falls have taken all reasonable, necessary and effective steps to comply with Astaldi's 1 February 2016 correspondence.
17. The severity of Nalcor's misrepresentations was compounded by execution of the LNTP on 24 September 2013, which provided that Nalcor and Astaldi would conduct good-faith negotiations to finalize the contract. This contractual relationship expressly engaged common law duties of good-faith and honest performance. All obligations

⁶ 978011 Ontario Ltd. v. Cornell Engineering Co., 2001 CarswellOnt 1290 (C.A.) at para 34.

under the LNTP, including negotiation of the contract, became subject to the principles recently affirmed by the Supreme Court of Canada in *Bhasin*:⁷

The first step is to acknowledge that **good faith contractual performance is a general organizing principle of the common law of contract** which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that **there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.**

[Emphasis added]

18. Nalcor was obliged to act with affirmative good-faith and to “*have appropriate regard to the legitimate contractual interests*” of Astaldi.⁸ The duties imposed by *Bhasin* require more than simple honesty. Nalcor breached its common law duty to act in good faith by failing to inform Astaldi that Nalcor had good reason to believe that Astaldi would be unable to complete the work within the contractual framework being negotiated.⁹
19. It was three years later, in September 2015, when the parties’ jointly-retained expert, Dr. William Ibbs, issued his report, that Astaldi learned for the first time, that the best possible labour productivity achievable on this project, in favourable weather conditions, is 11.50 to 12.00 manhours per cubic metre, and not Astaldi’s estimated 6.12 manhours per cubic metre. Nalcor’s breach of the duties established in *Bhasin* entitles Astaldi to rescission of the Civil Works Agreement and compensation on the basis of *quantum meruit*.¹⁰

⁷ *Bhasin v. Hrynew*, 2014 SCC 71, at para 33.

⁸ *Bhasin v. Hrynew*, 2014 SCC 71, at para 65.

⁹ *Elan Construction Limited v. South Fish Recreational Assn.*, 2015 ABQB 330 at para. 98.

¹⁰ Bruce MacDougall, *Misrepresentation* (Markham: LexisNexis, 2016), at para 1.140; Angela Swan, *Canadian Contract Law*, Second Edition (Markham: LexisNexis, 2009) at page 290.

20. Nalcor's misrepresentations go to the heart of the contract. Astaldi is entitled to rescission of the contract and payment for work performed to date on a *quantum meruit* basis.¹¹
21. In the event that the Civil Works Agreement is not void or voidable, Astaldi presents the following alternative claims.

2.0 Time at large

22. When Astaldi sought extensions of time under the terms of the contract, Muskrat Falls substituted a good-faith, extra-contractual dispute resolution process, as confirmed by Muskrat Falls in its letter of 25 March 2015 (LTR-CH0007001-0469). This circumvented contractually-mandated procedures and placed time at large in respect of the Civil Works Agreement. Muskrat Falls is therefore disentitled from claiming, assessing or deducting liquidated damages.
23. Muskrat Falls cannot insist on Astaldi's performance of its schedule obligations while preventing Astaldi from complying with those obligations by:
- a) Delaying the start of Astaldi's work well into the fall of 2013.
 - b) Failing to properly excavate the powerhouse area, causing overbreak.
 - c) Delaying the approval of the requisite Integrated Cover System ("ICS") redesign.
 - d) Delaying formal approval of Astaldi's 11 January 2016 rebaselining while requiring Astaldi to perform in accordance with that baseline. Muskrat Falls remains in breach of contract in this regard.

¹¹ *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; Bruce MacDougall, *Misrepresentation* (Markham: LexisNexis, 2016), at para 4.14, citing *Bauer v. Bank of Montreal*, [1980] S.C.J. No.46.; *S-244 Holdings Ltd. v. Seymour Building Systems Ltd.*, 1994 CarswellBC 266 (C.A.); adopted in *Rick v. Brandsema*, 2009 SCC 10.

24. Combined, Muskrat Falls delays caused Astaldi to perform powerhouse work without the benefit of the ICS, altering Astaldi's means and methods and further delaying the project.
25. The details underlying Astaldi's claim that time is at large are set out in **Annex A**.

3.0 Labour market conditions claim

26. Astaldi claims in respect of the direct costs, indirect costs, and schedule impacts arising from the labour market conditions in Newfoundland and Labrador that were unforeseen by Astaldi at the time of tender. The quantification of this claim is based upon the quantity of concrete not otherwise included in the ICS claim and 2014-2015 winter work claims below.
27. Astaldi claims for an increase to LMAX by \$192,800,000 and a corresponding increase of the Labour Profit of \$13,496,000 for a total increase to the Contract Price of \$206,290,000. Astaldi further requests an extension of all interim milestone dates consistent with the vetted May 2015 re-baseline schedule and relief from all corresponding liquidated damages. The details underlying Astaldi's claim are set out in **Annex B**.

4.0 Over-break in Powerhouse and delayed ICS redesign approval claim

28. Muskrat Falls delayed approval of the ICS design resulting in direct costs associated with the construction and removal of the ICS, productivity losses, and prolongation costs to complete the Powerhouse, the full extent of which is still being incurred on the Project.
29. Astaldi claims \$334,000,000 resulting from Muskrat Falls' delay in approving the ICS re-design, inefficiencies resulting from the inability to utilise the ICS, and prolongation costs related to completion of the Powerhouse. The details underlying Astaldi's claim are set out in **Annex C**.

5.0 2014-2015 winter work claim

30. Astaldi was forced to work on unprotected areas (principally the Spillway) during the winter of 2014-2015 (1 November 2014 through 30 April 2015), and incurred significant compensable excess costs above those anticipated in the Tender.
31. Astaldi's Tender and therefore the Contract Price was based on performance of most concrete activities during either the summer period or in a protected environment during the winter period.
32. Astaldi has incurred productivity losses and cost impacts due to the forced performance of concrete activities with work areas exposed to severe winter conditions during the 2014-15 winter.
33. Astaldi claims \$106,300,000 for work it was forced to perform in the winter of 2014-2015. The details underlying Astaldi's claim are set out in **Annex D**.

6.0 Labour wage escalation claim

34. Astaldi will be obliged to perform work at escalated labour rates due to project delays caused by others. Astaldi claims for an estimated \$20,530,000 for the costs arising from the escalation. The details underlying Astaldi's claim are set out in **Annex E**.

7.0 Compensation for incremental cost of construction managers

35. Muskrat Falls instructed Astaldi to employ several specific construction management personnel and agreed to reimburse Astaldi for all incremental costs. This is an ongoing issue and Astaldi seeks reimbursement. Astaldi claims for the incremental costs in an amount estimated at \$6,175,000. The details underlying Astaldi's claim are set out in **Annex F**.

8.0 Shift gap claim

36. The current shift schedule has resulted in excessive overtime being billed by craft labour during the gap between the work shifts during activities that cannot be paused as the shifts turn over.
37. This claim is for reimbursement for costs incurred as of August, 2015 in the amount of \$13,277,064 as well as \$929,394 for overhead and profit. The claim is also for the costs from August, 2015 as well as anticipated costs to be incurred in the estimated amount of \$43,292,710 plus \$3,030,490 for overhead and profit. The total amount of this claim is estimated at \$60,530,000. The details underlying Astaldi's claim are set out in **Annex G**.

9.0 Provision of sanitary services claim

38. Astaldi was asked to and did supply sanitary services which were the obligation of Muskrat Falls. Muskrat Falls has failed to reimburse Astaldi for the associated costs. This is an ongoing issue.
39. Astaldi estimates the cost of this claim at \$16,882,000. The details underlying Astaldi's claim are set out in **Annex H**.

10.0 High angle rescue service claim

40. Astaldi provides high angle rescue services as Muskrat Falls has failed to fulfil its obligations to do so under the Civil Works Agreement. This is an ongoing issue and Astaldi seeks reimbursement.
41. Astaldi has incurred costs and expenses in the amount of \$2,059,580.64 up to August 2015, and anticipates incurring additional costs through to project completion.
42. Astaldi claims \$8,413,000 in respect of high angle rescue services. The details underlying Astaldi's claim are set out in **Annex I**.

11.0 Lack of available accommodations claim

43. The Civil Works Agreement requires that Muskrat Falls provide accommodations including room and board for Astaldi personnel. Muskrat Falls failed to meet its obligations. Astaldi provided off-site accommodations and was forced to transport its personnel to and from the project work site and seeks reimbursement.
44. Astaldi claims \$2,001,250. The details underlying Astaldi's claim are set out in **Annex J**.

12.0 Poor quality of Muskrat Falls' stockpile

45. The Civil Works Agreement, Exhibit 1, Article 3.1.6, requires Astaldi to fabricate coarse and fine aggregates for concrete production from blasted rock stockpile and from granular borrow areas provided by Muskrat Falls. The stockpile material provided by Muskrat Falls has been of poor quality, requiring significant additional work in order to be utilized. This has had a negative effect on Astaldi's ability to meet Muskrat Falls' schedule and has led to additional costs required to mitigate the poor quality of the Muskrat Falls-provided stockpile.
46. Astaldi accordingly claims \$8,150,000. The details underlying Astaldi's claim are set out in **Annex K**.

13.0 Site blockade Force Majeure event

47. On 12 August 2015, Innu protestors commenced civil disturbance acts at the entrance gate of Muskrat Falls project, blockading access to the Muskrat Falls site from 13 to 18 August 2015. Muskrat Falls has already determined that this was a Force Majeure event within the meaning of the Civil Works Agreement entitling Astaldi to an extension to milestone dates and reimbursement of all costs incurred.
48. Astaldi claims for a 15 day extension to all milestones, relief from all corresponding liquidated damages, and costs in the amount of \$8,908,000. The details underlying Astaldi's claim are set out in **Annex L**.

14.0 Compensation of subcontractors' staff

49. Astaldi submits claims for staff labour costs of subcontractors. Currently, Astaldi is not being reimbursed for the staff of its subcontractors and claims for all such costs. Astaldi claims that Muskrat Falls is improperly interpreting the Civil Works Agreement and for clarity Astaldi demands that Table 1.3 of Appendix F to Exhibit 2 be revised such that its subcontractor staff labour costs be reimbursed pursuant to Article 2.3 of Appendix F to Exhibit 2. The details underlying Astaldi's claim are set out in **Annex M**.

- # # # -

WITHOUT PREJUDICE