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VIA E-MAIL
25394

Ms. Nancy McNeil
Regulatory Affairs Officer/Clerk
Nova Scotia Utility and Review Board
1601 Lower Water Street, 3rd Floor
Halifax, NS B3J 3S3

Dear Ms. McNeil:

Re: Nova Scotia Power Inc. - Digby Wind Project (NSUARB - NSPI - P-128.10)

This is the reply submission on behalf of the Consumer Advocate in relation to the above application.

The Consumer Advocate will comment on two submissions made by NSPI in their closing submission.

APPLICABILITY OF CODE OF CONDUCT TO THE EUS CONSTRUCTION CONTRACT

At p. 16 of the NSPI closing submission, the contention is made that "The Code of Conduct has no application to this contract". The reference is to the Construction Contract between 324 NSL and EUS.

The Consumer Advocate disagrees with that contention.

Mr. Bennett, in his evidence, repeatedly made the point that it was the policy of NSPI and Emera that assets they operate, in as many cases as are reasonably possible, be held by the regulated utility (see, for example, transcript p. 80). If Digby was not needed for the purpose of meeting the renewable quota, it was understood the project would be transferred to and held by NSPI. According to Mr. Bennett, the only reason the construction contract was initially with 324 NSL was to be able to have the option of using it to satisfy renewable quotas.

In circumstances where a contract is expected to ultimately be transferred to NSPI, Emera and all its affiliates must recognize contracts signed between them must be able to meet the criteria of the Code of Conduct when that contract is ultimately assigned to NSPI. To relieve any contract between affiliates of the requirement of meeting the Code merely opens a back door to permit avoidance of the Code requirements. It would allow Emera and its affiliates to enter into affiliate transactions that did not meet the Code criteria and then to transfer them to NSPI by structuring the subsequent transfer in compliance with the Code and claiming that the original contract is exempt from Board review.

Further, at the time an affiliate transaction is being transferred to NSPI, the affiliate transaction itself, and not merely the subsequent transfer, must satisfy Code requirements. The transfer transaction will not contain the substantive provisions which will determine if proper value is being obtained for ratepayers or if undue benefit has been given to an affiliate. That requires an analysis of the original contract.

Exempting the 324 NSL and EUS construction contract from the requirements of complying with the Code would be a serious and detrimental restriction of the Code of Conduct.

NECESSITY FOR THE BONUS HAS NOT BEEN ESTABLISHED

At p. 19 of its closing submission, NSPI contends that the bonus payment was justified on the rationale that bonuses are good business practice and "the incentive was created when 324 NSL sought to assign risk associated with the construction of the project to EUS."

It is the position of the Consumer Advocate that the evidence does not support or justify the payment of the bonus in these circumstances.

According to the evidence it appears at the time of establishing the construction contract, EUS and/or 324 NSL picked the contract price because it was equivalent to the engineering calculation of the cost and was lower than the tenders that had been received by the original developer. While those are relevant criteria to establish a market price range for the work, it does not establish that the price was the best available in the particular circumstances.

EUS and 324 NSL then determined that part of the contract price would be designated as a bonus.

It is the position of the Consumer Advocate the evidence does not establish the required justification for the payment of the bonus in the circumstances.

To begin with the evidence does not establish that the bonus had become payable under the contract. Article A3 "Contract Price" of the Construction Contract (exhibit N-1, Appendix 10, p. 3) provides that the bonus payment is to be made upon "Total Completion of the Works in the event that Substantial Completion of the Work is achieved by December 20, 2010". For the bonus to be payable, there must be not only Substantial Completion but also Total Completion.

Substantial Completion is defined in the definitions (GC 1) as being:

> **"Substantial Completion of the Work"** shall have been achieved when the Work is ready for use or is being used for the purpose intended and is so certified in writing by the Project Designer and the only outstanding Work is the Punch List Items.

"Total Completion of the Work" is defined as:

> **"Total Completion of the Work"** means when the entire Work including the completion of all Punch List Items, except those items arising from the provisions of GC 25 WARRANTY or otherwise agreed by the parties, has been performed to the requirements of the Contract and is so certified in writing by the Project Designer.

For the bonus to be payable, all Punch List Items, excepting only warranty deficiencies or agreed items, have to have been performed.

The only evidence provided by NSPI on this point was in the course of cross-examination by Mr. Outhouse (transcript page 116). It appears there are still Punch List Items remaining to be performed.

> **MR. SAVORY:** We have a very small punch list of outstanding items to get done over the next little bit, but essentially the wind farm is in service and declared commercial operation.
>
> **MR. OUTHOUSE:** Okay. So total completion hasn't quite been achieved, but you're very close to that?
>
> **MR. SAVORY:** From a total completion, correct. From a contractual viewpoint, it is complete.

All punch list items were not completed by December 20, 2010. NSPI provided no evidence that the outstanding Punch List Items were an agreed exemption from the requirements of the "Total Completion of the Work" or were warranty items.

Further, the evidence produced by NSPI simply did not justify payment of the bonus in these circumstances.

Typically, bonuses are paid if one contracting party performs over and beyond its basic contractual obligations e.g. if one of the contracting parties performs at an earlier date or at a cheaper price. In those cases, the bonus is triggered by the achievement of the performance over and above the basic contract requirement. (See the two examples in U-4)

In this case, the bonus was payable simply by performance of the basic contractual obligations set out in the Construction Contract. Although it appears that EUS completed the job at an earlier date than required by contract, the bonus was not triggered by that earlier performance. It was payable if the basic contract performance had been achieved by December 20th, regardless of whether it may have been achieved at an earlier date.

Nor was the bonus needed as an incentive in these circumstances. The Construction Contract already had ample incentives, in the nature of penalties, that were provided. Under GC 36, there were liquidated damages provided at the rate of $20,000 per day to a maximum of 10% of the contract price if Substantial Completion of the work did not occur on or prior to the Substantial Completion Date.

In addition, under General Condition 30.4, 324 NSL was entitled to hold back from EUS an amount equal to 125% of the estimated cost of completing any outstanding Punch List Items.

Between the two provisions, EUS was subject to severe financial penalties if performance was not obtained.

NSPI made no attempt to justify why the liquidated damages and withholding provisions of the contract were not a sufficient incentive in the circumstances and why there was need for an additional bonus.

In these circumstances, the Consumer Advocate reaffirms its request that the bonus portion of the Construction Contract not be recovered from ratepayers.

Yours truly,

John Merrick

JM:dlb

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