

January 18, 2011

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VIA E-MAIL TO Boardsec@oeb.gov.on.ca

Ontario Energy Board  
P.O. Box 2319  
2300 Yonge Street, 27<sup>th</sup> Floor  
Toronto, Ontario  
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Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**RE: In the Matter of the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B and in the Matter of an application by Toronto Hydro-Electric System Limited for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2011 – SUBMISSIONS OF AECON UTILITIES, A DIVISION OF AECON CONSTRUCTION GROUP INC.**

1. Aecon Utilities, a division of Aecon Construction Group Inc. (“Aecon”) makes the following submissions in relation to the Ontario Energy Board (the “Board”) Decision on Confidentiality and Procedural Order No. 4 (EB-2010-0142) dated January 12, 2011 (“Order”).
2. These submissions are further to Aecon’s letter of Application for Intervenor Status dated January 14, 2011 (“Notice Letter”) and further to Procedural Order No. 6 dated January 18, 2011 granting intervenor status to Aecon.

### **Background**

3. Toronto Hydro-Electric System Limited (“Toronto Hydro”) filed an application, dated August 23, 2010, with the Board under section 78 of the *Ontario Energy Board Act*, S.O. 1998, c.15, Schedule B, seeking approval for changes to the rates charged by Toronto Hydro for electricity distribution.

4. As part of the application, on December 20, 2010, Toronto Hydro filed additional documents in accordance with the Board's *Rules of Practice and Procedure* in its *Practice Direction on Confidential Filings* (the "Practice Direction"). One of the documents filed was a redacted Term Contract for Civil and Electrical Design Build Services (the "Contract") which was a representative contract with a contractor.
5. Toronto Hydro submitted that the Contract should be treated as confidential. The Contract contains Schedule C which contains unit pricing of its contractors.
6. Toronto Hydro has previously made a request for confidentiality in accordance and in compliance with paragraph 5.1.4 of the Practice Direction and Aecon's submissions are in support of the request for confidentiality made by Toronto Hydro.
7. The Board asked for submissions from parties on two matters relating to the Contract. First, whether or not confidentiality of the Contract should be maintained. Second, if so, whether the Board should also accept Toronto Hydro's proposal that only counsel for the various intervenors be permitted access to Schedule C of the Contract.
8. In the mean time, the Board restricted access to Schedule C of the Contract to counsel who will execute the Board's Declaration and Undertaking.

### **Factors Relevant to the Consideration of Confidentiality**

9. As set out in Schedule B to the Practice Direction some of the factors that the Board considers are
  - a. the potential harm that could result from the disclosure of the information, including
    - i. prejudice to any person's competitive position;
    - ii. whether the information could impede or diminish the capacity of that party to fulfill existing contractual obligations;
    - iii. whether the information could interfere significantly with negotiations being carried out by a party; and
    - iv. whether the disclosure would be likely to produce a significant loss or gain to any person;
  - b. whether the information consists of a trade secret or financial, commercial scientific, or technical material that is consistently treated in a confidential manner by the person providing it to the Board;

- g. any other matters relating to *FIPPA* and *FIPPA* exemptions.
10. The Board's Practice Direction states that it is subordinate to existing law and regulations, including the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*").

### **Application of the Factors to the Contract**

11. One of the specific factors that the Board will consider per Schedule B to the Practice Direction and per section 5.1.9 of the Practice Direction is whether the Board has in the past assessed or maintained the same type of information as confidential. As the Board recognizes, it is desirable to maintain the consistency in the treatment of information.
12. As set out in Schedule C to the Practice Direction, the Board has considered third party information as described in section 17(1) of *FIPPA* to be confidential information.
13. Section 17(1) of *FIPPA* states that the Board shall not, without the consent of the person to whom the information relates, disclose a record where
- a. The record reveals a trade secret or scientific, technical, commercial, financial or labour relations information;
  - b. The record was supplied in confidence implicitly or explicitly; and
  - c. Disclosure of the record could reasonably be expected to have the following effects:
    - i. Prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization;
    - ii. Result in similar information no longer being supplied to the Board where it is in the public interest that similar information continue to be so supplied;
    - iii. Result in undue loss or gain to any person, group, committee or financial institution or agency; or
    - iv. Reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.
14. Section 1(1) of Ontario Regulation 460 then specifically designates the Ontario Energy Board as an institution and states that the Chair is the head of that institution for the purpose of complying with the provisions of *FIPPA*.

15. Aecon's submission is that confidential information of Aecon is captured by the above and shall not be disclosed by the Board as a matter of compliance with *FIPPA*.
16. Aecon submits that the Contract provided to the Board by Toronto Hydro contains third party information which is proprietary to Aecon. Such financial information is a trade secret of Aecon which it has diligently sought to protect. As such, it asks the Board to consider the harm that would result from the disclosure of the information. Such disclosure would prejudice its competitive position. Its competitors and clients would have public access to the very information that gives Aecon its competitive advantage. It would result in interference with its contractual obligations and would impede its ability to enter into negotiations with other parties who would have its pricing information at their disposal. The above noted would result in significant undue loss to Aecon and in an unwarranted gain to its competitors. One of the consequences of releasing the pricing information is that competitors could use the knowledge of Aecon's unit pricing to outbid Aecon in the future. Furthermore, other customers of Aecon would become aware of the pricing information offered to Toronto Hydro resulting in serious interference with its contractual relations.
17. Some of the intervenors in the within proceedings are companies which are in the same industry as Aecon, specifically Powerline Plus Ltd., Horizon Utilities Corporation and PowerStream Inc. Even disclosure pursuant to a signed declaration could provide a competitive advantage to these companies to the detriment of Aecon.
18. Furthermore, it appears that allowing the disclosure of such information could result in parties intervening in the future for the wrong purpose of being able to gain a competitive advantage through access to competitors' confidential information.
19. The third party information was supplied to Toronto Hydro in confidence. Aecon submits that Toronto Hydro has a duty to keep such information confidential and it reasonably relied on Toronto Hydro's representation that its information, and particularly its pricing information will be kept strictly confidential by the Toronto Hydro.
20. The disclosure of the commercially sensitive and confidential information of Aecon would result in irreparable damage to its financial and market position.
21. Furthermore, it is submitted that the confidential information sought to be disclosed is not material to the Application.
22. As a result, it is Aecon's submission that the prejudice to both Aecon as a result of the disclosure of the Contract and particularly Schedule C and the prejudice to the public interest associated with this type of disclosure substantially outweighs the interest to the public in this matter to obtain this very specific information as part of the Board's process.

All of which is respectfully submitted,

**Aecon Utilities, a division of Aecon Construction Group Inc.**

[ *original signed by* ]

Patricia Skringer  
Legal Counsel

cc. J. Mark Rodger, Counsel for the Applicant  
cc. Intervenors of Record for EB-2010-0142