

**EB-2016-0152 - Ontario Power Generation Inc.
Application for payment amounts for the period
from January 1, 2017 to December 31, 2021**

**REASONS FOR CONFIDENTIALITY REQUEST
OF CANDU ENERGY**

Background

1. In Procedural Order No.1 dated August 12, 2016, the Board agreed to grant Candu Energy Inc. ("Candu") intervenor status to participate in procedural steps that relate to or affect the confidentiality of certain information filed by Ontario Power Generation Inc. ("OPG").
2. Candu seeks confidential treatment for certain portions of the Engineering, Procurement and Construction Agreement for the Darlington Refurbishment Steam Generator Project dated December 30, 2013 (the "SG EPC Contract"). By letter dated August 17, 2016, Candu confirmed its intent to participate as intervenor for this purpose.
3. Pursuant to the Board's *Practice Direction on Confidential Filings* ("*Practice Direction*"), OPG filed a confidential un-redacted version of the SG EPC Contract and contract summary. As an interim measure the Board put in place a process to allow counsel and consultants for intervenors that wish to review the confidential versions to do so after signing the Board's Declaration and Undertaking form.
4. Pursuant to section 5.1.4(a) of the *Practice Direction*, these submissions constitute Candu's reasons for the confidentiality request, including the reasons why the information at issue is considered confidential and the reasons that public disclosure of that information would be detrimental.

Summary of Candu's Reasons

5. Candu seeks confidential treatment only for those portions of the SG EPC Contract containing equivalent or analogous information to those which have been recognized by the Information and Privacy Commissioner of Ontario ("IPCO") to be exempt from public disclosure in accordance with ss. 17(1), and 18(1) of the *Freedom of*

Information and Protection of Privacy Act, R.S.O. 1990 c. F.21 ("*FIPPA*") in proceedings leading to Order PO-3311 dated February 25, 2014 (Adjudicator Loukidelis)¹.

6. Candu's reasons for requesting confidentiality are the same as those which were accepted by the IPCO in Order PO-3311 (for equivalent or analogous information of the SNC-Aecon JV), relating to the protection of trade secrets or scientific, technical, commercial, financial or labour relations information supplied in confidence to OPG by Candu, and protection of the Candu's interests in future negotiations.

7. The reasons that public disclosure would be detrimental to Candu are the same as those found by the IPCO Adjudicator in Order PO-3311 (for equivalent or analogous information of the SNC-Aecon JV), relating to the reasonable expectation that disclosure would prejudice significantly the competitive position, or interfere significantly with the contractual negotiations, of Candu, or result in undue loss to Candu, because the information could be unfairly exploited by a competitor of Candu in the marketplace.

The Information for which Confidential Treatment is Sought

8. In order to minimize inconvenience or cost to parties and the Board, Candu seeks confidential treatment only for the following portions of the SG EPC Contract and related portions of the contract summary (together, the "Candu Confidential Information"):

- Sections:
 - 2.14(g) - [WSIB account numbers only]
 - 5.6 – Adjustment to Reimbursable Work Fixed Fee
 - 7.6(a) - [GST/HST registration numbers only]
 - 8 – Incentives and Disincentives
 - 10.7 – Limitation of Liability
- Schedules:
 - 2.2(a) – Organisational Chart [names of individuals only]
 - 5.7 – Economic Cost Adjustment
- Attachments (to Schedule 7.1):
 - 7.1(1) – Contract Price (Escalated)
 - 7.1(3) - Fixed Price Work & Firm Price Work – Primary Side
 - 7.1(4) – Cost Flow for Fixed Price Work – Primary Side
 - 7.1(5) – Target Cost for Reimbursable Work – Primary Side
 - 7.1(6) – Cost Flow for Reimbursable Work – Primary Side
 - 7.1(7) – Reimbursable Work Fixed Fee – Primary Side
 - 7.1(14) – Contingency Work [for Primary Side Cleaning only]
 - 7.1(17) – Reimbursable Costs with No Mark Up [estimated costs only]
 - 7.1(18) - Milestone Payment Schedule for Fixed Price Work and Firm Price Work – Primary Side [payment breakdown only]

¹ Order PO-3311 was upheld by the Divisional Court in *Aecon Construction Group Inc. v. IPCO*, 2015 ONSC 1392 (Div. Ct.)

- 7.1(19) Milestone Payment Schedule for Reimbursable Work Fixed Fee – Primary Side & Secondary Side [payment breakdown for Primary Side only]
- 7.1(24) – Cost Allocation Table
- Project Change Directive 008 [price information only]

Order PO-3311

9. In claiming confidential treatment with respect to provisions of the SG EPC Contract and making redactions for purposes of OPG's public filing in this Application, Candu has strictly applied the reasoning and findings of Order PO-3311 to equivalent or analogous provisions in the SG EPC Contract.

10. In Order PO-3311, the Adjudicator found as a fact that:

- a. The RFR Agreement contains information that qualifies as commercial information for purposes of *FIPPA*: Order PO-3311, para. 22-24;
- b. Exhibits 1.1(jjjjjjj) and 1.1(qqqqqqq) to the RFR Agreement also contain technical information for purposes of *FIPPA*: Order PO-3311, para. 22;
- c. The provisions of the RFR Agreement containing pricing models, reimbursable costs and cost incentives, mark-ups, fixed fees, thresholds for various audits and burdens, and provisions relating to the terms and adjustments of payments, contain financial information for purposes of *FIPPA*: Order PO-3311, para. 25;
- d. The following portions of the RFR Agreement were supplied to OPG by the SNC-Aecon JV for purposes of *FIPPA*:
 - i. Exhibits 1.1(jjjjjjj), except its first page, and Exhibit 1.1(qqqqqqq): Order PO-3311, para. 55;
 - ii. Attachments 1 and 2 to Exhibit 6.1 (Pricing): Order PO-3311, para. 56; and
 - iii. The SNC-Aecon JV's WSIB, GST, HST registration numbers and banking information: Order PO-3311, para. 57;
- e. The SNC-Aecon JV had an expectation of confidentiality that was reasonably held in supplying this information to OPG: Order PO-3311, paras. 67-68;
- f. Disclosure of this information could reasonably be expected to prejudice the competitive position or interfere significantly with the contractual negotiations of the SNC-Aecon JV, and provide its competitors with details

that may prejudice the SNC-Aecon JV's competitive position, or result in undue loss to it: Order PO-3311, paras. 74 and 75;

- g. Disclosure of the following provisions of the RFR Agreement could reasonably be expected to result in prejudice to the economic interests or competitive position of OPG in the ongoing and future negotiations in which it must engage with the SNC-Aecon JV and others within ss. 18(1)(c) of *FIPPA*:
 - i. Sections 3.11 (in part) and 4.6; and
 - ii. Exhibits 3.11, 4.7, 6.3(a) excluding Attachment 1, and 8.2(a): Order PO-3311, paras. 104-105;
- h. OPG properly exercised its discretion in withholding these provisions: Order PO-3311, paras. 134-135; and
- i. The required elements for the application of the public interest override in s. 23 of *FIPPA* are not met.

11. In the event that any interested party or Board staff wishes to challenge the findings of the Adjudicator in Order PO-3311 or their applicability to the Candu Confidential Information, then Candu will ask the Board to provide it with an opportunity herein to file evidence and submissions to support its claims for confidentiality.

Conclusions

12. Candu submits that these reasons for its confidentiality requests, including the reasons why the information at issue is considered confidential and the reasons that public disclosure of that information would be detrimental, are fully supported by the reasoning and findings of the IPCO in Order PO-3311. Candu knows of no reason why they would not meet the Board's requirements under the Practice Direction, including section 5.1.4(a) thereof.

ALL OF WHICH IS RESPECTFULLY SUBMITTED. August 24, 2016