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BY EMAIL and RESS

August 31, 2016
Our File: EB20160152

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2016-0152 – OPG 2017-2021 – Issues List and Confidentiality Submissions

We are counsel to the School Energy Coalition (“SEC”). Pursuant to Procedural Order No.1, these are SEC’s submissions on the draft Issues List and confidentiality.

Draft Issues List

SEC has reviewed the submissions of Board Staff on the draft Issues List and supports their proposed revisions.

Confidentiality

SEC has conducted a preliminary review of the information contained in the pre-filed evidence for which confidentiality has been sought. Besides information addressed in the comments below, SEC believes the request for confidentiality is consistent with what the Board has granted in previous OPG payment amount proceedings (EB-2013-0321 and EB-2010-0008).

SEC does have concerns with the requests for confidential treatment related to certain Darlington Refurbishment Project (“DRP”) information. Based on the adequacy of the information provided, SEC is unable to properly assess what information should be accorded confidential treatment by the Board.

DRP Contracts and Summaries

OPG has redacted certain information regarding the DRP contracts and their summaries, primarily based on the request of the contract counterparties, SNC/AECON JV (a joint venture of AECON and SNC-Lavalin) and Candu Energy Inc. (“Candu”).¹ SNC/AECON JV and Candu have been granted intervenor status and have individually made requests for confidential treatment.

¹ OPG Letter dated May 27 2016 (Letter appears to mistakenly dated May 13 2015); OPG Submissions on Confidentiality, August 24 2016;

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SNC/AECON JV and Candu have sought confidential treatment over aspects of its DRP contracts with OPG², on the sole basis that the specific information was previously recognized by the Information Privacy Commissioner of Ontario ("IPC") to be exempt from disclosure, under *Freedom of Information and Privacy Act* ("FIPPA") in Order PO-3311 ("Order PO-3011" or "IPC Decision"), or that it is analogous information contained in the contracts not at issue in that IPC order.

In Order PO-3311, the IPC upheld OPG's decision to deny access to certain provisions of the Retube and Feeder Replacement Project Agreement between OPG and SNC/AECON JV either on the basis of section 17(1)(a) or (c)³, or 18(1)(c)⁴ of the *FIPPA*.⁵

For the purposes of this proceeding, SEC takes no position on the appropriateness of using an IPC decision as the sole basis for the Board granting confidential treatment to certain information. SEC does take issue with how that decision is being applied to the information that SNC/AECON JV and Candu are seeking confidential treatment in this proceeding. It is not sufficient to simply say the information is consistent with that identified as not requiring disclosure under *FIPPA*. SNC/AECON JV and Candu must show directly how it is consistent, and how they specifically (as opposed to OPG) would be able to utilize the *FIPPA* exemption themselves.

DRP Contracts. The information upheld on the basis of 18(1)(c) of *FIPPA* were certain provisions of the agreement related to schedule and execution phase plans, incentives and disincentives in the cost and schedule, and calculations of the productivity gains formula.⁶ The IPC Decision essentially rested on it accepting the evidence of OPG that there would be economic harm since certain contracts and sub-contracts at the time had not yet been negotiated and public disclosure could reasonably be expected to prejudice OPG's position in the ongoing and future negotiations "to bring the execution phase of the refurbishment project to fruition".⁷ The decision was rendered in February 2014, and much of the DRP work is already in the execution phase, and therefore, much of the rationale of the IPC no longer applies. No evidence or submissions were provided by OPG, SNC/AECON JV or Candu regarding what parts of the IPC Decision are still applicable due to the passage of time.

² SNC/AECON Contracts: D2-2-3, Attachments 6,8,10, Candu Contracts:Ex.2-2-3, Attachment 9

³ *Freedom of Information and Privacy Act*:

17(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

....

(c) result in undue loss or gain to any person, group, committee or financial institution or agency;

⁴ *Freedom of Information and Privacy Act* :

18. (1) A head may refuse to disclose a record that contains,

...

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

...

⁵ Information and Privacy Commission (Appeal PA12-216), Order PO-3311 ["PO-3311 IPC Decision"], p.41

⁶ PO-3311 IPC Decision, para. 105

⁷ PO-3311 IPC Decision, para. 104

Complicating matters is that SNC/AECON JV is only seeking confidentiality treatment over a sub-set of the Retube and Feeder Replacement Project Agreement information that the IPC upheld was not required to be disclosed⁸. But no rationale has been provided for why some aspects of that agreement can now be disclosed and others cannot. More problematic is that, with respect to all the other contracts' portions for which confidentiality treatment is being sought by SNC/AECON JV or Candu, on the basis that they are analogous to what was found in the IPC decision, no submissions were made actually linking the specific confidentiality requests sought with the purported analogous portion of the IPC decision. Both of them should be required to provide this information in their reply submissions. Parties then should be granted an opportunity to respond to them.

Regardless, since it is SNC/AECON JV and Candu who are really seeking the confidentiality over most of this information and not OPG, the IPC decision regarding section 18(1)(c) of *FIPPA* cannot be a basis for the Board granting confidentiality status. Section 18(1)(c) is about protecting the disclosure of information that would harm the economic interests or competitive position of an institution, which is an entity under the purview of *FIPPA* (i.e. OPG), not a third-party (i.e. SNC/AECON JV or Candu) to the request, as is the case section under 17(1)(a) or (c).

With respect to the information for which OPG is seeking confidential treatment independent of SNC/AECON JV and Candu, besides the Extended Services Master Services Agreement, which SEC accepts, it has not provided any specific rationale for why it should be confidential.⁹ It is not even clear to SEC which redactions are those it independently seeks confidential treatment on, or that were done so as to not prejudice any request SNC/AECON JV or Candu would make. OPG should specifically identify redactions of the contracts and contract summaries that it is seeking independent of that sought by SNC/AECON JV or Candu, and the reasons for it.

Contract Summaries. SEC submits it is unclear what the link between the proposed confidential information in the contracts and the proposed information contained in the contract summaries are. Neither SNC/AECON JV, Candu, or OPG have provided any specific rationale for why each of the redactions are being sought in the contract summary; just the blanket statement that they are consistent with the information that was not required to be disclosed by the IPC. It is unclear to SEC what the specific linkages are between the information, especially as most of the redacted information is at a relatively high level and/or is providing aggregate financial information that would not disclose information at the level of detail contained in the various contracts that would have been consistent with the IPC order.

With respect to the certain information contained in the Extended Services Master Services Agreement, which OPG is seeking to be treated with confidentiality, it is not clear to SEC that the rationale for the specific redactions to the contract requires any aspect of the summary to be also redacted.

Subject to reviewing any subsequent submissions, SEC sees no reason why any aspect of the contract summaries should be granted confidential treatment by the Board.

DRP Reports. OPG stated in its May 27 2016 letter that it has redacted some portions of various DRP Reports¹⁰ so as not to prejudice the position SNC/AECON JV may take related to confidential information.¹¹ Yet, in SNC/AECON JV's submissions on confidentiality, they did not seek nor reference the confidential treatment of any aspect of the reports. SEC submits the Board should not

⁸ For example, the PO-3311 IPC Decision upheld OPG's decision to deny access to sections 8.1-8.6 of the Retube and Feeder Replacement Project Agreement which related to incentives and disincentives of the cost and schedule. Neither OPG or SNC/AECON JV are currently seeking confidential treatment to those sections

⁹ OPG Letter dated May 27 2016, p.5

¹⁰ D2-2-8, Attachment 2,3 and 4; D2-2-0, Attachment 2

¹¹ OPG Letter dated May 27 2016, p.6

grant confidentiality to any aspect of the DRP reports on this basis. If in its reply submissions, SNC/AECON JV's claims that the information redacted in these reports is consistent with the information for which it has sought confidentiality specifically, it must ensure that those submissions do not suffer the same inadequacies as discussed above.

Conclusion on Confidentiality

SEC submits the request for confidential treatment over certain aspects of the DRP contract, the contract summaries, and any reports, is simply inadequate for a proper determination on confidentiality. SNC/AECON JV and Candu should be required to remedy this in their reply submissions, and intervenors should have a further opportunity to comment on those submissions.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Applicant and Interested Parties (by email)