

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

REPLY OF THE SNC/AECON JV ON ITS CONFIDENTIALITY REQUEST

Background

1. In response to the SNC/Aecon JV's Reasons for Confidentiality Request dated August 24, 2016 submitted pursuant to Procedural Order No.1 dated August 12, 2016, and the section 5.1.4(a) of the Board's *Practice Direction on Confidential Filings* ("*Practice Direction*") responses were received from only three parties on August 31, 2016: Ontario Power Generation Inc. ("OPG"), Schools Energy Coalition ("SEC"), and Board Staff.

2. This is the SNC/Aecon JV's Reply to those submissions

The Responses Received

3. The response from OPG simply clarifies its position on the confidentiality request of the SNC/Aecon JV, and requires no reply.

4. The response from Board Staff does not object to any aspect of the confidentiality request of the SNC/Aecon JV, and specifically states that Board Staff agrees with certain aspects of the request. Again, this response requires no reply.

5. The response from SEC is the only one to take issue with any aspect of the confidentiality request of the SNC/Aecon JV. Among other things, the response from SEC seeks a variation of Procedural Order No. 1, by requesting a right of sur-rely to the SNC/Aecon JV's reply.

6. The following submissions reply to the response of SEC.

Variation of Procedural Order No. 1.

7. The SNC/Aecon JV agrees that if the Board requires further proceedings regarding its request for confidentiality, then a variation of the procedures set out in Procedural Order No. 1 is required. However, the process variation proposed by SEC is inadequate.

8. In its August 24, 2016 submission, the SNC/Aecon JV provided a detailed listing of the provisions of the agreements and related documents for which it seeks confidential treatment, and a detailed synopsis of the findings made by Adjudicator Loukidelis in Order PO-3311 dated February 25, 2014 under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 c. F.21 ("*FIPPA*"). We then stated in para. 13:

"In the event that any interested party or Board staff wishes to challenge the findings of the Adjudicator in Order PO-3311, then the SNC/Aecon JV will ask the Board to provide it with an opportunity herein to file similar evidence and submissions to those provided in that proceeding, and the SNC/Aecon JV may also file other evidence and make additional arguments to support its claims for confidentiality."

9. If the Board requires further proceedings regarding any aspects of its confidentiality request, as suggested by SEC, then the SNC/Aecon JV asks that a date be set for the delivery of such evidence and submissions by the SNC/Aecon JV, and for responding evidence and submissions, if any, by other parties, with reply by the SNC/Aecon JV.

10. There is no risk that prejudice to any party or that any delay in this application will be caused by such process, because of the interim arrangements put in place by the Board for confidential access to the material reacted from the public Exhibits by counsel and consultants upon execution of the required Declaration and Undertaking.

The "Aspects" of the SNC/Aecon JV's Request Challenged by SEC are Unclear

11. At the outset, the response of SEC to all parties' requests for confidentiality (p. 1) states it is based on a "preliminary review" of the redacted information, and takes broad objection to "the adequacy of the information provided ...to properly assess what information should be accorded confidential treatment by the Board." SEC's

“Conclusion on Confidentiality” (p.4) suggest this may constitute a global objection to the adequacy of all of the SNC/Aecon JV’s confidentiality request.

12. On the other hand, the SEC response also states in the “Conclusion on Confidentiality” that its challenge may be to only “certain aspects” of the SNC/Aecon JV’s confidentiality request. The SEC response appears to concede (p. 1) that at least some aspects of the request are “consistent with what the Board has granted” in prior OPG proceedings. SEC does not specify in either case what aspects are referred to.

13. Any further process on these issues would be expedited and made more efficient if the Board (or by direction of the Board, SEC) would identify at the outset all specific contract or contract summary redactions on which further evidence and submissions are to be provided.

The Significance of Order PO-3311

14. However, it is submitted that the Board can and should, at this stage, address the propriety of the SNC/Aecon JV’s reliance on Order PO-3311.

15. The SEC response (p. 2) purports to take no position on this issue.

16. However, the Board Staff response (p. 8) properly notes that, based on the Board’s own Practice Direction Appendix “A”, section (e), it would be appropriate to accept any redactions found to be exempt from public disclosure in PO-3311 and equivalent or analogous information. As a matter of *prima facie* confidentiality, the SNC/Aecon JV submits that principle is necessarily both correct in law, and appropriate in terms of the Board’s regulatory integrity. While it is conceivable that the Board might weigh different factors than the IPCO in deciding whether a public interest override of the threshold right to confidentiality should be applied, based on special considerations of particular relevance to a matter in dispute before the Board, no such arguments are made by SEC or any other party in this case.

17. The SNC/Aecon JV maintains that all the redactions it has requested fall within this principle, and should be upheld.

Conclusions

18. The SNC/Aecon JV therefore submits that the Board should accept all of the redactions it has requested at this time. In the alternative, a new process should be

established to receive further evidence and submissions on specific redactions to be identified by the Board or SEC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED. September 9, 2016

A handwritten signature in black ink, appearing to read "M. Philip Tunley", with a period at the end.

M. Philip Tunley