

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

**SUPPLEMENTARY WRITTEN SUBMISSIONS ON CONFIDENTIALITY
OF THE SNC/AECON JV**

Background

1. Pursuant to the Board's Procedural Order No.1 dated August 12, 2016 and to section 5.1.4(a) of the *Practice Direction on Confidential Filings*, SNC-Lavalin Nuclear Inc. and Aecon Construction Group Inc. (together the "SNC/Aecon JV") as intervenors, provided reasons in support of their request for confidential treatment for information contained in certain portions of the contracts that they have entered into related to the refurbishment of the Darlington Nuclear Generating Station ("DNGS"). Those Written Submissions were filed on August 24, 2016 and a Reply on behalf of the SNC/Aecon JV was filed on September 9, 2016.
2. The three contracts with the Ontario Power Generation Inc. ("OPG") for which confidentiality protection has been claimed by the SNC/Aecon JV, including amendments thereto (collectively, the "DRP Contracts") are:
 - a. the Engineering, Procurement and Construction Agreement for the Darlington Refurbishment Retube and Feeder Replacement Project dated March 1, 2012 as amended (the "EPC Contract for RFR"),
 - b. the Engineering, Procurement and Construction Agreement for the Turbine Generator Refurbishment Project dated January 22, 2014 as amended (the "EPC for Turbine Generators"), and
 - c. the Extended Services Master Services Agreement dated December 19, 2014 (the "ES MSA").

3. OPG has filed a public redacted versions and confidential un-redacted versions of these contracts, and of related contract summaries, reports and other documents containing the information sought to be protected. The Board also put in place a process to allow identified 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. In its Decision on Confidential Filings and Procedural Order No. 3 dated November 1, 2016 (the "Decision"), the Board asked certain questions and requested further submissions from the SNC/Aecon JV and other interested parties regarding some aspects of these claims for confidentiality protection. In response, the SNC/Aecon JV is filing with these Supplementary Written Submissions evidence in the form of a Witness Statement of Hugh Loughborough to respond to the Board's questions and to provide a more complete factual foundation for the SNC/Aecon JV's Submissions.

5. These Supplementary Written Submissions rely upon, but do not necessarily repeat, the Submissions previously filed by the SNC/Aecon JV on August 24 and September 9, 2016. The three Submissions should be read together in connection with any final decision to be made by the Board.

The Board's Question About Ongoing Confidentiality

6. At page 11 of the Decision, the Board specifically asks the SNC/Aecon JV to address the following question:

"Why should the information in the related DRP Contracts, DRP Contract Summaries and DRP Reports be treated as confidential given that all the major contracts related to the DRP have been executed?"

7. At paragraphs 7-16 of his Witness Statement, Hugh Loughborough has provided a clear and detailed account of facts that are required to answer this question, that relate to current market conditions in the nuclear industry in Ontario, and the ongoing contracting activities in that marketplace of the SNC/Aecon JV and other suppliers of services similar to those contracted for in the DRP Contracts. These facts highlight, among other things, the following.

- a. The limited nature of the nuclear industry within Ontario, both in terms of the number of nuclear operators (ie clients) requiring such contractual

services, and in terms of the suppliers such as the SNC/Aecon JV and its component companies, who service them. (Para. 9)

- b. The limited, but ongoing nature of the contractual opportunities available to suppliers in that market - more than 500 RFP's or similar requests have been issued by Ontario based clients within the past year, resulting in only 10 major (\$10mn or above) new opportunities in the last 6 months, for one of only 3 major clients. (Paras. 13 and 14)
- c. The resulting needs for suppliers to be actively involved in bidding on the available contract opportunities as they arise on an ongoing basis – for example, the SNC/Aecon JV or its component companies have bid on more than 300 of the 500 available opportunities within the past year. (Paras. 9, 10, 13, 14 and 16)

8. In these paragraphs, Mr. Loughborough also attests to facts which specifically highlight the ongoing relevance and commercial sensitivity of the kinds of information for which confidentiality protection is sought, even where it appears in a prior executed contract, to the integrity of ongoing competitions for new contractual opportunities, some of which are very similar in nature to the DRP Contracts. (Paras. 8(c), 9, and 11-16) He elaborates on the specific types of information that are particularly sensitive in this regard in paras. 17-26 of his Witness Statement discussed below.

9. Importantly, Mr. Loughborough emphasizes that this is not just a matter of protecting the private interests of suppliers in this marketplace, but equally the clients' and the public interests in maintaining a viable and competitive community of qualified suppliers in the Ontario marketplace. (Paras. 8(b), 9-10, 13 and 15)

10. In that context, it is submitted that Mr. Loughborough is justified in his view that the date of signature of a contract, and even the date of completion of the execution of a given engagement, should not be considered relevant in determining whether particular contractual information remains commercially sensitive or not. (Paras. 12 and 15-16)

Clear and Detailed Support for the Confidentiality Requests

11. Also at page 11 of its Decision, the Board has asked for clear and detailed information to support submissions on why specific contract provisions or attachments are sought to be protected by a confidentiality order in this case.

12. Mr. Loughborough's Witness Statement provides a response to that request, in seven distinct but related categories:

a. Productivity: (Para. 20)

- EPC Contract for RFR Section 3.11 and Exhibit 3.11;
- EPC Contract for RFR - Amendment #4, Bullet 9 – Changes to Section 3.11 and Exhibit 3.11; and
- Expert Panel Report, Exhibit D2-2-8, Attachment 4, pg 24.

b. Fixed Fees: (Para. 21)

- EPC Contract for RFR Section 4.6, and Attachment 1 and 2 to Exhibit 6.1;
- EPC Contract for RFR - Amendment #2 Attachments 1 and 2 to Exhibit 6.1;
- EPC Contract for RFR - Amendment #3, Attachments 1 and 2 to Exhibit 6.1;
- EPC for Turbine Generators Section 5.6 and Attachments 7.1(6) and 7.1(9);
- ES MSA Sections 1.1(jjj) and 5.2(a); and
- KPMG Report, Exhibit D2-2-8, Attachment 3, pg 66.

c. Tooling Performance: (Para. 22)

- RFR EPC Contract Exhibit 1.1 (jjjjjjj) and Exhibit 1.1 (qqqqqqq).

d. Cost Adjustment and Escalation: (Para. 23)

- EPC Contract for RFR Exhibit 4.7;
- EPC Contract for RFR - Amendment #3, Exhibit 4.7;

EPC for Turbine Generators Schedule 5.7

e. Allowed and Disallowed Costs: (Para. 24)

- EPC Contract for RFR Exhibit 6.3(a);
- EPC Contract for Turbine Generator Attachments 7.1(10) and 7.1(13); and
- ES MSA Schedule 5.

f. Incentives and Disincentives: (Para. 25)

- EPC Contract for RFR Exhibit 8.2(a);
- EPC Contract for RFR - Amendment #4 Bullet 11 – Changes to Section 8.2(a)(2) and Exhibit 8.2 – and Bullet 12 – Changes to Section 8.2(b)(2) and Section 8.2(c)(2)
- EPC Contract for RFR - Amendment #5 Bullet 5 – Changes to Article 8 – Bullet 7 – Changes to Section 8.6 – and Exhibit 6.1

g. Mark-Up on Sub-Contracts: (Para. 26)

- ES MSA Section 8.1(g)

13. The factual basis and rationales provided by Mr. Loughborough for each category are compelling. They need not be repeated here. The SNC/Aecon JV commends them to the Board, and submits they should be accepted.

14. The fundamental conclusion that these types of information are commercially sensitive, and that disclosure would prejudice the integrity of contractual bidding processes in Ontario's nuclear industry, can be tested and confirmed in another way. If the suppliers themselves were to share this information in the context of a given competitive bid process, can there be any doubt that they would risk being challenged under the *Competition Act (Canada)*?

The Information is Contractually Protected

15. Finally, Mr. Loughborough points out that the contractual terms in the DRP Contracts, themselves, are also designed to protect the kinds of information for which the SNC/Aecon JV seeks confidentiality protection. It is submitted that "Intellectual Property" is defined very broadly in each of the DRP Contracts between OPG and the SNC/Aecon JV, for example in para. 2.16(a) of the EPC for Turbine Generators, to include

"documents of any kind, ... ideas, processes ... illustrations, schedules, performance charts ... specifications ... information, data ... trade secrets, confidential information ... and know-how"

16. Some of these terms specifically reference and include the types of materials typically submitted by suppliers in their pre-contract bid submissions, such as pricing or incentives proposals, which are later included in the resulting contracts. This intention

is further specifically confirmed by the exclusion of “information comprised within the Submittals” in certain circumstances from “OPG Confidential Information” as defined, for example in para. (mmmm)(2) of the EPC for Turbine Generators.

17. As such, it is submitted that these kinds of information properly fall within the definition of “Retained Intellectual Property”, which expressly preserves the SNC/Aecon JV’s “rights and title in its part of the Intellectual Property”, for example in para. 2.16(c) of the EPC for Turbine Generators.

18. The record of bidding procedures and of negotiation with respect to such items, as well as the terms of the contracts, themselves, when executed in final form, provide the required “written records” that these elements of Retained Intellectual Property “existed before” the Contracts and before the commencement of the Work under them, for the purposes of para. 2.16(c) of the EPC for Turbine Generators.

19. While they may not be binding on the Board in circumstances (not present here) which might demonstrate an overriding public interest in disclosure in the context of a particular proceeding before it, the SNC/Aecon JV submits that absent such a finding, and in the ordinary course, these contractual provisions are consistent with the public interests in maintaining a competitive and viable nuclear industry in Ontario, and should be given effect by the Board.

Conclusions

20. The SNC/Aecon JV again submits that its reasons for these confidentiality requests are fully supported, not only by the reasoning and findings of the IPCO in Order PO-3311, but also by the terms of the DRP Contracts, and by the laws relating to commercial confidentiality and competitive tendering which have been recognized and applied by courts and tribunals, including this Board, but also on the facts set out in the Witness Statement of Mr. Loughborough.

ALL OF WHICH IS RESPECTFULLY SUBMITTED. November 11, 2016



M. Philip Tunley