

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

**WITNESS STATEMENT OF HUGH LOUGHBOROUGH  
OF THE SNC/AECON JV**

**Background**

1. I am the Vice-President, Contracts and Risk Management with Aecon Construction Group Inc. ("Aecon"). As such, I have been assigned as the Contracts Manager for a joint venture between Aecon and SNC Lavalin Nuclear Inc. ("SNC", and together with Aecon, the "SNC/Aecon JV"), in relation to their contractual arrangements with the Ontario Power Generation Inc. ("OPG") related to the refurbishment of the Darlington Nuclear Generating Station ("DNGS").
2. The SNC/Aecon JV has been granted status as an intervenor in these proceedings before the Ontario Energy Board (the "Board"), for the limited purposes of participating in procedural steps that relate to or affect the confidentiality of certain information contained in the contracts between OPG and the SNC/Aecon JV that relate to the DNGS.
3. In that regard, I am thoroughly familiar with the background to and terms of the following contracts between the SNC/Aecon JV and OPG that relate to the DNGS for which confidentiality protection has been claimed by the SNC/Aecon JV, including amendments thereto (collectively, the "DRP Contracts"):
  - 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").
- 4. The SNC/Aecon JV has participated in proceedings leading to the Board's Decision on Confidential Filings and Procedural Order No. 3 dated November 1, 2016. (the "Decision").
- 5. I provide this Witness Statement in response to the requests by the Board in the Decision for further evidence to support, and to respond to, submissions the Board is entertaining on certain questions regarding the claims for confidentiality protection in relation to the DRP Contracts.

#### **A. The Status of the DRP Contracts and the Confidentiality Requests**

- 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. The DRP Contracts have indeed been signed by the parties, and are in the execution phase, however that execution phase is ongoing.
- 8. In response to the Board's question, the reasons why confidentiality is still essential in relation to the limited information for which confidentiality has been requested by the SNC/Aecon JV relate to
  - a. characteristics of Ontario's nuclear industry,
  - b. the public as well as private interests in maintaining the competitiveness of that industry, and

- c. the vulnerability of the SNC/Aecon JV, its component companies, and all successful participants in the industry to competitive disadvantage should public disclosure occur.

9. First, the nuclear industry within Ontario is limited, both in terms of the number of nuclear operators (i.e. clients) who require contractual services such as those provided in the DRP Contracts, and in terms of the suppliers such as the SNC/Aecon JV and its component companies, who service them. In order to maintain a presence and service capability in Ontario, it is essential that participating suppliers maintain the ability to bid competitively on the available contract opportunities as they arise.

10. As a result of these market conditions, whenever a contractual opportunity arises within the Ontario nuclear industry, so long as there is a fair and competitive playing field among suppliers, competition between them for such opportunities is fierce, and clients and their stakeholders benefit.

11. However, in my experience the public disclosure of sensitive information relevant to the pricing methodologies and/or mechanisms by which particular suppliers have been or are being compensated under recent contracts awarded by clients is never made voluntarily by suppliers, and I have never known it to be required by regulators, because it severely undermines the ability of successful (and by definition competitive) suppliers to be successful in bids for future work. This is not simply a matter of the global cost of service, or even the global compensation being received by a supplier, under a given existing contract, which are obviously of direct relevance to the Board, and to other regulators, stakeholders and the public. Rather, it is a function of the detailed pricing formulae and terms by which various elements of cost, or of fixed and performance-related compensation, are structured by a successful supplier within a given contractual engagement. It is a function not only of the competitiveness of the supplier overall, but their creativity and effectiveness in structuring and delivering on contractual arrangements that match the characteristics of the particular contractual opportunity presented by a client in terms of risk, return, performance, reliability, and a host of other factors relevant to that engagement. It is these sensitive pricing and other terms that the SNC/Aecon JV seeks to protect in these proceedings.

12. In this context, the date of signature of a contract, and even the date of completion of the execution of a given engagement, are not relevant in determining whether particular contractual information remains commercially sensitive or not. That is particularly so in the Ontario nuclear industry, and in the present case, for a number of reasons.

13. First, It is important to note that the DNGS refurbishment project currently being undertaken by the SNC/Aecon JV is not a one-off agreement with OPG, nor is it the only nuclear refurbishment project being undertaken in Ontario. The SNC/Aecon JV and its component companies individually consistently bid on new projects of various sizes and for varying scopes of work in response to RFP's issued by OPG, Bruce Power L.P., and other nuclear clients located in the province of Ontario. Within the past year more than 500 RFP's or similar requests have been issued by Ontario based clients. The SNC/Aecon JV and its component companies individually have responded to more than 300 of those requests. The ability to remain competitive is therefore important on a continuing basis, and the disclosure of any information that might have a negative impact on our ability to remain competitive is of the utmost importance.

14. The commercially sensitive information for which the SNC/Aecon JV seeks confidentiality protection in this proceeding can be used unfairly to our competitive disadvantage by competitors in each of these ongoing contractual opportunities as they arise. Thus, for example, over the past six months there have been a limited number of major (\$10mn or above) RFP/RFI opportunities, (not including opportunities arising under the existing ES MSA between the SNC/Aecon JV and OPG<sup>1</sup>) as follows:

- a. Bruce Power Steam Generator Replacement;
- b. Bruce Power Feeder Replacement;
- c. OPG DNGS Valve Program;
- d. OPG DNGS Aux Heating Facility M&O RFI;
- e. CNL – Gently-1 Resin Retrieval;
- f. CNL – Douglas Point Resin Retrieval;
- g. CNL – Whiteshell Standpipe Retrieval;
- h. CNL – Whiteshell Bunker Retrieval (now combined with Standpipe Retrieval);
- i. CNL – Near Surface Repository; and
- j. CNL – Ground Water Processing

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<sup>1</sup> There have in addition been three such: the 1) OPG ES-MSA for Darlington and Pickering; 2) Bruce Power MATOC, and 3) Canadian Nuclear Laboratories MSA

15. Had the information sought to be protected in this proceeding been in the public domain over that time period, it could have been used by our competitors unfairly and to the detriment and disadvantage of the SNC/Aecon JV and its component companies, in relation to each of these opportunities. This would be the case regardless of the precise execution status of the DRP Contracts at the time of each opportunity. Such disclosure would have had a serious negative impact on the competitive position of SNC/Aecon JV and its component companies, on their ability to be successful in these contractual processes, and on their ability to maintain a viable presence in the Ontario nuclear market.

16. In terms of major refurbishment projects like that currently underway at DNGS, Bruce Power L.P. is beginning its own refurbishment project which will to a large extent involve the same work as currently being undertaken at the DNGS. As a result, the disclosure of the redacted information referred to above would significantly impact the SNC/Aecon JV's ability to negotiate a competitive contract for such work since both Bruce Power L.P. and the SNC/Aecon JV's competitors would be privy to the most sensitive details of our pricing and execution strategies for this kind of work.

#### **B. Detailed Analysis of the Contractual Information in Issue**

17. 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.

18. I would emphasize that, with the exception of pinpoint redactions relating to HST number, addressed below, the general rationale for our requests for such protection is the same for all of the contract provisions or attachments in issue. It is based on the recognition that they contain information of a commercially sensitive nature, the disclosure of which would cause ongoing prejudice to the SNC/Aecon JV and its component companies in their commercial negotiations with other clients on other projects as described in the preceding section of this Statement.

19. However, the particular terms and attachments sought to be protected result in such prejudice in different ways which can be described and demonstrated in further detail as the Board requests. In order to respond to this request, I have grouped the redactions that are listed by the Board into several categories as follows.

20. **Productivity:** The redactions in this category are all related to the expected productivity of the SNC/Aecon JV in its execution of sensitive aspects of the contract

work. This includes anticipated gains in productivity that the SNC/Aecon JV has committed, and may in future be prepared to commit, to achieve during a multiple unit refurbishment program such as this. This information is ultimately tied to both the scheduling and pricing of the entire engagements, which are critical to the success of our bids for this type of work in future. The information that is contained in these provisions and attachments reflects the ways in which they are prepared, which in turn is based upon the SNC/Aecon JV's accumulated experience, as well as its methods and capabilities, in performing these kinds of contracts. This kind of information would not normally be available to the SNC/Aecon JV's competitors, but would be of significant value to them in any future contractual competition with us. I believe it would be unfair to make it available in the absence of any reciprocal disclosure from them. The redactions in this category are:

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

21. **Fixed Fees:** The redacted information in this category is all related to the calculation or build-up of the SNC/Aecon JV's fixed fees for various components of the applicable work. It specifically identifies all profit, overhead, contingencies and escalation amounts that are factored in to the pricing of various aspects of the contract work. In any contract bid or negotiation, suppliers in Ontario's nuclear industry draw on their experience and on their technical and other capabilities in calculating and adjusting these elements of a particular contractual arrangement. As such, any information which contains or tends to reveal the methodologies and approaches used by a given supplier for particular aspects of the work, including any resulting price breakdown from which these can be inferred, is extremely sensitive. Disclosure affecting only one supplier would again be competitively harmful and unfair in the extreme. The redactions in this category are:

- a. EPC Contract for RFR Section 4.6, and Attachments 1 and 2 to Exhibit 6.1;
- b. EPC Contract for RFR - Amendment #2 Attachments 1 and 2 to Exhibit 6.1;

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

22. **Tooling Performance:** The redacted information in this category is all related to the performance of the tooling supplied by the SNC/Aecon JV. This includes the corresponding calculation of the reduction of tooling fixed price based on the satisfaction of various performance guarantees. It is obvious that tooling for the performance of contract work in the nuclear industry reflects decisions by a supplier about such things as technological choices and innovation, investment in tooling, and other commercially sensitive matters. These matters in turn affect pricing levels and models, schedule, performance guarantees, and other critical competitive issues in contract bidding and negotiation by suppliers, such that their the disclosure has the potential to affect the fairness and outcomes of particular contractual opportunities. The redactions in this category are:

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

23. **Cost Adjustment and Escalation:** The redacted information in this category identifies the mechanisms by which target costs (namely labour and equipment) are adjusted each year and the applicable indices utilized in the calculation of those costs. These provisions reflect both the judgments being made by individual suppliers about external factors that affect pricing, such as future economic trends, and their own strengths or sensitivities in terms of resources to offset such external impacts. Information about these matters is highly sensitive, such that their the disclosure has the potential to affect the fairness and outcomes of particular contractual opportunities.

- a. EPC Contract for RFR Exhibit 4.7;
- b. EPC Contract for RFR - Amendment #3, Exhibit 4.7;
- c. EPC for Turbine Generators Schedule 5.7

24. **Allowed and Disallowed Costs:** The redacted information in this category identifies all costs contemplated in the project, which in part reflects the actual costs anticipated by a given supplier for which reimbursement was sought during negotiations. The information in this particular case also reveals the classification of such costs, following negotiation with OPG, as either allowed and therefore reimbursable to the SNC/Aecon JV or disallowed and therefore not reimbursable to the SNC/Aecon JV. Both these kinds of information are extremely sensitive to a given supplier, because their disclosure to competitors can reveal important competitive characteristics or sensitivities of the supplier, and important negotiation strategies that they have employed. The redactions in this category are:

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

25. **Incentives and Disincentives:** The redacted information in this category all relates the application and calculation of incentives and disincentives affecting the SNC/Aecon JV's target costs. It specifically reveals the impact of such incentives and disincentives on the fixed fees applicable to the work. For the reasons that have already been outlined in paragraphs 21 and 24 of this Statement, this information is extremely sensitive and its disclosure would cause unfairness and competitive disadvantage to affecting the SNC/Aecon JV in its participation in ongoing and future contract opportunities. The redactions in this category are:

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

26. **Mark-Up on Sub-Contracts:** The redacted information in Section 8.1(g) of the ES MSA relates to mark-up on subcontracts. This information reflects an assessment of the SNC/Aecon JV's costs to oversee the work of subcontractors, in light of our views about the sensitivity of the overall contract performance – in terms of price, schedule, and risk to the SNC/Aecon JV – to the work these subcontractors are to perform. This



information is also commercially sensitive in the manner explained more particularly in paragraphs 20, 21, 24 and 25 of this Statement.

### **C. The Other Pinpoint Redactions**

27. The remaining pin-point redactions for which confidentiality protection is sought contain the SNC/Aecon JV's HST number, which has no bearing on the proceedings before the Board. This information (contained in the ES MSA Sections 8.1(g) and 8.12(a)) is confidential and sensitive to the SNC/Aecon JV, and has not been voluntarily disclosed for that reason. However, the other ground for our request that they not be disclosed by the Board is simply because it is not relevant to the proceeding. The redactions in this category are similar to those accepted by the Board at page 10 of the Decision.

### **D. The Overall Approach to these Confidentiality Requests**

28. It is my own view and it is the position of the SNC/Aecon JV that these confidentiality requests reflect a principled approach to identifying the minimum redactions required to prevent undue commercial harm to the SNC/Aecon JV and its component companies. This is so for a number of reasons.

29. First, the SNC/Aecon JV has been sensitive to requests by OPG for increasing public disclosure in the interests of its stakeholders during contract performance, as well as in anticipation of these proceedings before the Board. The remaining requests for confidentiality reflect the SNC/Aecon JV's own ongoing interests in resisting the release of information that would confer an unfair commercial advantage to our competitors, and resulting harm to us.

30. Second, the SNC/Aecon JV has only sought confidential treatment for those portions of the three contracts 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), and equivalent or analogous information in provisions of the contracts which were not at issue at the time Order PO-3311 was made. Specifically, we have not sought protection for types of information that were determined by Order PO-3311 to be publicly disclosable. In addition, we have only maintained a claim for protection of information which was originally protected at the request of OPG under ss. 18(1) of *FIPPA*, where we believe that same information

is also properly protected at the instance of the SNC/Aecon JV itself under ss. 17(1) of *FIPPA*. Our reasons for that belief are outlined in detail herein.

31. Finally, all of the information sought to be protected by the SNC/Aecon JV has been consistently treated by us as confidential, including under the terms of the DRP Contracts, themselves. Specifically, the SNC/Aecon JV relies upon the definitions of “Intellectual Property” and “Retained Intellectual Property” in the DRP Contracts to include and protect its commercial interests in these types of information, because they all reflect and are the products of “processes”, “trade secrets”, “confidential information”, and “know-how” that the SNC/Aecon JV and its component companies have developed, and which they apply on an ongoing basis in responding to contractual opportunities, as described in this Statement.

November 11, 2016

A handwritten signature in black ink, appearing to read 'H. Loughborough', written over a horizontal line.

Hugh Loughborough