



CITY OF HAMILTON

**PUBLIC WORKS DEPARTMENT
Transportation Division**

TO: Chair and Members Public Works Committee	WARD(S) AFFECTED: CITY WIDE
COMMITTEE DATE: April 8, 2013	
SUBJECT/REPORT NO: Governance Agreement for the Joint Procurement of Electric Cooling Systems and Electric Cooling System Retrofits (PW13028) - (City Wide)	
SUBMITTED BY: Gerry Davis, CMA General Manager Public Works Department	PREPARED BY: Douglas H. Murray Manager, Transit Fleet Maintenance (905) 546-2424, Extension 2804
SIGNATURE:	

RECOMMENDATION

- (a) That the Mayor and City Clerk be authorized and directed to enter into a Governance Agreement with Metrolinx, attached as Appendix “A” to Report PW13028, for the joint procurement of Electric Cooling Systems and Electric Cooling System Retrofits;
- (b) That upon Council approval, a certified copy of this Governance Agreement and accompanying By-Law, in a form satisfactory to Legal Services, Procurement, and Corporate Finance, attached as Appendix “B” to Report PW13028, be forwarded to Metrolinx;
- (c) That the cost of approximately \$1,350,000 to retrofit up to 54 buses be fully funded from the Ontario Transit Capital Reserve #108027.

EXECUTIVE SUMMARY

The City of Hamilton has been offered the opportunity to participate in a joint procurement of Electric Cooling Systems and Electric Cooling System (ECS) Retrofits with Metrolinx and up to ten other Transit Systems. The benefits include:

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- ECS are electrically driven cooling systems that replace the original hydraulic system installed in most transit buses also known as “mini-hybrid” units, and have obtained a resulting fuel savings of 5 to 15%.
- ECS units are a proven technology with over 5,000 units in service across 100 Transit systems, in fact Hamilton’s last order of 41 buses for 2011/2012 had these units factory installed.
- Estimated cost of these units is \$25,000/ per unit excluding installation.
- Return on investment is estimated to be four to five years.

Alternatives for Consideration - See Page 4

FINANCIAL / STAFFING / LEGAL IMPLICATIONS

Financial: Ratification of the Governance Agreement and related by-law implementation would allow the City of Hamilton to become eligible to participate in the Provincial Joint Procurement of Electric Cooling Systems and Electric Cooling System Retrofits. Over the next two to three years, Transportation recommends retrofitting up to 54 buses, model years 2008 to 2010, at a cost of \$1,350,000. This expense would be fully funded from Ontario Transit Capital Reserves #108027. This costing estimate could potentially be further reduced due to a proposed Metrolinx one-time \$5,000/unit grant, less a \$260 Metrolinx participation fee per bus, resulting in a net \$4,740/unit savings to Ontario municipal transit providers to retrofit ECS eligible transit buses. Metrolinx has a confirmed \$2 million grant which would allow for retrofitting of up to 400 Transit buses province-wide.

Staffing: There are no staffing implications.

Legal: There are no legal implications.

HISTORICAL BACKGROUND

This procurement initiative facilitated by Metrolinx involves up to ten Transit systems. This initiative calls for the joint procurement of Electric Cooling Systems and Electric Cooling System Retrofits for the fiscal year 2013 and two consecutive one year options in 2014 and 2015. Other Transit systems can participate in the program subject to the terms and conditions of the governance agreement which is predicated on the following key principals:

- Metrolinx, as facilitator, shall use an open and competitive procurement and be in compliance with Ontario Broader Public Sector Procurement Policies when issuing the tender, whereby the proposals will be evaluated and the master agreement will be awarded to the lowest compliant bidder.
- Participation by transit systems in the joint procurement initiative is voluntary, and participants can withdraw up to and including seven calendar days before award of the master agreement by the Steering Committee.
- The procurement will be overseen/managed by the Steering Committee.

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- Avoid costs by standardizing the tender documents including terms and conditions.
- Obtaining more favourable pricing, given order size and standardizing of specifications.
- Providing the opportunity to share resources in dealing with the technical nature of this procurement.
- Avoid costs and reduce time associated with the procurement process allowing transit systems to focus on core competency.

POLICY IMPLICATIONS/LEGISLATED REQUIREMENTS

The City of Hamilton, entering into a procurement agreement with Metrolinx, complies with our current Procurement Policy under Cooperative Procurements.

The Public Works Business Plan was developed and implemented in 2007. It is used to define the vision for the Public Works Department through to 2017. The plan contains seventeen priorities that are categorized into four division drivers: Communities, People, Processes, and Finances. Hamilton's partnership with Metrolinx and other Transit Systems demonstrates three of the four strategic commitments:

- "Smart Processes to Match our Needs". Partnering with Metrolinx and neighbouring Transit Systems saves valuable human resource time and money.
- "Sound Financial Management for the Long Haul". The purchase of these retrofits will have a positive effect on our fuel budget of 5 to 15% going forward and will be fully funded within current reserves.
- "Servicing our Communities with Trust". The benefits of installing ECS include a reduced power requirement resulting in lower greenhouse gas emissions, and quieter operation, is in accordance with Public Works Strategic Plan commitment to be a leader in "greening" of the City.

RELEVANT CONSULTATION

Staff consulted with Procurement, Legal Services, and Corporate Finance, and all concur with the recommendations in this report. Further, staff consulted with the other Transit Systems throughout our involvement in this current procurement initiative.

ANALYSIS / RATIONALE FOR RECOMMENDATION

There are numerous benefits of converting conventional transit buses to electrically driven cooling systems that replace the original hydraulic system installed in most transit buses, resulting in fuel savings of 5-15%. Other positive factors would be lower greenhouse gas emissions, greater reliability, quieter operation, and a reduced risk of engine fires. Across Ontario, approximately 1,500 transit buses would benefit from ECS retrofits. At a 5% fuel savings, this would remove 9,000 tons of CO2 from the carbon

footprint annually, which is the equivalent of 2,250 cars removed from our roads. ECS is four times more cost effective in achieving fuel cost savings than investing in hybrid technology.

ALTERNATIVES FOR CONSIDERATION

That staff can be directed to enter into a dedicated tender process for the City of Hamilton, or be directed to maintain status quo.

ALIGNMENT TO THE 2012 - 2015 STRATEGIC PLAN

Strategic Priority #1

A Prosperous & Healthy Community

WE enhance our image, economy and well-being by demonstrating that Hamilton is a great place to live, work, play and learn.

Strategic Objective

- 1.1 Continue to grow the non-residential tax base.
- 1.2 Continue to prioritize capital infrastructure projects to support managed growth and optimize community benefit.
- 1.3 Promote economic opportunities with a focus on Hamilton's downtown core, all downtown areas and waterfronts.
- 1.4 Improve the City's transportation system to support multi-modal mobility and encourage inter-regional connections.
- 1.5 Support the development and implementation of neighbourhood and City wide strategies that will improve the health and well-being of residents.
- 1.6 Enhance Overall Sustainability (financial, economic, social and environmental).

Strategic Priority #2

Valued & Sustainable Services

WE deliver high quality services that meet citizen needs and expectations, in a cost effective and responsible manner.

Strategic Objective

- 2.1 Implement processes to improve services, leverage technology and validate cost effectiveness and efficiencies across the Corporation.
- 2.2 Improve the City's approach to engaging and informing citizens and stakeholders.
- 2.3 Enhance customer service satisfaction.

Strategic Priority #3

Leadership & Governance

WE work together to ensure we are a government that is respectful towards each other and that the community has confidence and trust in.

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Strategic Objective

- 3.1 Engage in a range of inter-governmental relations (IGR) work that will advance partnerships and projects that benefit the City of Hamilton.
- 3.2 Build organizational capacity to ensure the City has a skilled workforce that is capable and enabled to deliver its business objectives.
- 3.3 Improve employee engagement.
- 3.4 Enhance opportunities for administrative and operational efficiencies.

APPENDICES / SCHEDULES

Appendix A - Governance Agreement for the Joint Procurement of Electric Cooling Systems and Electric Cooling System Retrofits

Appendix B - By-law to Authorize the Signing of a Governance Agreement for the Joint Procurement of Electric Cooling Systems and Electric Cooling System Retrofits

**GOVERNANCE AGREEMENT FOR THE JOINT PROCUREMENT
OF ELECTRIC COOLING SYSTEMS AND ELECTRIC COOLING SYSTEM RETROFITS**

FEBRUARY 12, 2013

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**GOVERNANCE AGREEMENT
FOR THE
JOINT PROCUREMENT OF ELECTRIC COOLING SYSTEMS AND ELECTRIC COOLING
SYSTEM RETROFITS**

THIS AGREEMENT is effective as of the 12th day of February, 2013.

A M O N G:

METROLINX

- AND -

THE CITY OF HAMILTON

- AND -

THE CORPORATION OF THE CITY OF THUNDER BAY

- AND -

THE CORPORATION OF THE CITY OF WELLAND

- AND -

THE CORPORATION OF THE TOWN OF OAKVILLE

- AND -

THE REGIONAL MUNICIPALITY OF DURHAM

- AND -

LONDON TRANSIT COMMISSION

WHEREAS Metrolinx has been working with Ontario municipal transit systems to modernize transit bus fleets and make them more fuel efficient by replacing hydraulically-driven engine cooling systems with electric cooling systems (such systems, as described more fully in Schedule 1 (Definitions), the “Electric Cooling Systems” or “ECS” or “ECS units”, and the installation of such ECS units, the “ECS Retrofit”);

AND WHEREAS the Parties wish to:

- a. Reduce the cost of ECS units and ECS Retrofits by consolidating municipal orders to achieve economies of scale through a joint Procurement process;
- b. Reduce time and avoid costs associated with Procurement by standardizing the Public Tender Documents, including ECS Specifications, terms and conditions, thereby allowing transit systems to focus on core competencies;
- c. Improve buying power and delivery schedules for ECS units; and

- d. Facilitate the installation of ECS units in an efficient and cost-effective manner.

ARTICLE I: INTERPRETATION

1.1 Definitions

In this Agreement, unless the context otherwise requires, each capitalized term shall have the meaning attributed thereto in Schedule A.

1.2 Schedules and Order of Priority

The following are the schedules attached to and forming part of this Agreement:

<u>Schedule</u>	<u>Description of Schedule</u>
------------------------	---------------------------------------

A	Definitions
B	Communications Plan
C	Procurement Approach
D	Confidentiality Agreement
E	Purchaser Information
F	Sample Council/Board/Commission By-Law/Resolution
G	Sample Certificate of Appointment
H	Confirmation Agreement

In the event of any conflict between the provisions of this Agreement and its Schedules, the provisions of this Agreement shall take precedence over the Schedules.

1.3 Entire Agreement

This Agreement shall constitute the entire Agreement and understanding between the Parties relating to the matters dealt with and supersedes all prior understandings, discussions, negotiations, commitments, representations, warranties and agreements, written or oral, express or implied, existing between the Parties at the Effective Date with respect to the subject of this Agreement. None of the Parties shall be bound by any definition, condition, warranty or representation other than as expressly stated in this Agreement or as mandated by federal or provincial law.

1.4 Governing Laws and Agreement

This Agreement shall be governed by, and be construed and interpreted in accordance with, the laws of the Province of Ontario and the laws of Canada applicable in the Province of Ontario.

1.5 Severability

If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, in whole or in part, such invalidity or unenforceability shall attach only to such

provision, which shall be severed from this Agreement, and the remaining provisions of this Agreement shall continue in full force and effect. Provided that the context allows, the remaining provisions shall be interpreted in the same way as they would have been had the severance not taken place.

1.6 No Partnership, Joint Venture or Corporation

The execution of this Agreement and the other arrangements with respect to the Procurement are not intended to create, and shall not be treated as having created, a general or limited partnership, joint venture, or corporation.

1.7 Members of Council, Officers, Agents, etc.

Each Purchaser and its members of commissions, council, directors, officers, agents, contractors and employees are not, nor are they deemed to be, officers, agents, employees or officials of Metrolinx.

1.8 No Fiduciary Duties

Metrolinx shall not by reason of this Agreement or any of the discussions leading to or in connection with this Agreement have a fiduciary or trust relationship with the Purchasers or any other person, or any other obligation other than as specifically stated in this Agreement.

1.9 Number and Gender

In this Agreement words in the singular include the plural and vice-versa and words in one gender include all genders.

ARTICLE II: PRINCIPLES OF ECS PROCUREMENT

2.1 Key Principles

This Agreement shall be guided by the following key principles:

- a. Metrolinx shall comply with any Procurement Policies which it is required to follow when issuing any Public Tender whereby tenders will be evaluated.
- b. Metrolinx shall work with a Steering Committee in undertaking a Public Tender.
- c. Metrolinx will facilitate the Purchasers' Procurement of ECS units and ECS Retrofits through a Public Tender process.
- d. Participation by Purchasers in a joint Procurement is voluntary up to five (5) Business Days following the Steering Committee's recommendations that Metrolinx enter into a Master Agreement with the successful Proponent, pursuant to Section 4.8 (Award of a Master Agreement).
- e. Ownership of the ECS units and legal obligations related to the Procurement of the ECS units and ECS Retrofits shall reside exclusively with the respective Purchasers, each of whom shall enter into a separate ECS Purchase Agreement with the successful Proponent.
- f. The initial term of a Master Agreement shall be for one year, ending March 31, 2014, with the option to extend the Master Agreement for any of the two additional one-year

periods (each, an “Option Year”) ending March 31, 2015 and March 31, 2016 respectively.

- g. Subject to Section 4.2 (Procurement Process), the decision on whether or not to exercise the right to extend for any of the Option Years and, to the extent any Option Year is exercised, the number of ECS units or ECS Retrofits to be purchased, rests exclusively with each of the respective Purchasers.
- h. Each Purchaser shall pay a Participation Fee as described in Schedule C (Procurement Approach – 4. Participation Fee).
- i. Metrolinx and the Purchasers will cooperate fully on all aspects of the joint Procurement including timely sharing of information and on-going two-way communication to promote informed decision making and budgeting.

ARTICLE III: STEERING COMMITTEES

3.1 Steering Committee Membership

For each Public Tender intended to be issued by Metrolinx pursuant to Section 3.5 (Decisions of a Steering Committee), there shall be a Steering Committee comprising one representative from each of Metrolinx (the “Metrolinx Member”), GO Transit (provided that GO Transit is participating as a Purchaser in the particular Public Tender), and one representative from each other Purchaser participating in that Public Tender. For each Steering Committee, Metrolinx, GO Transit (as applicable), and each Purchaser may also appoint one Alternate Member, who can act on the Member’s behalf in the Member’s absence at Steering Committee meetings.

3.2 Council By-Law, Resolution or Certificate of Appointment

The appointment of the Member and the Alternate Member by a Purchaser shall be confirmed by either (i) a certificate of appointment, substantially in the form of Schedule G (Sample Certificate of Appointment), authorizing the appointment of the Member and the Alternate Member and signed by the agent(s) authorized to sign this Agreement on behalf of the Purchaser, or (ii) a by-law or resolution of the municipal council, commission, or board, as applicable, providing authorization for the appointment of the Member and the Alternate Member similar to that provided in Schedule G (Sample Certificate of Appointment). The appointments shall refer to positions rather than specific individuals.

3.3 Votes

Save and except for the Metrolinx Member, each Purchaser participating in a Public Tender and GO Transit (as applicable) shall, through their Member, have one vote on the Steering Committee for that Public Tender. For greater certainty and consistent with its role as facilitator, the Metrolinx Member shall have no vote on any Steering Committee.

3.4 Quorum

Unless otherwise provided in this Agreement, a quorum for the transaction of business at any meeting of a Steering Committee shall consist of at least two-thirds of the total number of the Steering Committee Members eligible to vote. Members may be present either in person or by means of such telephone, electronic and other communication facilities as

permit all Members participating in the meeting to communicate with each other simultaneously and instantaneously. Wherever possible, the Steering Committee shall convene a meeting to conduct its business; however, in the absence of a meeting, the Steering Committee shall be authorized to make decisions and transact business with the unanimous written consent of all Steering Committee Members eligible to vote, which consent may be provided in the form of e-mail confirmation ("Unanimous Written Consent").

3.5 Decisions of a Steering Committee

The following decisions of a Steering Committee require the concurrence of at least two-thirds of the Steering Committee Members present at a meeting and eligible to vote, or the Unanimous Written Consent of the Steering Committee Members:

- a. recommending to Metrolinx the issuance of any Public Tender;
- b. recommending to Metrolinx the selection of a successful Proponent under any Public Tender issued pursuant to Section 3.5 (Decisions of a Steering Committee);
- c. recommending to Metrolinx any amendments to a Master Agreement; and
- d. determining whether any Party is in default for the purposes of Section 9.2 (Metrolinx Remedies for Event of Default by Purchaser).

Where a Steering Committee exercises its authority under Section 9.2 (Metrolinx Remedies for Event of Default by Purchaser), the Party whose Default status is being determined may participate in the discussion but may not vote in the decision.

All other decisions of a Steering Committee require the concurrence of a majority (51%) of the Steering Committee Members present at a meeting and eligible to vote, or the Unanimous Written Consent of the Steering Committee Members.

Subject to its rights or other obligations as set out in this Agreement and any other agreement, law, policy, rule, directive or other requirement or provincial direction to which it may be bound or subject, Metrolinx shall either act in accordance with the decisions of the Steering Committee or not at all.

3.6 Sub-committees

Each Steering Committee will establish sub-committees, as needed, which will include one representative from each Purchaser wishing to participate on such sub-committees, GO Transit, to the extent that it is a Purchaser in the particular Procurement and elects to participate on such sub-committees, and one representative from Metrolinx. When establishing sub-committees, a Steering Committee will establish the procedures, including quorum requirements and voting rights for the sub-committee.

3.7 Binding Decisions

All Steering Committee decisions must comply with the terms of this Agreement, the Public Tender Documents and the Master Agreement related to the particular tender. Steering Committee decisions are final and binding on all Purchasers.

3.8 Regular Meetings

Each Steering Committee shall meet at least annually and may meet more often where the Chair of such Steering Committee notifies the Parties in writing of any special meeting required in accordance with Section 3.9 (Special Meetings).

3.9 Special Meetings

Metrolinx alone or any two (2) Steering Committee Members can, with at least five (5) Business Days prior written notice to the Chair and to the other Steering Committee Members, require a special meeting of the Steering Committee. The written notice shall specify the issue to be considered at the special meeting and shall include an agenda.

3.10 Location of meetings

Unless a Steering Committee decides otherwise, all meetings of a Steering Committee shall be held either at the Project Office or via teleconference.

3.11 Responsibilities of Steering Committee

In addition to the other responsibilities provided for in this Agreement, each Steering Committee shall:

- a. approve the appointment of a Chair;
- b. approve the ECS Specifications;
- c. recommend the terms and conditions of the relevant Public Tender including the proposed Supplier agreements forming a part of such Public Tender;
- d. recommend the issuance of a Public Tender pursuant to Section 3.5 (Decisions of a Steering Committee);
- e. subject to Section 4.8 (Award of a Master Agreement), recommend that Metrolinx enter into a Master Agreement that sets out the terms and conditions of the Procurement with the successful Proponent, as well as any amendments to such Master Agreement;
- f. subject to the terms of this Agreement, establish rules and procedures regarding its meetings;
- g. approve the implementation schedule for each Procurement;
- h. establish a Communication Plan, as described in Schedule B (Communication Plan), in cooperation with Metrolinx for each Procurement; and
- i. be responsible for any other matter required to be approved by the Steering Committee in order to carry out the intent and purpose of this Agreement.

3.12 Responsibilities of Steering Committee Chair

The responsibilities of a Steering Committee Chair include:

- a. except for special meetings called in accordance with Section 3.9 (Special Meetings), establishing and distributing the agenda at least five (5) Business Days prior to each meeting;
- b. presiding over each meeting including special meetings; and
- c. arranging for the recording, distribution and storing of the minutes of such meetings.

ARTICLE IV: PROCUREMENT APPROACH AND TERM

4.1 ECS Specification

The ECS Specifications shall be based on the major functional and performance requirements of an ECS unit pertinent to a transit bus in the Ontario jurisdictions participating in the Procurement. The intent is to provide a common ECS unit for the Procurement; however, Purchasers will have the ability to select certain additional Options from an Option list. All Proponents are required to submit an Option list that sets out pricing for the additional Options as part of their tender. Purchasers will have the ability to purchase the ECS unit (with or without any of the Options) or an ECS Retrofit, which includes the supply and installation of the ECS unit by the successful Proponent, on the terms and conditions described in the Public Tender Documents.

4.2 Procurement Process

Subject to this Agreement, the specific terms of the Public Tender and the Master Agreement, each Procurement is intended to identify a Supplier as the exclusive Supplier of ECS units and ECS Retrofits for the term of the relevant Master Agreement for Purchasers who do not elect to terminate their participation in the Procurement pursuant to Section 9.6 (Termination Without Cause by a Purchaser). The option to extend for any of the Option Years will be at the sole discretion of the Purchasers, each of whom shall have the right to exercise the Option Years or not in accordance with the Master Agreement and their Electric Cooling System Purchase Agreement ("ECS Purchase Agreement"). Upon exercise of an Option Year by any Purchaser under section 4.11 (Option Years), the successful Proponent will be the exclusive Supplier of ECS units and ECS Retrofits to such Purchaser during the relevant Option Years in accordance with the terms of the Master Agreement and the relevant ECS Purchase Agreement. For the avoidance of doubt, if a Purchaser does not elect to exercise an Option Year in accordance with Section 4.11 (Option Years), the Purchaser shall no longer be considered a Purchaser or qualify for addition as an Eligible Purchaser for the remainder of the Term of this Agreement.

4.3 Supplier

A Supplier procured pursuant to a Public Tender shall:

- a. be given an exclusive contract for the Term; therefore, Purchasers that plan to procure ECS units or ECS Retrofits during the Term and that have not withdrawn in accordance with Section 9.6 (Termination Without Cause by a Purchaser) must purchase ECS units or ECS Retrofits from the successful Supplier on an exclusive basis;
- b. not be contractually guaranteed the purchase of any particular number of ECS units or ECS Retrofits under the relevant Master Agreement; and
- c. be advised by the Purchasers of their respective ECS orders or ECS Retrofits upon approval of funding from their respective municipal councils or board of directors, as the case may be, on or around March 31 of each year of the Term and, where applicable, the Option Years, to facilitate ECS delivery in the relevant year.

4.4 Master Agreement

On the recommendation of the Steering Committee in accordance with Section 4.8 (Award of Master Agreement) and in compliance with Section 1.4 (Governing Laws and Agreement) and any Procurement Policies required to be followed by it, Metrolinx may sign a Master Agreement with the successful Proponent for each completed Public Tender that will establish the Supplier for each Master Agreement. Notwithstanding the foregoing, as the issuer of the Public Tender and signatory to the Master Agreement, Metrolinx retains final discretion on whether or not to execute any Master Agreement. The Master Agreement will specify the terms and conditions of the Procurement and costing for the ECS units and ECS Retrofits as well as pricing for additional Options that can be selected by Purchasers. General terms and conditions that apply to all Purchasers will be contained in each Master Agreement.

4.5 ECS Purchase Agreement with Supplier

Subject to the Master Agreement, each Purchaser will enter into an ECS Purchase Agreement directly with the Supplier that will provide details related to their particular purchase of ECS units or ECS Retrofits (including delivery times, if applicable, and any particular Options selected by that Purchaser, pricing, and any other appropriate terms and conditions consistent with the terms of the relevant Master Agreement). The ECS Purchase Agreement will also include terms requiring payment of the Participation Fee by the Purchaser to the Supplier, which the Supplier will in turn be required to remit to Metrolinx under the Master Agreement on account of the services provided by Metrolinx for the Procurement. In the event that the Supplier fails or refuses to pay this amount to Metrolinx, the Purchaser(s) will be authorized to set off this amount from any payments otherwise due to the Supplier under the ECS Purchase Agreement, and required to remit this amount to Metrolinx directly.

Each ECS Purchase Agreement between a Purchaser and the Supplier is subject to review by the Project Officer, as described on Schedule C (Procurement Approach), prior to its execution. The Project Officer will review each ECS Purchase Agreement to ensure it is consistent with the relevant Master Agreement. Should it be found to be inconsistent, the Project Officer will report the inconsistency to the Steering Committee and Metrolinx. Purchasers are required to renew their existing ECS Purchase Agreement or enter into a new ECS Purchase Agreement with the Supplier upon the exercise of any of the Option Years.

4.6 Timing

Subject to the terms of this Agreement, the Public Tender is anticipated to be issued by Metrolinx no later than March 31, 2013 to accommodate delivery of ECS units and ECS Retrofits in the fiscal year ending March 31, 2014 and the Option Years ending March 31, 2015 and March 31, 2016. These timelines are estimates only and are subject to change by Metrolinx, in its sole discretion, acting reasonably.

4.7 Issuance of Public Tenders

Metrolinx shall conduct the Procurement in accordance with this Agreement, any Procurement Policies that Metrolinx is required to follow, and the Requirements of Law. The Procurement shall include:

- a. an open advertisement through MERX™;
- b. a posting of Proponent questions and answers through addenda on MERX™; and
- c. a tender evaluation process, as described on Schedule C (Procurement Approach – 3. Tender Evaluation).

The cost of the joint Public Tender process shall be borne by Metrolinx; provided however, that Metrolinx shall not be responsible for any costs incurred by any Purchaser relating to such process including without limitation those of a Purchaser who elects not to participate under Section 9.6 (Termination Without Cause by a Purchaser).

4.8 Award of a Master Agreement

- a. Each Steering Committee may recommend that Metrolinx award a Master Agreement to the qualified Proponent offering the lowest total contract price identified through the tender evaluation process by sending written notification thereof to Metrolinx.
- b. Notwithstanding this Section 4.8 (Award of a Master Agreement), each Steering Committee reserves the right not to recommend awarding a Master Agreement to any Proponent if, in the view of two-thirds or more of Steering Committee Members eligible to vote, no tender is acceptable based on the terms and conditions of the particular Public Tender. If at least two-thirds of the Steering Committee Members eligible to vote agree that no tender is acceptable, they may agree to recommend to Metrolinx that the Public Tender be cancelled and each Purchaser shall thereafter be free to independently obtain the ECS units or ECS Retrofits which were the subject of the Public Tender, subject to the survival of and the Purchasers' continued compliance with the specific terms of this Agreement, including without limitation the provisions related to confidentiality (Article VII: Confidentiality) and conflict of interest (Article VIII: Conflict of Interest).
- c. Following a Steering Committee's recommendation to Metrolinx to award a Master Agreement and in accordance with Section 9.6 (Termination Without Cause by a Purchaser), Purchasers shall have five (5) Business Days following the Steering Committee's recommendation to decide whether they will participate or terminate their participation under this Agreement without cause. Following these five (5) Business Days, Metrolinx shall wait at least three (3) Business Days before executing the Master Agreement and notifying the successful Supplier.
- d. Metrolinx's execution of a Master Agreement is subject to Metrolinx's rights under Section 4.4 (Master Agreement).

4.9 Participation Fees

Each Purchaser will pay a participation fee as described in Schedule C (Procurement Approach – 4. Participation Fees).

4.10 Term

Subject to any extension or termination of this Agreement pursuant to the provisions herein, or the survival of any of the obligations of this Agreement as provided herein, this Agreement for the purposes of the Procurement of ECS units and ECS Retrofits shall be in effect until the termination or expiration of the relevant Master Agreement (the "Term"), including the exercise of any Option Years.

4.11 Option Years

Each Purchaser may exercise the Option Years contemplated by the Master Agreement and the ECS Purchase Agreement, by providing Metrolinx notice in writing of its intention to do so no later than forty-five (45) calendar days prior to the completion of the current term of the Master Agreement. Such notice may be provided by that Purchaser's Member. As described in Section 4.5 (ECS Purchase Agreement with Supplier), Purchasers are required to renew their existing ECS Purchase Agreement or enter into a new ECS Purchase Agreement with the Supplier upon the exercise of any of the Option Years. Notwithstanding anything in this Agreement to the contrary, in the event that no Purchaser notifies Metrolinx of its intention to exercise the Option Years under the Master Agreement, the Master Agreement shall be deemed to be at an end and shall expire at the completion of its stated term, unless the Steering Committee advises Metrolinx otherwise.

ARTICLE V: ROLES AND RESPONSIBILITIES OF METROLINX

5.1 Roles and Responsibilities of Metrolinx

Metrolinx shall have the following roles and responsibilities in addition to those referred to elsewhere in this Agreement:

- a. Metrolinx shall facilitate all aspects of each Public Tender including without limitation, issuance, tender evaluation and award and shall, through the Project Officer, administer the provisions contained in a Master Agreement on behalf of the Parties.
- b. Metrolinx shall appoint and fund a Project Manager.
- c. The Project Manager may attend and participate in any of the activities carried out in relation to the joint Procurement, including any meetings of a Steering Committee and/or sub-committee(s) established by a Steering Committee.
- d. Metrolinx will:
 - i. work with each Steering Committee to coordinate the:
 - I. development of common ECS Specifications;
 - II. development of common terms and conditions for each Public Tender;
 - III. development of each ECS Master Agreement and ECS Purchase Agreement;
 - ii. assist in the consolidation of orders for ECS units and ECS Retrofits on behalf of the Purchasers; and
 - iii. be responsible for notifying the Supplier and respective Steering Committee if other municipalities wish to participate in the Procurement by becoming Purchasers. At such time, Metrolinx shall contact the Supplier to determine if there is sufficient manufacturing capacity to accommodate the additional ECS units and ECS Retrofits on the basis of the existing terms and conditions of each Master Agreement.
- e. Except through GO Transit's participation in the Procurement, Metrolinx shall not otherwise:
 - i. evaluate tenders, except for determining a Proponent's compliance with the mandatory requirements set out in the Public Tender Documents;
 - ii. mediate disputes between the Purchaser and the Supplier following the execution by a Purchaser of an ECS Purchase Agreement; or

- iii. pay or otherwise be responsible for any amounts for Deliverables or other services as may be set out in any Purchaser's ECS Purchase Agreement from time to time with the Supplier.
- f. Notwithstanding anything in this Agreement to the contrary, any payment or funding obligation made by Metrolinx under this Agreement in respect of any activity whatsoever, including without limitation Metrolinx's retention of a Project Officer and/or Electric Cooling System Inspector ("ECS Inspector"), as described on Schedule C (Procurement Approach – 1. Project Officer and 2. ECS Inspector), is subject to there being an appropriation of moneys by the Legislature of Ontario (the "Legislature") sufficient to satisfy such commitments under this Agreement. Activity, payment or funding obligations may be reduced or terminated, in response to the Legislature's annual budget, a change in departmental funding levels by the Legislature, or any other parliamentary decision that has an impact on the program under which this Agreement is made.
- g. Notwithstanding its retention of the ECS Inspector pursuant to Schedule C (Procurement Approach – 2. ECS Inspector) and the Project Officer pursuant to Schedule C (Procurement Approach – 1. Project Officer), Metrolinx does not guarantee, warrant or otherwise provide any assurance as to suitability of any of the Deliverables to the Purchasers, or anyone, and Metrolinx is not responsible for the acts or omissions of the Project Officer or the ECS Inspector.

5.2 No Metrolinx Liability

Where Metrolinx has entered into a Master Agreement, each Purchaser acknowledges and agrees that Metrolinx shall not be liable or responsible to any other Party to this Agreement, any Purchaser, the Supplier and/or any third party for any matter arising under such Master Agreement, the Procurement process or the provision of the Deliverables, except to the extent to which such matter relates to the negligence or wilful misconduct of Metrolinx in the performance of its duties, and without limiting the generality of the foregoing, each Purchaser acknowledges and agrees that:

- a. Metrolinx will not be liable or responsible for any act or omission of the Purchaser or the Supplier in relation to Deliverables under any Master Agreement and/or any ECS Purchase Agreement. In no case whatsoever will Metrolinx be responsible or liable for the cost of any Deliverables under an ECS Purchase Agreement.
- b. Metrolinx shall not be liable or responsible in any way whatsoever and the Purchasers agree that they shall satisfy themselves as to the suitability of the Deliverables for their purposes, including without limitation the Deliverables' compliance with applicable laws, policies, safety, licensing, funding and insurance requirements as such may apply to the Purchaser's provision of transit services in its jurisdiction and/or its acquisition of ECS units or ECS Retrofits hereunder.
- c. Except for determining a Proponent's compliance with the mandatory requirements set out in the Public Tender Documents, Metrolinx has not endorsed, recommended or approved the suitability of a Supplier or its Deliverables for a Purchaser.
- d. Each Purchaser shall be responsible for obtaining its own professional advice, including its own independent legal advice in respect of its execution of this Agreement, its participation hereunder, and its completion of an ECS Purchase Agreement, if any. Each Purchaser may include such additional business and legal terms and conditions to the ECS Purchase Agreement as it sees fit in the circumstances provided that the required terms of the ECS Purchase Agreement approved by the Steering Committee (the "Required Terms") are wholly retained and

provided further that any such additional terms and conditions are not inconsistent with the terms and conditions of the relevant Master Agreement and the Required Terms.

- e. Unless otherwise provided in this Agreement, each Purchaser shall be responsible for its own costs of any nature whatsoever arising as a result of, through or in any way related to its execution of this Agreement and its participation hereunder.
- f. Unless otherwise provided in this Agreement, each Purchaser shall be responsible for the oversight and administration of its own ECS Purchase Agreement with the Supplier and shall not direct any Supplier service issues that may arise to Metrolinx but shall inform Metrolinx's Project Officer of such issues.
- g. Metrolinx shall not be liable for any loss or damages suffered by any of the Purchasers, or any other person as a result of any act or inaction of Metrolinx.
- h. Metrolinx shall not be liable for any losses, costs or damages sustained or incurred by any Purchaser, including losses, costs or damages relating to third party lawsuits arising out of any Procurement process or the Master Agreement.

ARTICLE VI: PURCHASERS

6.1 Steps Required to Become a Purchaser

Subject to Section 6.3 (Addition of Purchasers to this Agreement) a municipality or other entity becomes a Purchaser when:

- a. the person or persons authorized to execute this Agreement on behalf of the municipality or other entity has or have duly executed this Agreement, a counterpart to this Agreement, or in the event an Eligible Purchaser is being added to the Agreement after the Effective Date in accordance with Section 6.3, a confirmation agreement in the form attached as Schedule H (Confirmation Agreement); and
- b. the municipality or other entity has provided to the Project Manager the following documents:
 - i. a Purchaser Information Sheet attached as Schedule E (Purchaser Information Sheet);
 - ii. a certified copy from a Purchaser's clerk or other authorized officer, confirming passage and enforceability of a by-law, resolution or other authority, as applicable, substantially in the form of the sample by-law/resolution attached as Schedule F (Sample Council/Board/Commission By-Law/Resolution);
 - iii. either (x) a certificate of appointment substantially in the form of Schedule G (Sample Certificate of Appointment) from the agent(s) authorized to sign this Agreement on behalf of the Purchaser, which designates the persons authorized to provide instructions and any necessary approval for the Procurement as Steering Committee Member or Alternate Member, and confirms that all necessary actions have been taken by the Purchaser to authorize such person(s) to give instructions and any necessary approval for the Procurement, or (y) a by-law or resolution of the municipal council, commission, or board, as applicable, providing authorization for the appointment of the Member and the Alternate Member similar to that provided in Schedule G (Sample Certificate of Appointment). The appointments shall refer to positions rather than to specific individuals; and

- iv. a signed Confidentiality Agreement substantially in the form of Schedule D (Confidentiality Agreement).

6.2 Representations and Warranties of Purchaser

- a. Each Purchaser covenants, represents and warrants to Metrolinx that:
 - i. it is a validly existing legal entity under the laws of its relevant jurisdiction;
 - ii. it has the requisite legislative and other authority and any necessary approval to enter into this Agreement and to carry out its terms, including the entering into joint Procurement arrangements and has passed any necessary by-law or resolution and has complied with its own procurement requirements;
 - iii. it will take all necessary steps to ensure that it has all approvals (including budget approvals) which are required in order to carry out the Procurement;
 - iv. its entry into this Agreement and performance of the terms hereof will not result in a breach of its constituting documents, by-laws, or any other agreements, ordinances or laws to which it is a party;
 - v. it has not entered into any agreement or arrangement that would restrict the ability of Metrolinx to perform its obligations under this Agreement;
 - vi. unless it has withdrawn from this Agreement under Section 9.6 (Termination Without Cause by a Purchaser) it will not enter into any new contract or contract extension with any supplier other than the Supplier for the Deliverables specified in the Master Agreement during the Term without the prior written approval of Metrolinx, unless the Supplier cannot provide the Deliverables on a timely basis or has not met the requirements under the Master Agreement or ECS Purchase Agreement as determined by the Steering Committee, acting reasonably; and
 - vii. it will collect and submit to Metrolinx without unreasonable delay any data that Metrolinx may reasonably request from time to time in order to monitor and evaluate the effectiveness of the ECS units and ECS Retrofitted Buses.
- b. The Purchaser shall be deemed to have repeated the foregoing representations and warranties each time it provides instructions for a Procurement. Metrolinx shall have no obligation to make any further inquiry to confirm the truth or accuracy of any representation or warranty, or the validity of any action taken by a Purchaser hereunder.

6.3 Addition of Purchasers to this Agreement

Metrolinx may from time to time after the Effective Date, add Eligible Purchasers as Parties to this Agreement. Each proposed additional Eligible Purchaser must first:

- a. receive confirmation from the Project Officer that the Supplier has sufficient capacity to accept additional Purchasers without impacting on the delivery of ECS units or ECS Retrofits already on order by existing Purchasers;
- b. confirm in writing to Metrolinx that it has not issued a Public Tender or subsequently cancelled an order for ECS units or ECS Retrofits in Fiscal Year 2013, Fiscal Year 2014 or Fiscal Year 2015 in order to participate in the Procurement; and
- c. complete Section 6.1 (Steps Required to Become a Purchaser) in full.

Upon its completion of the foregoing, an Eligible Purchaser shall become a Purchaser and shall enjoy all of the rights and obligations in this Agreement excepting only the services of

the ECS Inspector which shall be subject to the availability of Metrolinx funds. The Purchaser may then enter into an ECS Purchase Agreement in accordance with the approved specifications and Options available for the respective Procurement. Each Purchaser agrees that this Agreement is binding on it regardless of the addition of Purchasers by Metrolinx hereunder.

ARTICLE VII: CONFIDENTIALITY

7.1 Confidential Information

During and following the Term, each Purchaser shall ensure that its advisors, agents, directors, commissioners, officers, partners, Personnel, representatives and contractors keep all Confidential Information confidential in accordance with the terms and conditions set out in Schedule D (Confidentiality Agreement), a form of which is to be signed by each Purchaser.

ARTICLE VIII: CONFLICT OF INTEREST

8.1 No Conflict of Interest

No Purchaser nor any of its advisors, partners, directors, commissioners, officers, Personnel, agents, or contractors shall engage in any activity or provide any services where such activity or the provision of such services creates a Conflict of Interest (actual or potential) with the terms and conditions set out in this Agreement or any of the Procurements, Public Tender Documents, Master Agreements and ECS Purchase Agreements contemplated or completed under this Agreement.

8.2 Conflict of Interest and the Receipt of Confidential Information

Each Party declares that there is no actual or potential Conflict of Interest arising out of the receipt of the Confidential Information or the Party's role in the Procurement. Each Purchaser acknowledges and agrees that it shall be a Conflict of Interest for it to use Confidential Information relevant to the Procurement, including without limitation bids and pricing information, where Metrolinx has not specifically authorized such use unless the Confidential Information relates solely to that Purchaser and has been provided by that Purchaser. Where a Purchaser exercises its right to terminate its participation in the Procurements in accordance with Section 9.6 (Termination Without Cause by a Purchaser) or where Metrolinx terminates a defaulting Purchaser's right to participate in the Procurement in accordance with paragraph (a) of Section 9.2 (Metrolinx Remedies for Event of Default by Purchaser), it shall not be entitled to contract with the Supplier for the purchase of ECS units or ECS Retrofits which were the subject matter of any Public Tender, during the term of the Master Agreement.

8.3 Reporting a Conflict of Interest

Each Party declares that, if at any time during the course of participating in the Procurement, a Party or any of its advisors, partners, directors, commissioners, officers, Personnel, agents, or contractors has an actual or potential Conflict of Interest (each, a "Conflicted Party"), the Conflicted Party will immediately disclose such Conflict of Interest to

Metrolinx and the Project Manager. Metrolinx shall have the authority to determine whether the Conflicted Party may continue to participate in the activity or provide the services in question, and shall also have the authority to attach limitations or conditions on the Conflicted Party's participation in the Procurement. Each Party shall be responsible for ensuring compliance by its advisors, partners, directors, commissioners, officers, Personnel, agents, or contractors with the Conflict of Interest requirements set out under this Agreement.

ARTICLE IX: DEFAULT, ENFORCEMENT AND TERMINATION

9.1 Event of Default

Each of the following events is an Event of Default in respect of either a Purchaser or Metrolinx ("Event of Default"), as applicable:

- a. if any representation or warranty made by a Purchaser in this Agreement or any documentation delivered to Metrolinx by such Purchaser pursuant hereto shall be false or misleading in any material respect;
- b. if a Purchaser is in default in carrying out any of the material terms, covenants or obligations of this Agreement to be carried out by such Purchaser;
- c. if Metrolinx is in default in carrying out any of the material terms, covenants or obligations of this Agreement to be carried by Metrolinx; or
- d. if Metrolinx, a Purchaser or any of their respective advisors, partners, directors, commissioners, officers, Personnel, agents, representatives, or contractors has breached the requirements of Article VII (Confidentiality) or Article VIII (Conflict of Interest).

9.2 Metrolinx Remedies for Event of Default by Purchaser

Notwithstanding any other rights which Metrolinx may have under this Agreement, if an Event of Default by a Purchaser has occurred, Metrolinx shall have the following remedies provided that, in the case of an Event of Default which is curable, as determined by Metrolinx, Metrolinx has first given written notice of the Event of Default to the defaulting Purchaser and the defaulting Purchaser has failed to correct the Event of Default within thirty (30) calendar days of receipt of such notice or such longer period of time as Metrolinx may consent in writing:

- a. Metrolinx may terminate the defaulting Purchaser's right to participate in the Procurement by giving the defaulting Purchaser at least thirty (30) calendar days prior written notice of the termination date. Subject to Section 9.8 (Obligations Survive), as of the termination date:
 - i. the defaulting Purchaser shall no longer participate in the Procurement; and
 - ii. the defaulting Purchaser shall no longer be a Purchaser for the purpose of this Agreement;
- b. subject to Article X (Dispute Resolution), Metrolinx may avail itself of any other legal remedies that may be available to it under law or in equity.

9.3 Purchaser Remedies for Event of Default by Metrolinx

If an Event of Default by Metrolinx has occurred, as determined by the Steering Committee, a Purchaser shall have the following remedies provided that, in the case of an Event of Default which is curable, as determined by the Steering Committee, the Steering Committee has first given written notice of the Event of Default to Metrolinx and Metrolinx has failed to

correct the Event of Default within thirty (30) calendar days of receipt of such notice or such longer period of time as the Steering Committee may consent in writing:

- a. the Purchaser may, subject to Section 9.8 (Obligations Survive), terminate its participation in this Agreement by giving Metrolinx at least thirty (30) calendar days prior written notice of the termination date; and
- b. subject to Article X (Dispute Resolution), each Purchaser may avail itself of any other legal remedies that may be available to it at law or in equity.

9.4 Termination Without Cause by Metrolinx

Metrolinx may terminate this Agreement at any time, without cause, by delivering written notice, in accordance with Section 11.1 (Address for Notices), to that effect to each Purchaser, which notice shall be effective sixty (60) calendar days following delivery of the notice by Metrolinx. Any outstanding payment obligations of the Purchasers remaining as of the date of termination shall remain in effect.

9.5 Effect of Termination Without Cause by Metrolinx

Where Metrolinx has provided notice pursuant to Section 9.4 (Termination Without Cause by Metrolinx), the remaining Parties may request that Metrolinx assign any or all of its rights and obligations under this Agreement and/or the Master Agreement to all of them or any of them. Such request shall be made before the expiry of the notice period referred to in Section 9.4 (Termination Without Cause by Metrolinx).

9.6 Termination Without Cause by a Purchaser

A Purchaser may terminate its participation under this Agreement or any Public Tender without cause up to five (5) Business Days following the Steering Committee's recommendation to Metrolinx to enter into the Master Agreement pursuant to Section 4.8 (Award of a Master Agreement), by delivering written notice to that effect to the other Parties which notice shall be effective immediately. Where a Purchaser gives such notice, it shall no longer have any rights with respect to participation on the Steering Committee in relation to the relevant Public Tender. No notice by an individual Purchaser shall affect the rights and obligations of the other Parties.

9.7 Termination after Award by a Purchaser

Subsequent to the award of a Master Agreement, a Purchaser is required to engage in the joint Procurement to the extent permitted by the amount of funding approved by that Purchaser's approving authority for the purchase of ECS units or ECS Retrofits for the term of the Master Agreement and a Purchaser shall not purchase ECS units or ECS Retrofits from any party other than the Supplier during this period. In addition to any other remedies which may be available to Metrolinx, failure to comply with this provision may result in the Province of Ontario withholding any applicable Provincial transit funding as may be applicable.

9.8 Obligations Survive

Despite any termination under this Article IX (Default, Enforcement and Termination) each Party agrees that certain rights and obligations (whether contingent or matured, absolute or not), as set out in Section 11.5 (Survival) of each Party existing immediately before the termination shall survive such termination.

Where Metrolinx terminates this Agreement pursuant to Section 9.4 (Termination Without Cause by Metrolinx), it shall remain responsible for all costs to which it is obligated under this Agreement up to the termination date.

Notwithstanding a Purchaser's termination of its participation in this Agreement under this Article IX (Default, Enforcement and Termination), the Purchaser shall continue to be bound by the terms and conditions of any ECS Purchase Agreement which may have been executed by it prior to such termination and any termination of an ECS Purchase Agreement by the Purchaser shall be made only in accordance with its terms.

ARTICLE X: DISPUTE RESOLUTION

10.1 Legal Remedies for Disputes

Any dispute, question, claim, or other matter arising out of or relating to this Agreement (each, a "Dispute") shall be resolved by the escalation procedure set out below in Section 10.3 (Three-Tiered Dispute Resolution). However, no Party shall be precluded from initiating a proceeding in a court of competent jurisdiction for the purposes of obtaining any emergency or provisional remedy to protect its rights that may be necessary and that are not otherwise available under this Agreement, including temporary and preliminary injunctive relief and restraining orders.

10.2 Dispute Notice

A Party may refer a Dispute to dispute resolution under this Section 10.2 (Dispute Notice) of this Article X (Dispute Resolution) by the delivery of a notice requesting dispute resolution to the other Parties, which notice shall set out the Dispute in reasonably sufficient detail (a "Dispute Notice").

10.3 Three-Tiered Dispute Resolution

The Parties agree that any Dispute shall be referred for dispute resolution by high-level negotiation, mediation or arbitration in the following manner:

(i) High-Level Negotiation

In the event a Party issues a Dispute Notice, as described in Section 10.2 (Dispute Notice), to the other Parties, the Chief Administrative Officer or equivalent of each non-Metrolinx Party, and in the case of Metrolinx, the executive to which the Transit Procurement Initiative reports, shall meet and make a good faith effort to resolve the Dispute as set out in the Dispute Notice in a prompt manner and for the purpose of same, each Party shall provide its negotiator with full and timely disclosure of all relevant facts, information and documents to facilitate such negotiation. Negotiations shall be commenced within thirty (30) calendar days of the delivery of a Dispute Notice and shall, unless all Parties agree otherwise, be concluded within thirty (30) calendar days of their commencement. In the event that a resolution satisfactory to all Parties is achieved through such negotiations, the Parties shall detail, in writing, the manner in which the Dispute has been resolved.

(ii) Mediation

If the Dispute has not been resolved through high-level negotiation as contemplated in (i) (High-Level Negotiation) above, the Dispute will be referred to structured negotiation with the assistance of a mediator appointed by mutual agreement of the Parties within thirty (30) calendar days of any Party issuing a supplementary Dispute Notice requesting mediation. If

a mutual agreement is not reached within the timelines set out above, then Metrolinx, acting in good faith, may appoint a mediator and provide the other Parties with written notice of such appointment. The mediator shall be an independent person who by training and experience has the professional qualifications and the mediation skills to mediate any Dispute that may arise among the Parties. The Parties shall agree on the procedure to be used in mediation. If the Parties achieve a resolution of the Dispute, the mediator shall confirm the resolution in writing. If the Parties do not resolve the Dispute, the mediator shall provide a written confirmation that the Parties were unable to resolve the Dispute.

(iii) Arbitration

Any Party may, within thirty (30) calendar days of the delivery of the mediator's confirmation that the Parties were unable to resolve their Dispute, issue a supplementary Dispute Notice requesting arbitration. The Parties shall agree on the procedure to be used for arbitration unless the Parties are required by legislation to comply with a particular arbitration process.

Any determination by arbitration shall be final and binding upon the Parties, and not subject to appeal or challenge.

To the extent not specified in this Agreement, an arbitration shall be governed by the provisions of the *Arbitration Act, 1991*, as amended.

10.4 Performance to Continue

Notwithstanding that a matter has been referred to dispute resolution under the provisions of this Article X (Dispute Resolution), the Parties shall throughout the period of dispute resolution endeavour to perform their respective obligations under the terms of the Agreement to the best of their abilities.

10.5 Dispute Cost

The Parties shall bear and be responsible for their own costs in connection with or relating to any Dispute. Except for Metrolinx, the Parties in a Dispute shall share equally the costs related to any Disputes arising out of the Master Agreement.

10.6 Disputes Between the Purchasers and the Supplier

Each Purchaser shall be solely responsible for dealing with any Disputes that may arise between it and the Supplier.

ARTICLE XI: MISCELLANEOUS

11.1 Address for Notices

Any notice or other communication required or permitted to be given under this Agreement shall be delivered or sent by registered mail, postage prepaid or facsimile (with follow-up mailed copy unless otherwise specified in this Agreement) in the case of Purchasers to the

addresses or facsimile numbers set out in Schedule E (Purchaser Information Sheet), and in the case of Metrolinx, to:

Attn.: Project Manager
Transit Procurement Initiative
Metrolinx
20 Bay Street, Suite 600
Toronto, ON M5J 2W3
Fax: (416) 869-1794

Any Party may change the address to which notices or other communications required or permitted to be given under this Agreement shall be sent, by sending notice in writing to every other Party, such address change shall become effective immediately upon receipt of such notice.

11.2 No Waiver

- a. The benefit of any provision of this Agreement may be waived in whole or in part by the Party for whose benefit the provision operates and any Party may waive any or all of its rights in the event of a breach of any provision of this Agreement by another Party. A waiver is binding on the waiving Party only if it is in writing. A waiver may be absolute or may be limited in any way as to duration or scope.
- b. The failure by one of the Parties to insist in one or more instances on the performance by another Party of any of the terms or conditions of this Agreement shall not be construed as a waiver by the Party of its right to require future performance of any such terms or conditions, and the obligations of such other Party with respect to such future performance shall continue to be in full force and effect.

11.3 Force Majeure

- a. A Party shall not be responsible for failures in performance due to Force Majeure.
- b. "Force Majeure" means any circumstance or act beyond the reasonable control of a Party claiming Force Majeure, including an intervening act of God or public enemy, war, blockade, civil commotions, labour stoppages, strikes or lockouts, fire, flood, earthquake, epidemic, quarantine restriction, a stop-work order or injunction issued by a court or public authority having jurisdiction, or governmental embargo, which delays the performance of any obligation created by this Agreement beyond its scheduled time, provided such circumstance or act is not expressly dealt with under this Agreement or does not arise by reason of:
 - i. the negligence or wilful misconduct of the Party claiming Force Majeure or those for whom it is responsible at law;
 - ii. any act or omission by the Party claiming Force Majeure (or those for whom it is responsible at law) in breach of the provisions of this Agreement; or
 - iii. lack or insufficiency of funds or failure to make payment of monies.
- c. Provided further that, in the case of an event of Force Majeure, the Party affected thereby shall notify the other Parties and Metrolinx, if Metrolinx is not the other Party, as soon as possible and in any event within five (5) Business Days following the date upon which the affected Party first becomes aware (or should have been aware, using all

reasonable due diligence) of such event of Force Majeure so that the other Parties may verify the same.

- d. If an event of Force Majeure continues for a period of more than forty-five (45) calendar days, a Party shall have the right to terminate its participation in this Agreement (or in the case of Metrolinx, to terminate this Agreement) upon five (5) Business Days written notice to the other Parties. This right shall not affect a Purchaser's obligation to a Supplier under an ECS Purchase Agreement which shall be determined in accordance with the relevant ECS Purchase Agreement terms.

11.4 Remedies Cumulative

All remedies, rights, undertakings, obligations and agreements of the Parties under this Agreement shall be cumulative, and none thereof shall be in limitation of any other remedy, right, undertaking, obligation or agreement of any Party. Each Party may follow any remedy to which it is entitled concurrently or successively, at its option.

11.5 Survival

Articles VII (Confidential Information), VIII (Conflict of Interest), IX (Default, Enforcement and Termination), Section 5.2 (No Metrolinx Liability), and Section 6.2 (Representations and Warranties of Purchaser), excluding Subsection 6.2 (a)(iv), shall survive the expiration or termination of this Agreement.

11.6 Amendment

Except as expressly provided herein, this Agreement may be amended or modified only by an instrument in writing executed by each of the Parties, which will form part of the Agreement.

11.7 No Assignment

Except as otherwise provided in this Agreement, Metrolinx shall not assign the whole or any part of its rights or obligations under this Agreement without the express written consent of the Steering Committees, which consent shall not be unreasonably withheld.

No Purchaser shall assign the whole or any part of its rights or obligations under this Agreement without the express written consent of Metrolinx, which consent shall not be unreasonably withheld.

11.8 Further Action

Each Party shall at all times promptly execute and deliver and cause to be executed and delivered such documents and take and cause to be taken such action as may be necessary or appropriate to give effect to the provisions of this Agreement.

11.9 Enurement

This Agreement shall enure to the benefit of and be binding upon each Party and their respective successors and permitted assigns.

11.10 Time of the Essence

In the performance and observance of the terms and conditions of this Agreement, time is of the essence and no extension or variation of this Agreement shall operate as a waiver of this provision.

11.11 Counterparts

This Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed to be an original, and all such counterparts shall together constitute one and the same instrument. All signatures of the Parties to and pursuant to this Agreement may be transmitted by facsimile and such facsimile shall for all purposes be deemed to be the original signature of the person whose signature it produces and shall be binding upon that person and on the Party on whose behalf that person signed.

IN WITNESS WHEREOF, the Parties have executed and delivered this Agreement as of the date set out above.

METROLINX

Per: _____

Name:

Title:

I have the authority to bind the corporation.

Per: _____

Name:

Title:

I have the authority to bind the corporation.

METROLINX
operating as GO Transit

Per: _____

Name:

Title:

I have the authority to bind the corporation.

Date: _____

THE CITY OF HAMILTON

Per: _____

Name:

Title:

Per: _____

Name:

Title:

I/We have the authority to bind the City.

Date: _____ **THE CORPORATION OF THE CITY OF THUNDER BAY**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

I/We have the authority to bind the Corporation.

Date: _____

THE CORPORATION OF THE CITY OF WELLAND

Per: _____

Name:

Title:

Per: _____

Name:

Title:

I/We have the authority to bind the Corporation.

Date: _____

THE CORPORATION OF THE TOWN OF OAKVILLE

Per: _____

Name:

Title:

Per: _____

Name:

Title:

I/We have the authority to bind the Corporation.

Date: _____

THE REGIONAL MUNICIPALITY OF DURHAM

Per: _____

Name:

Title:

Per: _____

Name:

Title:

I/We have the authority to bind the Municipality.

Date: _____

LONDON TRANSIT COMMISSION

Per: _____

Name:

Title:

Per: _____

Name:

Title:

I/We have the authority to bind the Commission.

SCHEDULE A:

DEFINITIONS

1. Definitions

In this Agreement,

“**Agreement**” means this agreement, including its Schedules, as each may be amended from time to time;

“**Alternate Member**” means a person appointed by a Party to act in the absence of its Member and has all the rights, responsibilities and obligations of the Member;

“**Arbitration Act, 1991**” means the *Arbitration Act, 1991*, S.O. 1991, c. 17, as amended from time to time;

“**Authority**” means any government authority, agency, body or department, whether federal, provincial or municipal, having or claiming jurisdiction over this Agreement, the Master Agreement or the Deliverables;

“**Business Day**” means any day which is not a Saturday or Sunday or a day observed as a holiday under the laws of the Province of Ontario or the federal laws applicable to the Province of Ontario, or a day observed as a holiday for the Government of Ontario;

“**Chair**” means a Steering Committee chair appointed by the relevant Steering Committee in accordance with Section 3.11 (Responsibilities of Steering Committee);

“**Communication Plan**” means the communication plan for any major joint communication event concerning the Procurement developed by Metrolinx and approved by the respective Steering Committee;

“**Confidential Information**” means:

- (i) the Procurement process and solicitation documents and any information relating to or arising from the process and solicitation documents, including, without limitation, any Public Tenders issued, or proposed to be issued, by Metrolinx relating to the Procurement, any tenders received, evaluation(s) completed, and pricing;
- (ii) any proprietary information of a Party;
- (iii) any personal information as contemplated in FIPPA or MFIPPA;
- (iv) all information that a Party is obliged, or has the discretion, not to disclose under provincial or federal legislation; or
- (v) any other information specifically designated in writing by a Party as being of a confidential or proprietary nature.

Confidential Information does not include information that:

- (i) is or becomes generally available to the public through no fault of a Party, including, by way of example only, information related to the Procurement and released by Metrolinx after a successful Supplier has been identified, including the names of the bidders that submitted bids and the total contract price awarded to the successful bidder;

- (ii) prior to receipt from Disclosing Party, was known to the receiving party on a non-confidential basis and is not subject to another obligation of secrecy and non-use, as documented by written records possessed by the receiving party;
- (iii) was independently developed by the receiving party prior to receipt from the Disclosing Party, as documented by written records possessed by the receiving party; or
- (iv) becomes available to the receiving party on a non-confidential basis from a source other than the Disclosing Party that is not under other obligations of confidence.

For the avoidance of doubt, the contents of this Agreement shall not be considered Confidential Information.

“Conflict of Interest” means any situation or circumstance where, in relation to the Procurement, a Purchaser or any of its advisors, partners, directors, commissioners, officers, Personnel, agents, or contractors or Steering Committee Members (a) communicates with any person with a view to influencing preferred treatment inconsistent with the Procurement Process, (b) engages in conduct that compromises or could be seen to compromise the integrity of the open and competitive Procurement and render that process non-competitive or unfair, or (c) has other commitments, relationships or financial interests that (i) could or could be seen to exercise an improper influence over the objective, impartial exercise of its independent judgment, or (ii) could or could be seen to compromise, impair or be incompatible with the effective performance of its obligations under this Agreement;

“Contract” means the aggregate of: (a) the Master Agreement; (b) the Purchaser-specific ECS Purchase Agreement; (c) the Public Tender Documents, including any addenda; (d) the successful Tender; and (e) any amendments executed in accordance with the terms of the Master Agreement;

“Deliverables” means everything developed for or provided to the Purchaser by the Supplier in the course of performing its obligations under the Contract or agreed to be provided to the Purchaser under the Contract by the Supplier, including but not limited to any goods or services;

“Disclosing Party” means a Party that discloses Confidential Information in connection with the Procurement;

“Dispute” has the meaning ascribed thereto in Section 10.1 (Legal Remedies for Disputes) of this Agreement;

“Dispute Notice” has the meaning ascribed thereto in Section 10.2 (Dispute Notice);

“ECS” or “ECS unit” or “Electric Cooling System” means all the components required to replace a bus’ hydraulic or mechanical cooling system with an electric cooling system, including the fans, electronic controllers and software, heat exchangers, power steering pump (if replaced), alternator, wires, connectors, hoses and pipes, including manuals, diagnostic equipment, testing and training, as set out in the Public Tender Documents including, without limitation, the ECS Specifications, excluding any Options;

“ECS Inspector” or “Electric Cooling System Inspector” means the person or persons hired by Metrolinx pursuant to Schedule C (Procurement Approach – 2. ECS Inspector) to perform inspection services during the installation phase of the ECS units ordered by the Purchasers and to perform additional testing during the post-installation phase;

“ECS Purchase Agreement” or “Electric Cooling System Purchase Agreement” means the contract or contracts to be entered into between the Purchasers and the Supplier to deliver the ECS units or ECS Retrofits and any other related supplies and services as described in a Public Tender with any additional Options specified by each Purchaser;

“ECS Retrofit” means the supply and installation of the Electric Cooling System and safe disposal of the removed hydraulic or mechanical cooling system components by the Supplier in accordance with the Requirements of Law; subject to the terms and conditions set out in the Public Tender Documents including, without limitation, the ECS Specifications, excluding any Options;

“ECS Retrofitted Bus” means a bus that has undergone an ECS Retrofit;

“ECS Specifications” means the specific technical requirements of the ECS units and ECS Retrofits to be included in the Public Tender Documents and form a part of the Master Agreement with the Supplier;

“Effective Date” means the date this Agreement is effective as set out on the first page of this Agreement;

“Eligible Purchaser” means:

a) a municipality, as defined under the *Municipal Act* or a transit authority including a transit commission or other persons or classes of persons as may be authorized under the *Municipal Act* with which a municipality is permitted to enter into an agreement for the Procurement; or

b) GO Transit;

but for greater certainty does not include a Party who has previously terminated its participation under this Agreement, or a Purchaser who has terminated an ECS Purchase Agreement or failed to exercise an Option Year.

“Event of Default” has the meaning ascribed thereto in Section 9.1 (Event of Default) of this Agreement;

“FIPPA” means the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31, as amended from time to time;

“Force Majeure” has the meaning ascribed thereto in Section 11.3 (Force Majeure) of this Agreement;

“GO Transit” means the operating division of Metrolinx responsible for the provision of public transportation services, who, for the purposes of this Agreement, shall be considered a Purchaser and treated in accordance with the rights and obligations accruing to Purchasers hereunder, separate and distinct from Metrolinx.

“Legislature” has the meaning ascribed thereto in Section 5.1 (Roles and Responsibilities of Metrolinx) of this Agreement;

“Master Agreement” means the contract, including its schedules, to be entered into between Metrolinx and the Supplier to deliver the ECS units and ECS Retrofits as they will be described in a Public Tender and any other related supplies and services, or any part thereof;

“Member” means a person appointed by a Party as set out in Section 3.1 (Steering Committee Membership) and who is deemed authorized by virtue of such appointment to perform any action, and provide any required recommendations, instructions and approvals to complete the Procurement within the scope of this Agreement;

“MERX™” means the electronic tendering system used to connect suppliers of goods and services to people who purchase on behalf of governments and public sector organizations;

“MFIPPA” means the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended from time to time;

“Metrolinx” means the Corporation Metrolinx as established under the *Metrolinx Act, 2006*;

“Metrolinx Member” has the meaning ascribed thereto in Section 3.1 (Steering Committee Membership);

“Municipal Act,” means the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended from time to time;

“Option Year” has the meaning ascribed thereto in Section 2.1 (Key Principles) of this Agreement;

“Options” means a component, feature, service or material that is proposed and priced by the Proponent as an alternative (or an addition or deletion) to the Proponent’s standard component/feature/material for the ECS units and/or ECS Retrofit and as contained in the technical specifications included in the Public Tender Documents.

“Participation Fee” has the meaning ascribed thereto in Schedule C (Procurement Approach – 4. Participation Fee) to this Agreement;

“Party” means any one of the legal entities which have executed this Agreement, and **“Parties”** means more than one Party;

“Personnel” means collectively, in the case of each Party, individuals who provide services to such Party or any of its contractors in connection with this Agreement, whether as employees or independent contractors, and includes the employees and independent contractors of the Party;

“Procurement” means the process of procuring the ECS units and ECS Retrofits as they will be described in the Public Tender Documents and any other related supplies and services in accordance with this Agreement including without limitation the Project Officer and the ECS Inspector;

“Procurement Policies” means the procurement policies and directives in effect from time to time respecting the procurement of equipment, services and supplies applicable to Metrolinx;

“Project Manager” means the Metrolinx representative responsible for the overall facilitation and administration of the Procurement initiative under Section 5.1 (Roles and Responsibilities of Metrolinx).

“Project Office” means the office designated by Metrolinx as such from time to time by notice in writing to the other Parties;

“Project Officer” means the technical expert hired by Metrolinx pursuant to Schedule C (Procurement Approach – 1. Project Officer) to assist each Steering Committee and the Purchasers on technical issues from the time the Master Agreement is awarded up until the point the ECS units and/or ECS Retrofits are accepted by the respective Purchasers;

“Proponent” means the legal entity that submits a bid in response to a Public Tender contemplated by this Agreement;

“Public Tender” means the process by which Metrolinx will issue Public Tender Documents and advertise such Public Tender Documents in connection with the Procurement on the electronic tendering system, MERX™.

“Public Tender Documents” means the written tender document issued by Metrolinx for the joint procurement of ECS units and ECS Retrofits and any supporting documentation posted on MERX™ in connection with such tender.

“Purchaser” means:

a) a municipality, as defined under the Municipal Act or a transit authority including a transit commission or board or other persons or classes of persons as may be authorized under the Municipal Act with which a municipality is permitted to enter into an agreement for the Procurement; or

(b) GO Transit;

and includes each Party to this Agreement and any Eligible Purchaser that has subsequently complied with the requirements of Section 6.1 (Steps Required to Become a Purchaser);

“Required Terms” has the meaning ascribed thereto in Section 5.2 (No Metrolinx Liability) of this Agreement;

“Requirements of Law” means all applicable requirements, laws, statutes, codes, acts, ordinances, decrees, injunctions, by-laws, rules, regulations, official plans, permits, licences, authorizations, Provincial policy directions, and agreements with Authorities that now or at any time hereafter may be applicable to either the Supplier, the Purchasers, the Master Agreement or the Deliverables or any part of them;

“Schedules” means the schedules listed in Section 1.2 (Schedules and Order of Priority) and forming a part of this Agreement, and any other schedules subsequently added in accordance with the terms of this Agreement, as each may be amended from time to time;

“Steering Committee” means the committees described in Article III (Steering Committees);

“Supplier” means the Proponent with whom Metrolinx enters into a Master Agreement;

“Term” has the meaning ascribed thereto in Section 4.10 (Term) of this Agreement.

“Unanimous Written Consent” means the written consent of all of the Members of the Steering Committee eligible to vote, which may be provided in the form of an e-mail confirmation, as described in Section 3.4 (Quorum).

**SCHEDULE B:
COMMUNICATION PLAN**

1. Communication Plan

- a. The Parties agree that any communication with third parties in relation to the Procurement shall be carried out in accordance with the terms and conditions set out in this Agreement and the Communication Plan approved by each Steering Committee.
- b. The purpose of the Communication Plan is for Metrolinx and the Purchasers to communicate with the public about the joint Procurement initiative and to enhance opportunities for appropriate, continuous and consistent recognition of the co-operative efforts of the Parties.
- c. Each Purchaser and Metrolinx agree to undertake joint communications activities and products that will promote opportunities to communicate with the public in an open, transparent, effective and proactive manner, using appropriate, ongoing, consistent public information material acknowledging the Parties' participation as set out in this Agreement.
- d. Unless agreed to in advance by all Parties, a Party shall give the other Parties at least ten (10) Business Days prior written notice of any media releases, media conferences, public announcements and other events pertaining to the joint Procurement, and/or the printing, producing or publishing of: public reports or internet pages providing information for transit agencies, municipalities, contractors and members of the public on this Agreement (each, a "Communication"). In addition, each Party shall provide the Project Manager with a copy of the content of any such Communication at least ten (10) Business Days prior to its proposed release, and in the event any Communication is inaccurate or otherwise inconsistent with the terms of this Agreement, the Master Agreement or the Procurement Policies, the Project Manager shall have the right to prohibit the release of such Communication.

SCHEDULE C: PROCUREMENT APPROACH

1. Project Officer

Metrolinx shall retain and provide funding for the services of a Project Officer who shall assist each Steering Committee and its respective Purchasers from the time each Master Agreement is executed up until the point the respective ECS units or ECS Retrofits are accepted by the respective Purchasers.

In each case, the Project Officer shall be responsible for:

- a. being the central point of contact between the Supplier and the Purchasers;
- b. reviewing all ECS Purchase Agreements prior to their execution by the relevant Purchaser to ensure consistency with the Master Agreement;
- c. identifying any issues to the Parties and/or Supplier related to the performance of work under the Master Agreement and the ECS Purchase Agreement;
- d. overseeing the work of the ECS Inspector retained by Metrolinx hereunder, including without limitation establishing the ECS inspection schedule based upon the Project Officer's timely receipt of orders for ECS units and ECS Retrofits from the Purchasers in accordance with this Agreement; and
- e. rejecting work from the Supplier that does not conform to the relevant ECS Purchase Agreement and/or Master Agreement. This is in addition to the right of the ECS Inspector under paragraph 2 below (ECS Inspector).

2. ECS Inspector

Metrolinx shall retain and fund the services of an ECS Inspector to oversee the installation of the ECS Retrofits at the Supplier's installation facility for ECS Retrofits installed prior to March 31, 2014, and March 31, 2015 for the Option Year 2014 and March 31, 2016 for the Option Year 2015. In order to qualify for the ECS Inspector's services, a copy of the Purchaser's ECS Purchase Agreements and related order(s) must be provided by the Purchasers to Metrolinx no later than the dates specified herein.

Metrolinx will confirm the availability of ECS inspection services available hereunder upon receipt of a copy of a Purchaser's ECS Purchase Agreement and related order received in accordance with the foregoing. Orders received subsequent to the dates identified herein may not qualify for ECS inspection services.

Inspections will include detailed inspection of the first ECS Retrofit for each Original Equipment Manufacturer (OEM) of the buses, random inspections and post-installation inspections.

For each Procurement, the ECS Inspector will report to and take direction from the Project Officer and shall be responsible for:

- a. performing inspection services during the assembly and installation of the ECS Retrofits ordered by the Purchasers, including:
 - i. inspecting and ensuring proper function of all installed systems and sub-systems;
 - ii. tracking and documenting installation progress; and

- iii. ensuring all deficiencies are corrected prior to release of ECS Retrofits to Purchasers and witnessing pre-delivery tests;
- b. monitoring and reporting to the Project Officer the Supplier's compliance with the Technical Specifications, the quality assurance, installation and delivery provisions contained in the Master Agreement and the ECS Purchase Agreement, and all applicable Requirements of Law at the time of installation;
- c. working with the Supplier, the Purchasers and/or the Project Officer to address any issues related to the quality and performance of work and installation schedule;
- d. reviewing all requests for waiver, requests for deviation and engineering change proposals and submitting recommended course of action to the Project Officer for decision or Steering Committee review;
- e. rejecting work from the Supplier that does not conform to the relevant Master Agreement and/or the ECS Purchase Agreement;
- f. providing a final inspection summary for each Purchaser detailing inspection information for the ECS Retrofits ordered; and,
- g. performing post-installation inspection services of the ECS Retrofits ordered by the Purchasers, including: inspecting and ensuring proper function of all installed systems and sub-systems.

3. Tender Evaluation

The Parties agree that, as described more fully in the Public Tender Documents, the tenders will be evaluated using the following criteria:

- a. total contract price;
- b. Proponent's qualifications;
- c. proper completion by the Proponent of all Public Tender Documents and any appendices; and
- d. compliance with the technical specifications and all other requirements set out in the Public Tender Documents.

4. Participation Fee

Each Purchaser will pay a participation fee equal to \$260 for each ECS unit and \$345 for each ECS Retrofit purchased by the Purchaser during the Term of the Agreement and during any Option Year, inclusive of applicable taxes, the specific terms of which payment shall be set out in the Master Agreement (the "Participation Fee").

**SCHEDULE D:
CONFIDENTIALITY AGREEMENT**

WHEREAS, Metrolinx has been working with Ontario municipal transit systems with the goal of facilitating the joint procurement of electric cooling systems and electric cooling system retrofits (such prospective procurement, the “Procurement”);

AND WHEREAS, in connection with the Procurement, the undersigned may receive certain confidential or proprietary information from Metrolinx or other municipal transit systems participating in the Procurement (each, a “Party”, and to the extent such Party discloses Confidential Information, a “Disclosing Party”);

NOW THEREFORE, in consideration received of the undersigned's receipt of Confidential Information and other good and valuable consideration the receipt and sufficiency is hereby acknowledged, the undersigned hereby acknowledges and agrees and undertakes as follows.

Capitalized terms used but not defined herein have the meanings ascribed to them in the Governance Agreement, dated [_____] by and among Metrolinx and [insert names of Parties], as amended, restated, supplemented or otherwise modified from time to time, (the “Governance Agreement”).

1. Confidential Information

“Confidential Information” means:

- (i) the Procurement process and solicitation documents and any information relating to or arising from the process and solicitation documents, including, without limitation, any Public Tender issued, or proposed to be issued, by Metrolinx relating to the Procurement, any proposals received, evaluation(s) completed, and pricing;
- (ii) any proprietary information of a Party;
- (iii) any personal information as contemplated in the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F. 31 (FIPPA) or the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56 (MFIPPA), as such instruments shall be amended, from time to time;
- (iv) all information that a Party is obliged, or has the discretion, not to disclose under provincial or federal legislation; or
- (v) any other information specifically designated in writing by a Party as being of a confidential or proprietary nature.

The undersigned shall keep, and to the extent applicable, shall ensure that its advisors, agents, directors, commissioners, officers, partners, Personnel, representatives and contractors keep, all Confidential Information confidential in accordance with the terms and conditions of this Confidentiality Agreement. In addition to any other liabilities of the undersigned pursuant to this Confidentiality Agreement or otherwise at law or in equity, the undersigned shall be liable for

any and all liability, losses, costs, damages, expenses (including all reasonable legal, expert and consultant fees), causes of action, and proceeding arising from any non-compliance with this Confidentiality Agreement by the undersigned or any of its advisors, agents, directors, commissioners, officers, Personnel representatives or contractors.

2. Use of Confidential Information

(a) Confidential Information disclosed directly or indirectly by a Disclosing Party to the undersigned shall be held by the undersigned in confidence, and the undersigned:

(i) shall not disclose, reveal, publish, or disseminate any of the Disclosing Party's Confidential Information, provided that the undersigned may disclose Confidential Information to those of its advisors, agents, directors, commissioners, officers, partners, Personnel, representatives and contractors with a need to know such Confidential Information in connection with assisting, advising and/or providing feedback to the Procurement process, provided that such person is subject to obligations of confidentiality substantially similar to those contained in this Confidentiality Agreement;

(ii) shall take all reasonable steps required to prevent any unauthorized reproduction, use, disclosure, publication, or dissemination of the Disclosing Party's Confidential Information;

(iii) shall not copy, reproduce in any form or store the Disclosing Party's Confidential Information in a retrieval system or database, without the prior written approval of the Disclosing Party;

(iv) shall immediately notify the Disclosing Party in the event that it becomes aware of any unauthorized disclosure of Confidential Information; and

(v) shall satisfy and comply with all applicable privacy legislation and any other statute or regulation applicable to the Confidential Information, including without limitation FIPPA and MFIPPA.

(b) At any time at the request of the Disclosing Party, the undersigned shall immediately:

(i) return all Confidential Information to the Disclosing Party; or

(ii) destroy the Confidential Information and all copies thereof in any form whatsoever under its power or control and provide the Disclosing Party with a certificate signed by the undersigned, or an appropriate officer of the undersigned, certifying such destruction.

3. Exceptions

The obligations of confidentiality set out in Section 2 shall not apply to Confidential Information that:

(i) is or becomes generally available to the public through no fault of the undersigned, including, by way of example only, information related to the Procurement process and disclosed by Metrolinx after a successful bidder has been identified, including the names of the bidders that submitted proposals and the total contract price of the successful bidder;

(ii) prior to receipt from the Disclosing Party, was known to the undersigned on a non-confidential basis and is not subject to another obligation of secrecy and non-use, as documented by written records possessed by the undersigned;

(iii) was independently developed by the undersigned prior to receipt from the Disclosing Party, as documented by written records possessed by the undersigned; or

(iv) becomes available to the undersigned on a non-confidential basis from a source other than the Disclosing Party that is not under other obligations of confidence.

4. Authorized Purpose

The undersigned acknowledges that all Parties have disclosed Confidential Information to the undersigned solely in connection with assisting, advising and/or providing feedback to the Procurement (the "Authorized Purpose"). The undersigned may use the Confidential Information solely in connection with the Authorized Purpose and for no other purpose. The undersigned acknowledges and agrees that unauthorized dealings with the Confidential Information would be detrimental to the interests, business and affairs of any of the Parties (or third parties with respect to third party information), including the integrity of the Procurement.

5. Conflict of Interest

The undersigned declares that there is no actual or potential conflict of interest arising out of the receipt of the Confidential Information or the undersigned's role on the Procurement. The undersigned declares that the undersigned will immediately disclose any actual or potential conflict of interest that may arise during the course of participating in the Procurement. Furthermore, the undersigned acknowledges and agrees that if it is participating in or involved with, or has participated in or been involved with, the Procurement and is at any time in receipt of Confidential Information, the undersigned is precluded from participating in any activity with any third party, including any third party responding to a Procurement solicitation document in respect of the Procurement, whether as an employee, advisor or otherwise, which will constitute an actual or potential conflict of interest for a period of six (6) months from (i) the execution of the agreement(s) with the successful supplier resulting from a Public Tender or (ii) the final abandonment or cancellation of a Public Tender by Metrolinx.

6. Legally Required Disclosure

If the undersigned becomes compelled to disclose any Confidential Information pursuant to applicable law, the undersigned shall provide the Disclosing Party with prompt written notice of any such requirement and shall cooperate with the Disclosing Party in seeking to obtain any protective order or other arrangement pursuant to which the confidentiality of the relevant Confidential Information is preserved. If such an order or arrangement is not obtained, the undersigned shall disclose only that portion of the Confidential Information as is required pursuant to applicable law. Any such required disclosure shall not, in and of itself, change the status of the disclosed information as Confidential Information under the terms of this Confidentiality Agreement.

7. Ownership

The Disclosing Party shall retain all right, title and interest, including all intellectual property rights, in and to its Confidential Information. Neither the execution of this Confidentiality Agreement, nor the furnishing of any Confidential Information by a Disclosing Party shall be construed as granting to the undersigned, either by implication or otherwise, any interest, license or right respecting the Disclosing Party's Confidential Information, including any intellectual property rights.

8. No Warranties, Representations or Liability

ALL INFORMATION IS PROVIDED "AS IS", WITHOUT WARRANTY OR GUARANTEE OF ANY KIND AS TO ITS ACCURACY, COMPLETENESS, OPERABILITY, FITNESS FOR PARTICULAR PURPOSE, NON-INFRINGEMENT OF THIRD PARTY INTELLECTUAL PROPERTY RIGHTS OR ANY OTHER WARRANTY, EXPRESS OR IMPLIED. THE DISCLOSING PARTY SHALL NOT BE LIABLE FOR ANY DAMAGES, LOSS, EXPENSE OR CLAIM OF LOSS ARISING FROM THE USE OF, OR RELIANCE ON, THE INFORMATION BY THE UNDERSIGNED.

9. Damages

The undersigned acknowledges and agrees that:

- (a) any breach or threatened breach of the terms of this Confidentiality Agreement and the obligations set out herein shall cause immediate and irreparable harm for which damages alone are not an adequate remedy; and
- (b) a Disclosing Party shall be entitled to seek, in addition to any other legal remedies which may be available to it, such equitable relief as may be necessary and available to protect such Party against such breach or threatened breach.

10. Survival

The undersigned acknowledges and agrees that the terms of this Confidentiality Agreement shall survive (i) the term of any agreement with the successful supplier resulting from a Public Tender process relating to the Procurement, including any renewal periods exercised by any of the Parties, or (ii) the final abandonment or cancellation of the Procurement by Metrolinx, as applicable.

11. General

No delay or failure by a Disclosing Party, in exercising any rights, powers, remedies or privileges available to it hereunder shall operate as a waiver thereof. The single or partial exercise of a right, power, remedy or privilege shall not preclude its subsequent exercise or the exercise of any other right, power, remedy or privilege. If any provision of this Confidentiality Agreement is invalid, unenforceable or illegal, such provision shall be deemed to be severed without affecting any other provision. The provisions herein shall enure to the benefit of each Disclosing Party's successors and assigns. This Confidentiality Agreement may be executed by the Parties in separate counterparts, each of which when so executed and delivered will be an original, but all such counterparts will together constitute one and the same instrument.

12. Governing Law

This Confidentiality Agreement shall be governed by the laws of the Province of Ontario and the laws of Canada applicable therein.

IN WITNESS WHEREOF the undersigned has caused this Confidentiality Agreement to be duly executed as of the date first written above.

Per: _____

Name: _____

Title: _____

SCHEDULE E: PURCHASER INFORMATION SHEET

1. **Legal name of organization**

2. **Contact information**

Mailing address and fax number for notices:

Fax: _____

3. **Steering Committee Member**

Alternate Member

Title: _____

Address: _____

Telephone #: _____

Fax #: _____

E-mail: _____

**SCHEDULE F:
SAMPLE COUNCIL/BOARD/COMMISSION BY-LAW/RESOLUTION**

The Council/Board/Commission for [insert legal name of municipality/Purchaser] hereby authorizes the future signing by [insert title of authorized agent] of a “Governance Agreement for the Joint Procurement of Electric Cooling Systems and Electric Cooling System Retrofits” (the “Agreement”) for the purpose of purchasing Electric Cooling Systems and Electric Cooling System Retrofits on an exclusive basis from a supplier selected pursuant to a public tender (“Public Tender”) process facilitated by Metrolinx, on terms and conditions set out in the Governance Agreement between, among others, Metrolinx and [insert legal name of municipality/Purchaser].

This By-law/Resolution was adopted by the Council/ Board/Commission of

[Insert legal name of municipality/Purchaser]

on _____, 201_

Member of Council/Governing Board/Commission

Member of Council/Governing Board/Commission

I/we have the authority to bind the Council/Governing Board/Commission.

**SCHEDULE G:
SAMPLE CERTIFICATE OF APPOINTMENT**

I [insert legal name of agent authorized to sign Governance Agreement on behalf of the municipality], [and I, insert legal name of agent authorized to sign Governance Agreement on behalf of the municipality,]¹, as the individual[s] authorized by [insert name of Council/Board/Commission] pursuant to [insert name of the by-law or resolution authorizing agents to sign the Governance Agreement] to sign the "Governance Agreement for the Joint Procurement of Electric Cooling Systems and Electric Cooling System Retrofits" (the "Agreement") for the purpose of purchasing Electric Cooling Systems and Electric Cooling System Retrofits on an exclusive basis from a supplier selected pursuant to a public tender ("Public Tender") process facilitated by Metrolinx, on terms and conditions set out in the Agreement, hereby authorize[s]:

[insert title of Steering Committee Member] to perform any action, and provide any required recommendations, instructions and approvals to complete the procurement within the scope of the Agreement, to appoint alternate members to the Steering Committee to perform the above in their absence and to exercise the Council/Board/Commission's rights of early termination in accordance with Section 9.6 (Termination Without Cause by a Purchaser) of the Agreement.

This certificate was signed on _____, 201__

Authorized Signatory of the Agreement:

Authorized Signatory of the Agreement:

I/we have the authority to bind the Council/Governing Board/Commission.

¹ To be included only if more than one agent will sign the Governance Agreement on behalf of the municipality.

SCHEDULE H: CONFIRMATION AGREEMENT

THIS INSTRUMENT of accession forms part of a Governance Agreement for the Joint Procurement of Electric Cooling Systems and Electric Cooling System Retrofits made as of the ____ day of _____, 20____, together with the Schedules attached thereto, as each may be amended, restated, supplemented or otherwise modified from time to time, by and among Metrolinx and [insert names of Parties] (the “Governance Agreement”). **Capitalized terms used herein have the meanings ascribed to them in the Governance Agreement.**

[WHEREAS [name of party] was added as a Party to the Governance Agreement pursuant to a Confirmation Agreement dated [insert date of relevant confirmation agreement]²;

[AND] WHEREAS pursuant to Section 6.3 of the Governance Agreement, Metrolinx has the right to add Eligible Purchasers as Parties to the Governance Agreement, and, once added as a Party such Eligible Purchaser shall become a Purchaser;

AND WHEREAS [insert name of new Purchaser] is an Eligible Purchaser, as that term is defined in the Governance Agreement, and wishes to be added as a Party to, and become a Purchaser under, the Governance Agreement;

NOW THEREFORE in consideration of the mutual covenants of the Parties set out in the Governance Agreement and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, [insert name of new Purchaser] and Metrolinx hereby agree as follows:

1. This Confirmation Agreement is a counterpart to the Governance Agreement and that, by execution and delivery hereof, [insert name of new Purchaser] becomes and agrees to be a Party to the Governance Agreement;
2. Subject to (i) [insert name of new Purchaser]’s compliance with the requirements set out in Section 6.1 of the Governance Agreement and (ii) the limitations set out in Section 6.3 of the Governance Agreement, [insert name of new Purchaser] shall become a Purchaser for all purposes contemplated in the Governance Agreement.
3. [insert name of new Purchaser] hereby agrees:
 - a. to be bound by, and hereby confirms, all covenants, agreements, representations, warranties, consents, submissions, appointments and acknowledgements attributable to or made by a Purchaser in the Governance Agreement;
 - b. to perform any and all obligations required of a Purchaser by the Governance Agreement; and
 - c. that the representations and warranties set forth in the Governance Agreement and applicable to [insert name of new Purchaser] are true and correct as at the effective date of this Confirmation Agreement.

² To be included only if other parties have joined the Governance Agreement after the Effective Date pursuant to a separate Confirmation Agreement.

4. This Confirmation Agreement shall be governed by the laws of the Province of Ontario.

IN WITNESS WHEREOF the undersigned has caused this Confirmation Agreement to be duly executed as of the date first written above.

[INSERT NAME OF NEW PURCHASER]

Per: _____

Name: _____

Title: _____

I have the authority to bind the [city/corporation].

Address of Party for Purposes of Notice:

METROLINX

Per: _____

Name: _____

Title: _____

Per: _____

Name: _____

Title: _____

We have the authority to bind the corporation.

**Appendix B
Report PW13028**

Authority: Item 8.1, Public Works Committee
Report 12-003 (PW12-012)
CM: March 5, 2012

Bill No.

CITY OF HAMILTON

BY-LAW NO. 13-

**To Authorize the Signing of a Governance Agreement for
the Joint Procurement of Electric Cooling Systems and Electric Cooling
System Retrofits
for Fiscal Year 2013 and two consecutive one year options in 2014 and
2015**

WHEREAS the Council of the City of Hamilton deems it advisable to enter into an agreement for the joint procurement of Electric Cooling Systems and Electric Cooling System Retrofits 2013-2015, with Metrolinx;

NOW THEREFORE the Council of the City of Hamilton enacts as follows:

1. The Mayor and Clerk are authorized and directed to enter into a Governance Agreement with Metrolinx for the Joint Procurement of Electric Cooling Systems and Electric Cooling System Retrofits (the "Agreement").
2. The Director of Transit is hereby appointed to the Steering Committee to perform any action, and provide any required recommendations, instructions and approvals to complete the Procurement within the scope of the Agreement.
3. The Manager of Transit Fleet Maintenance is hereby appointed as an Alternate Member to the Steering Committee to perform the above in his absence and to exercise the Council's rights of early termination in accordance with section 9.6 (Termination without cause by a Purchaser) of the Agreement.

PASSED this XXXXX, 2013.

R. Bratina
Mayor

R. Caterini
Clerk