

CITY OF HAMILTON

PUBLIC WORKS DEPARTMENT
Transportation, Energy and Facilities Division

TO: Chair and Members Public Works Committee	WARD(S) AFFECTED: CITY WIDE
COMMITTEE DATE: March 5, 2012	
SUBJECT/REPORT NO: City of Hamilton/Metrolinx Governance Agreement for the Joint Procurement of Specialized Transit (DARTS) Buses (PW12012) - (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, attached as Appendix "A" to report PW12012, for the joint procurement of replacement Specialized Transit buses for 2012-2013 in accordance with the DARTS ten year capital fleet replacement plan as approved by Council;
- (b) That a certified copy of this Governance Agreement and accompanying By-Law in a form satisfactory to Corporate Legal Services, Corporate Purchasing, and Corporate Finance be forwarded to Metrolinx upon Council approval.

EXECUTIVE SUMMARY

The City of Hamilton has been offered the opportunity to participate in a joint procurement of Specialized Transit buses for 2012 and 2013 with Metrolinx and 16 other Transit Systems. The benefits include:

- Purchasing new fleet with a secured price;
- Mitigates Operating budget pressures through ensuring delivery of replacement fleet in the scheduled year of replacement;

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- Fleet meets the 2010 emission standards that run on Ultra Low Sulphur Diesel and are equipped with Diesel Particulate Filters and uses Diesel Exhaust Fluid to meet stringent emission standards;
- Building on the initiatives undertaken with the Province - Hamilton is a member in the GTTA-Hamilton fare card initiative.

The Governance Agreement referred to in recommendation (a) of this report is a required prerequisite to join the Provincial Procurement for Specialized Buses. Under the conditions of the agreement, a By-Law is required to authorize the Mayor and City Clerk to sign the “Governance Agreement between Her Majesty the Queen in Right of the Province of Ontario” (attached as Appendix A), represented by Metrolinx and the City of Hamilton related to the opportunity of becoming part of the Provincial Joint Procurement of Specialized Buses.

The Procurement Agreement does not bind the City to purchase fleet. It does however, bind the City to purchasing fleet from the successful bidder to this tender should the City desire to purchase replacement DARTS fleet in 2012 – 2013. Should the City choose not to avail itself of taking advantage of purchasing fleet, than the City is committing to not otherwise tender or purchase fleet in 2012 – 2013.

The Province first offered this program in 2010 for a one year period, Hamilton was not involved as we had already tendered ourselves for specialized fleet and were in the process of having fleet delivered. We are now in a position to join this procurement initiative which is similar to the procurement of conventional Transit buses that we have been participating in since 2008. This objective translates to benefits for the transit systems, the related municipality, the Province, as well as the manufacturers. Based on our successful experience to date, staff is recommending that Hamilton joins in this latest procurement initiative for specialized buses for 2012 - 2013.

Metrolinx has retained, and provided funding for the services of an independent, fairness commissioner. The fairness commissioner will be a third party observer who provides independent confirmation that the procurement is open, fair and transparent and complies with the terms and conditions of the RFP and the Ontario procurement policies.

Council has an approved Specialized Transit (DARTS) Fleet of 70 buses based on previously approved service levels. This requires a replacement of 10 buses per year based on Council’s seven year replacement cycle.

Alternatives for Consideration - See Page 5

FINANCIAL / STAFFING / LEGAL IMPLICATIONS

Financial: Ratification of the Governance Agreement and related by-law implementation results in the City of Hamilton becoming eligible to participate in the Provincial Joint Procurement of Specialized Buses for our 2012 - 2013 Specialized Bus Purchase.

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Staffing: There are no staffing implications.

Legal: There are no legal implications.

HISTORICAL BACKGROUND

This procurement initiative, facilitated by Metrolinx now involves sixteen transit systems; Barrie, Cornwall, Durham, Hagi Community Services, Kingston, Hamilton, Kenora, Lanark Transportation Association, North Bay, Oakville, OC Transpo, Orillia, Sarnia, St. Thomas, Welland, and York. This initiative calls for the joint procurement of specialized buses for 2012 – 2013. 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 principles:

- Metrolinx, as facilitator, shall use an open and competitive procurement and be in compliance with Ontario Procurement Policies when issuing the Request for Proposal, whereby proposals will be evaluated and the master agreement will be awarded to the bidder with the highest overall score;
- 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, after which, the City is bound to purchase for 2012 - 2013 council approved replacement fleet;
- The procurement will be overseen/managed by the Steering Committee;
- Avoid costs by standardizing the RFP documents including terms and conditions;
- Obtaining more favourable pricing given order size and standardization of specifications;
- Improving the procurement process in terms of time requirements, time availability, and completeness of the request for proposal document, including bus specifications;
- Providing the opportunity to share resources in dealing with technical (new technology) issues associated with the bus, particularly for medium to smaller systems;
- Avoid costs and reduce time associated with the bus procurement process allowing transit systems to focus on core competency;
- Reduce uncertainty for manufacturers through longer production runs, predictability, and performance-based specifications.

POLICY IMPLICATIONS

City Of Hamilton entering into a procurement agreement with Metrolinx.

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The Public Works Strategic 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 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". Purchase of replacement specialized fleet within the capacity of the current capital budget contribution for Transit complies with the Public Works Strategic plan ensuring that work is undertaken at approved service levels with budgets that match;
- "Servicing our Communities with Trust". The purchase of eight metre Specialized buses that are low emission diesel powered that meets the increased standard for 2010 and are equipped with particulate filters and further use diesel exhaust fluid to ensure the lowest tailpipe emissions is in accordance with Public Works Strategic Plan commitment to be a leader in "greening" of the City.

RELEVANT CONSULTATION

Staff has consulted with Barbara Kinrade in Purchasing and Don Fisher in Legal. Staff has consulted with the other participating Transit Systems throughout our involvement in the joint specialized bus procurement initiative. All have reported a positive experience. Comments include:

- Good performance based contract specifications;
- Delivery schedules adhered to;
- Competitive pricing;
- Avoid costs and reduce time associated with the bus procurement process;
- Opportunity to improve buying power;
- Access to on site (at manufacturer's plant) third party inspection service;
- The opportunity to build on what has been learned i.e. other opportunities for similar initiatives;
- Process was very "pristine".

ANALYSIS / RATIONALE FOR RECOMMENDATION

Joining this Procurement initiative facilitated by Metrolinx offers many benefits and advantages to the City, which include purchasing new fleet with a secured price, better utilization of staff resources, mitigates operating budget pressures by ensuring timely fleet replacements, ensures compliance with Purchasing Policies.

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ALTERNATIVES FOR CONSIDERATION

Staff can be directed to enter into a dedicated tender process for the City of Hamilton.

CORPORATE STRATEGIC PLAN

Focus Areas: 1. Skilled, Innovative and Respectful Organization, 2. Financial Sustainability, 3. Intergovernmental Relationships, 4. Growing Our Economy, 5. Social Development, 6. Environmental Stewardship, 7. Healthy Community

Financial Sustainability

- ◆ Financially Sustainable City by 2020
- ◆ Delivery of municipal services and management capital assets/liabilities in a sustainable, innovative and cost effective manner
- ◆ Full life-cycle costing for capital

Intergovernmental Relationships

- ◆ Maintain effective relationships with other public agencies

APPENDICES / SCHEDULES

Appendix A - Governance Agreement

**GOVERNANCE AGREEMENT FOR THE JOINT PROCUREMENT
OF SPECIALIZED TRANSIT BUSES**

December 15, 2011

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**GOVERNANCE AGREEMENT
FOR THE
JOINT PROCUREMENT OF SPECIALIZED TRANSIT BUSES**

THIS AGREEMENT is effective as of the • day of •, 2011.

A M O N G:

METROLINX

- AND -

THE CORPORATION OF THE CITY OF BARRIE

- AND -

THE CORPORATION OF THE CITY OF CORNWALL

- AND -

THE REGIONAL MUNICIPALITY OF DURHAM

- AND -

HAGI COMMUNITY SERVICES FOR INDEPENDENCE

- AND -

KINGSTON ACCESS SERVICES

- AND -

CITY OF HAMILTON

- AND -

THE CORPORATION OF THE CITY OF KENORA

- AND -

LANARK TRANSPORTATION ASSOCIATION

- AND -

THE CORPORATION OF THE CITY OF NORTH BAY

- AND -

THE CORPORATION OF THE TOWN OF OAKVILLE

- AND -

OC TRANSPORATION CORPORATION

- AND -

THE CORPORATION OF THE CITY OF ORILLIA

- AND -

THE CORPORATION OF THE CITY OF SARNIA

- AND -

THE CORPORATION OF THE CITY OF ST. THOMAS

- AND -

THE CORPORATION OF THE CITY OF WELLAND

- AND -

THE REGIONAL MUNICIPALITY OF YORK

WHEREAS Metrolinx has been working with Ontario municipal specialized transit systems and entities that provide specialized transit services under contract to municipalities and entities that receive provincial funding to provide transit services to persons with disabilities in a municipality to jointly develop detailed common vehicle specifications for low-floor and high-floor Specialized Transit Buses that can be used for a joint Procurement;

AND WHEREAS the Parties wish to:

- a. Reduce the unit cost of buses by consolidating municipal Specialized Transit Bus orders to achieve the volumes required to attain economies of scale for municipal transit systems and their municipally-funded specialized transit service providers.
- b. Avoid costs by standardizing the Request for Proposal documents including vehicle specifications, terms and conditions.
- c. Avoid costs and reduce time associated with the bus procurement process allowing transit systems to focus on core competency.

- d. Improve buying power and delivery schedules for specialized transit systems.
- e. Reduce uncertainty for manufacturers through longer production runs, predictability, and performance-based specifications.

ARTICLE I: PRINCIPLES OF TRANSIT BUS PROCUREMENT

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 RFP whereby proposals will be evaluated.
- b. 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 the Master Agreement with the successful Proponent, pursuant to Section 25 (Award of a Master Agreement).
- c. The term of a Master Agreement shall be for one year with the option to extend the Master Agreement for an additional one year (the "Option Year").
- d. Subject to Section 15 (Procurement Process), the decision on whether or not to exercise the right to extend for the Option Year and, to the extent the Option Year is exercised, the number of Specialized Transit Buses to be purchased, rests exclusively with each of the respective Purchasers.
- e. Metrolinx shall work with a Steering Committee in undertaking a Procurement.
- f. Metrolinx will facilitate the Purchasers' Procurement of Specialized Transit Buses.
- g. Ownership of the Specialized Transit Buses and legal obligations related to the Procurement of the Specialized Transit Buses shall reside exclusively with the respective Purchasers.
- h. 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 II: STEERING COMMITTEES

2. Steering Committee Membership

For each RFP intended to be issued by Metrolinx pursuant to Section 6(a) (Decisions of a Steering Committee), there shall be a Steering Committee comprising one representative from each of Metrolinx (the "Metrolinx Member"), GO Transit (to the extent that GO Transit is participating in that RFP), and one representative from each Purchaser under that RFP. 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. Council By-Law, Resolution

The appointment of a Member and the Alternate Member for a Purchaser shall be confirmed by a by-law or resolution of the municipal council, commission, or board (as applicable) in a form consistent with Schedule F. The appointment shall refer to a position rather than a specific individual.

4. Votes

Save and except for the Metrolinx Member, each Purchaser under the RFP and GO Transit shall, through their Member, have one vote on the Steering Committee for that RFP. For greater certainty and consistent with its role as facilitator, the Metrolinx Member shall have no vote on any Steering Committee.

5. 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.

6. 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:

- a. recommending to Metrolinx the issuance of any RFP;
- b. recommending to Metrolinx the selection of a successful Proponent under any RFP issued pursuant to Section 6(a) (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 32 (Metrolinx Remedies for Event of Default by Purchaser).

Where a Steering Committee exercises its authority under Section 6(d) (Decisions of a Steering Committee), 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.

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.

7. 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, should it elect 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. Each Steering Committee will establish an evaluation committee to evaluate the proposals of the Proponents for the relevant RFP and make recommendations to the Steering Committee. Notwithstanding the above, the Metrolinx Member shall not have representation on the evaluation committee but may be present as an observer and/or to facilitate the evaluation process.

8. Binding Decisions

All Steering Committee decisions must comply with the terms of this Agreement, the RFP and the Master Agreement related to the relevant RFP and are final and binding on all Purchasers.

9. Regular Meetings

Each Steering Committee shall meet at least quarterly 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 10 (Special Meetings).

10. 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.

11. Location of meetings

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

12. 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 common specifications for a Base Bus;
- c. recommend the terms and conditions of the relevant RFP including the proposed Supplier agreements forming a part of such RFP;
- d. recommend the issuance of an RFP pursuant to Section 6(a) (Decisions of a Steering Committee);
- e. consider the recommendations of the evaluation committee related to the evaluation of the RFP proposals received;
- f. subject to Section 25 (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;
- g. subject to this Agreement establish rules and procedures regarding its meetings;
- h. approve the implementation schedule for each Procurement;
- i. establish a Communication Plan in cooperation with Metrolinx for each Procurement; and
- j. 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.

13. Responsibilities of Chair

The responsibilities of a Steering Committee Chair include:

- a. except for special meetings called in accordance with Section 10 (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 III: PROCUREMENT APPROACH

14. Vehicle Specification

The Specialized Transit Bus specification(s) will be primarily performance-based, identifying minimum performance requirements rather than specific components and enabling all qualified Proponents the flexibility to bid in the most efficient, cost-effective manner. The intent is to provide a common Base Bus for each Procurement; however, Purchasers will have the ability to select alternative components to those specified, based upon an Options list provided by the

successful Proponent. The Proponent's proposal must include pricing for these optional components.

15. Procurement Process

Subject to this Agreement, the specific terms of the RFP and the Master Agreement, each Procurement is intended to identify a Supplier as the exclusive Supplier of that Specialized Transit Bus for the term of the relevant Master Agreement for Purchasers who do not elect to terminate their participation in the Procurement pursuant to Section 36 (Termination Without Cause by a Purchaser). The option to extend for the Option Year will be at the sole discretion of each Purchaser, each of whom shall have the right to exercise the Option Year or not in accordance with the Master Agreement and their Bus Purchase Agreement. Upon exercise of the Option Year by any Purchaser under section 56 (Option Year), the successful Proponent will be the exclusive Supplier of Specialized Transit Buses to such Purchaser during the Option Year in accordance with the terms of the Master Agreement and the relevant Bus Purchase Agreement.

16. Supplier

A Supplier procured pursuant to an RFP:

- a. be given an exclusive contract for the Term; therefore, Purchasers that plan to procure Specialized Transit Buses during the Term and that have not withdrawn in accordance with Section 36 (Termination Without Cause by a Purchaser) must purchase Specialized Transit Buses from the successful Supplier on an exclusive basis;
- b. not be contractually guaranteed the purchase of any particular number of Specialized Transit Buses under the relevant Master Agreement; and
- c. be advised by the Purchasers of their respective Specialized Transit Bus orders 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 Year, to facilitate Specialized Transit Bus delivery in that year

Deleted: ¶

17. Master Agreement

On the recommendation of the Steering Committee in accordance with Section 25 (Award of Master Agreement) and in compliance with Section 45 (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 RFP that will establish the Supplier for each Master Agreement. Notwithstanding the foregoing, as the issuer of the RFP 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 Base Bus 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

18. Bus Purchase Agreement with Supplier

Subject to the Master Agreement, each Purchaser will enter into a Bus Purchase Agreement directly with the Supplier that will provide details of delivery times for their respective Specialized Transit Buses, selected vehicle Options specific to that Purchaser, pricing and other appropriate terms and conditions consistent with the terms of the relevant Master Agreement. Each Bus Purchase Agreement between a Purchaser and the Supplier is subject to review by the Project Engineer prior to its execution. The Project Engineer will review each Bus Purchase Agreement to ensure it is consistent with the relevant Master Agreement. Should it be found to be inconsistent, the Project Engineer will report the inconsistency to the Steering Committee and Metrolinx. Purchasers are required to enter into a new Bus Purchase Agreement with the Supplier if they choose to exercise the Option Year.

19. Timing

Subject to the terms of this Agreement, the RFPs are anticipated to be issued by Metrolinx no later than October 2011 to accommodate delivery of Specialized Transit Buses in the fiscal year ending March 31, 2013 and the Option Year ending March 31, 2014. These timelines are estimates only and are subject to change by Metrolinx, in its sole discretion, acting reasonably.

20. Issuance of RFP

Metrolinx shall conduct each 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 Proponent information session;
- c. a posting of Proponent questions and answers through addenda on MERX™;
and
- d. an evaluation committee to review and evaluate all RFP proposals, consisting of one representative from each Purchaser who chooses to participate on the evaluation committee.

The cost of the joint Procurement 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 36 (Termination Without Cause by a Purchaser).

21. Project Engineer

Metrolinx shall retain and provide funding for the services of a Project Engineer who shall assist each Steering Committee and its respective Purchasers from the time each Master Agreement is executed up until the point the respective Specialized Transit Buses are accepted by the respective Purchasers.

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

- a. being the central point of contact for the Supplier with the Purchasers;
- b. reviewing all Bus 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 Bus Purchase Agreement;
- d. overseeing the work of the Bus Inspector retained by Metrolinx hereunder, including without limitation establishing the bus inspection schedule based upon the Project Engineer's timely receipt of Specialized Transit Bus orders from the Purchasers in accordance with this Agreement; and
- e. rejecting work from the Supplier that does not conform to the relevant Bus Purchase Agreement and/or Master Agreement. This is in addition to the right of the Bus Inspector under Section 22(f) (Bus Inspector).

22. Bus Inspector

Metrolinx shall retain and fund the services of a Bus Inspector to oversee the production of the Specialized Transit Buses at the Supplier's manufacturing location from the start of production until delivery to the Purchasers of Specialized Transit Buses ordered prior to June 15, 2012 and June 15, 2013 of the Option Year. In order to qualify for the Bus Inspector's services, a copy of the Purchaser's Bus 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 bus inspection services available hereunder upon receipt of a copy of a Purchaser's Specialized Transit Bus Purchase Agreement and related order received in accordance with the foregoing. Orders received subsequent to the dates identified herein may not qualify for bus inspection services.

A series of in-plant inspections will be conducted at the following key stages of production:

- Modified OEM chassis
- Passenger compartment structure (prior to paneling installation)
- Completed bus
- Pre-delivery tests

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

- a. performing Supplier in-plant inspection services during key stages of the manufacturing, production and assembly of Specialized Transit Buses ordered by the Purchasers, including:
 - i. inspecting and ensuring proper function of all installed systems and sub-systems;
 - ii. tracking and documenting production progress; and
 - iii. ensuring all deficiencies are corrected prior to release of Specialized Transit Buses to Purchasers and witnessing pre-delivery tests;
- b. monitoring and reporting to the Project Engineer the Supplier's compliance with the Technical Specifications, the quality assurance, production and delivery provisions contained in the Master Agreement and the Bus Purchase Agreement, and all applicable Requirements of Law at the time of manufacture;
- c. working with the Supplier, the Purchasers and/or the Project Engineer to address any issues related to the quality and performance of work and production schedule;
- d. reviewing all manufacturer production requests for waiver, requests for deviation and engineering change proposals and submitting recommended course of action to the Project Engineer for decision or Steering Committee review;
- e. any cross-border clearances necessary to inspect the manufacturing work conducted in Canada and in the USA;
- f. rejecting work from the Supplier that does not conform to the relevant Master Agreement and/or the Bus Purchase Agreement; and,
- g. providing a final inspection summary for each Purchaser detailing production and inspection information for the Specialized Transit Buses ordered.

23. Fairness Commissioner

Notwithstanding anything in this Agreement to the contrary, Metrolinx shall alone and in its sole and absolute discretion, procure, retain and provide funding for the services of an independent fairness commissioner. The fairness commissioner will be a third party observer who provides independent confirmation that the Procurement is open, fair and transparent and complies with the terms and conditions of the RFP and any Procurement Policies required to be followed by Metrolinx.

24. Evaluation of Proposals for each RFP

The Parties agree that:

- a. an evaluated award approach will be used in awarding each Master Agreement.
- b. an evaluation committee, consisting of a representative from each Purchaser who chooses to participate on the evaluation committee, will conduct the evaluation of proposals in compliance with any Procurement Policies required to be followed by Metrolinx and will include the following:
 - i. Stage I will consist of a review to ensure all of the mandatory submission requirements have been met.
 - ii. Stage II will consist of a review to ensure all of the mandatory technical requirements have been met.
 - iii. In stage III, the evaluation committee will score the rated items in each qualified proposal.
 - iv. Stage IV will occur after the completion of stage III, when the sealed pricing envelope for each qualified proposal will be opened and the Base Bus price and total spare parts basket price(s) will be evaluated and scored.
 - v. At the conclusion of stage IV, all scores from stage III and stage IV will be added to determine the overall highest scoring qualified Proponent.

Proponents must successfully complete each stage of the evaluation prior to proceeding to the next stage as listed above. If the mandatory requirements are not met, proposals may be rejected and not evaluated further. The Metrolinx Member shall be entitled to attend all meetings of the evaluation committee, but shall not evaluate proposals.

25. Award of a Master Agreement

- a. Each Steering Committee may recommend that Metrolinx award a Master Agreement to the overall highest scoring qualified Proponent identified by the respective evaluation committee by sending written notification thereof to Metrolinx.
- b. Notwithstanding Section 25(a) (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 Proposal is acceptable based on the terms and conditions of the RFP. If at least two-thirds of the Steering Committee Members eligible to vote agree that no proposal is acceptable, they may agree to recommend to Metrolinx that the RFP be cancelled and each Purchaser shall thereafter be free to obtain the Specialized Transit Buses which were the subject of the RFP, subject to the survival of and the Purchaser's continued compliance with the specific terms of this Agreement, including without limitation confidential and conflict of interest.
- c. Following a Steering Committee's recommendation to Metrolinx to award a Master Agreement and in accordance with Section 36 (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 17 (Master Agreement).

ARTICLE IV: LIABILITY

26. 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 Bus Purchase Agreement. In no case whatsoever will Metrolinx be responsible or liable for the cost of any Deliverables under a Bus 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 specialized transit services in its jurisdiction and/or its acquisition of Specialized Transit Buses hereunder, and including without limitation and by way of example only the Canadian Content Policy.
- c. 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 a Bus Purchase Agreement, if any. Each Purchaser may include such additional business and legal terms and conditions to the Bus Purchase Agreement as it sees fit in the circumstances provided that the required terms of the Bus Purchase Agreement approved by the Steering Committee (the "Required Terms") are wholly retained and provided further that 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 Bus Purchase Agreement with the Supplier, including without limitation the Supplier's compliance with the Canadian Content Policy and shall not direct any Supplier service issues that may arise to Metrolinx but shall inform Metrolinx's Project Engineer 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 V: ROLES AND RESPONSIBILITIES

27. 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 RFP including without limitation, issuance, evaluation and award and shall, through the Project Engineer, 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 Specialized Transit Bus specifications;
 - II. development of common RFP terms and conditions for each Specialized Transit Bus RFP;
 - III. development of each Specialized Transit Bus Master Agreement and Bus Purchase Agreement;

- ii. assist in the consolidation of Specialized Transit Bus orders 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 Specialized Transit Buses 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 proposals;
 - ii. mediate disputes between the Purchaser and the Supplier following the execution by a Purchaser of a Bus 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 Bus Purchase Agreement from time to time to 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 Engineer and/or Bus 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 Bus Inspector pursuant to Section 22 (Bus Inspector) and the Project Engineer pursuant to Section 21 (Project Engineer), Metrolinx does not guarantee, warranty 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 Engineer or the Bus Inspector.

ARTICLE VI: PURCHASERS

28. Steps Required to Become a Purchaser

Subject to Section 30 (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 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, which includes, at a minimum, the information in the sample by-law/resolution attached as Schedule “F” (Sample Council/Board/Commission By-Law/Resolution), including the designation of persons authorized to provide instructions and any necessary approval for the Procurement as Steering Committee Member, Alternate Member, and confirming that all necessary actions have been taken by the Purchaser to authorize such persons to give instructions and any necessary approval for the Procurement. The designations shall refer to positions rather than to specific individuals; and
 - iii. a confidentiality agreement attached as Schedule “G” (Confidentiality Agreement).

29. 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, and
 - vi. unless it has withdrawn from this Agreement under Section 36 (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 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 Bus Purchase Agreement as determined by the Steering Committee, acting reasonably.

- 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.

30. 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 Engineer that the Supplier has sufficient capacity to accept additional Purchasers without impacting on the delivery of Specialized Transit Buses already on order by existing Purchasers;
- b. confirm in writing to Metrolinx that it has not issued an RFP or a tender or subsequently cancelled an order for Specialized Transit Buses in Fiscal Year 2012 or Fiscal Year 2013 in order to participate in this Procurement; and
- c. complete Section 28 (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 Bus Inspector which shall be subject to the availability of Metrolinx funds. The Purchaser may then enter into a Bus 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.

In addition to the foregoing and notwithstanding anything in this Agreement to the contrary, within twelve (12) months of the Effective Date the Parties will revisit the terms applicable to the inclusion and addition of non-municipal and non-provincial Purchasers to this Agreement and recommend amendments to the Agreement to this end, if appropriate. Any amendment shall be effected only by instrument in writing executed by each of the Parties in accordance with Section 61 (Amendment).

ARTICLE VIII: DEFAULT, ENFORCEMENT AND TERMINATION

31. 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 materially false or misleading in any 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 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 Section 53 (No Conflict of Interest) and Section 54 (Confidential Information).

32. 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. 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.

33. 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 38 (Obligations Survive), terminate its participation in this Agreement by giving Metrolinx at least thirty (30) calendar days prior written notice of the termination date.

- 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.

34. Termination Without Cause by Metrolinx

Metrolinx may terminate this Agreement at any time, without cause, by delivering written notice, in accordance with Section 39 (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.

35. Effect of Termination Without Cause by Metrolinx

Where Metrolinx has provided notice pursuant to Section 34 (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 them or any of them. Such request shall be made before the expiry of the notice period referred to in Section 34 (Termination Without Cause by Metrolinx).

36. Termination Without Cause by a Purchaser

A Purchaser may terminate its participation under this Agreement or any RFP 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 25 (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 RFP. No notice by an individual Purchaser shall affect the rights and obligations of the other Parties.

37. 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 Specialized Transit Buses for the term of the Master Agreement and a Purchaser shall not purchase Specialized Transit Buses 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 vehicle funding as may be applicable.

38. Obligations Survive

Despite any termination under this Article VIII (Default, Enforcement and Termination) each Party agrees that certain rights and obligations (whether contingent or matured, absolute or not), as set out in Section 60 (Survival) of each Party existing immediately before the termination shall survive such termination.

Where Metrolinx terminates this Agreement pursuant to Section 34 (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 VIII (Default, Enforcement and Termination), the Purchaser shall continue to be bound by the terms and conditions of any Bus Purchase Agreement which may have been executed by it prior to such termination and any termination of a Bus Purchase Agreement by the Purchaser shall be made only in accordance with its terms.

ARTICLE IX: NOTICE

39. 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) 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.

ARTICLE X: DISPUTE RESOLUTION

40. Legal Remedies for Disputes

Any dispute, question, claim, or other matter arising out of or relating to this Agreement (collectively, a "Dispute") shall be resolved by the following escalation procedure. 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.

41. Disputes with Supplier

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

42. 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 manner described in Schedule "B" (Dispute Resolution). For greater certainty, a Party may refer a Dispute to dispute resolution under the provision 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").

43. 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 this Agreement to the best of their abilities.

44. 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 with the Supplier arising out of a Dispute related to the Master Agreement.

ARTICLE XI: Interpretation of Agreement

45. 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.

46. 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.

47. Entire Agreement

- a. 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.
- b. The following Schedules are attached to and form a part of this Agreement:
 - Schedule "A" – Definitions and Interpretation;
 - Schedule "B" – Dispute Resolution;
 - Schedule "C" – Communication Plan;
 - Schedule "D" – Confidentiality Provisions;
 - Schedule "E" – Purchaser Information Sheet;
 - Schedule "F" – Sample Council/Board/Commission By-Law/Resolution;
 - Schedule "G" – Confidentiality Agreement;
 - Schedule "H" – Confirmation Agreement
 - Schedule "I" – Ministry of Transportation Canadian Content for Transit Vehicle Procurement Policy

48. 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.

49. 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.

50. 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.

51. Conflict

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.

52. 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 XII:
CONFLICT OF INTEREST**

53. 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, RFPs, Master Agreements and Bus Purchase Agreements contemplated or completed under this Agreement. 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 proposals 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 36 (Termination Without Cause by a Purchaser), it shall not be entitled to contract with the Supplier for the purchase of Specialized Transit Buses which were the subject matter of the RFP, during the term of the Master Agreement.

ARTICLE XIII: CONFIDENTIAL INFORMATION

54. Confidential Information

During and following the Term, each Purchaser in accordance with the terms and conditions set out in Schedule "D" (Confidentiality Provisions), 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 "G" (Confidentiality Agreement) with respect to each Purchaser.

ARTICLE XIV: Term

55. 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 for each type of Specialized Transit Bus shall be in effect until the termination or expiration of the relevant Master Agreement (the "Term").

56. Option Year

Each Purchaser may exercise the Option Year contemplated by Section 17 (Master Agreement) and Section 18 (Bus Purchase Agreement with Supplier), by providing to 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 Party's Member. Notwithstanding anything in this Agreement to the contrary, in the event that no Purchaser notifies Metrolinx of its intention to exercise the Option Year under the Master Agreement, the Master Agreement shall be deemed to be at an end and shall expire at the completion of its current term.

**ARTICLE XV:
GENERAL**

57. 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.

58. 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 Party 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 Party may verify 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 a Bus Purchase Agreement which shall be determined in accordance with the relevant Bus Purchase Agreement terms.

59. 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.

60. Survival

Articles XII (Conflict of Interest), XIII (Confidential Information), VIII (Default, Enforcement and Termination), IV (Liability), and Section 29 (Representations and Warranties of Purchaser), excluding Subsection 29 a.iv, shall survive the expiration or termination of this Agreement.

61. 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.

62. 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 reasonably 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.

63. 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.

64. Enurement

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

65. 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.

66. 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:

I have the authority to bind the corporation.

Per: _____

Name:

I have the authority to bind the corporation.

METROLINX
operating as GO Transit

Per: _____

Name:

Date: _____

**THE CORPORATION OF THE CITY OF
BARRIE**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____

**THE CORPORATION OF THE CITY OF
BROCKVILLE**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____

**THE CORPORATION OF THE CITY OF
CORNWALL**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____

**THE REGIONAL MUNICIPALITY OF
DURHAM**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation

Date: _____ **THE CORPORATION OF THE CITY OF DRYDEN**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____

**CORPORATION SUPPORT CENTRE (ESSEX
COUNTY)**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____

**HAGI COMMUNITY SERVICES FOR
INDEPENDENCE**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____

CITY OF HAMILTON

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____

**THE CORPORATION OF THE CITY OF
KENORA**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation

Date: _____

**LANARK TRANSPORTATION
ASSOCIATION**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____

**THE CORPORATION OF THE
MUNICIPALITY OF LEAMINGTON**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____

**THE CORPORATION OF THE CITY OF
NORTH BAY**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____

**THE CORPORATION OF THE TOWN OF
OAKVILLE**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____ **OC TRANSPOR CORPORATION**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____

**THE CORPORATION OF THE CITY OF
ORILLIA**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____

**THE CORPORATION OF THE CITY OF
SARNIA**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____

**THE CORPORATION OF THE CITY OF
ST. THOMAS**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____

**THE CORPORATION OF THE CITY OF
WELLAND**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

Date: _____ **THE REGIONAL MUNICIPALITY OF YORK**

Per: _____

Name:

Title:

Per: _____

Name:

Title:

We have the authority to bind the corporation.

SCHEDULE A:

DEFINITIONS AND INTERPRETATION

1. Definitions

In this Agreement,

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

“**Alternate Member**” means a person designated 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;

“**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;

“**Base Bus**” means the Specialized Transit Bus proposed by a Proponent, with the Proponent’s selection of standard components/materials, that meets the mandatory requirements specified in the RFP and the Technical Specification, including the Purchaser’s Choices but excluding the Options;

“**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;

“**Bus Inspector**” means the person or persons hired by Metrolinx pursuant to Section 22 (Bus Inspector) to perform in-plant inspection services during all phases of the manufacturing, production and assembly of the Specialized Transit Buses ordered by the Purchasers;

“**Bus Purchase Agreement**” or “**BPA**” means the contract or contracts to be entered into between the Purchasers and the Supplier to deliver the Specialized Transit Buses and any other related supplies and services as described in an RFP with any additional Options specified by each Purchaser;

“**Canadian Content Policy**” means the Ministry of Transportation’s Canadian Content for Transit Vehicle Procurement Policy, issued in September 2008 and as amended from time to time, a current copy of which is attached to this Agreement as Schedule I;

“**Chair**” means a Steering Committee chair appointed by the relevant Steering Committee in accordance with Section 12 (Responsibilities of Steering Committee);

“Communication Plan” means the communication plan for any major joint communication event 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 the solicitation documents, including, without limitation, any Request for Proposals 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 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 nature. “Confidential Information” shall not include (i) information that is or becomes generally available to the public without fault or breach on the part of a Party of any duty of confidentiality owed by the Party to Metrolinx or to any third-party; (ii) a Party can demonstrate to have been rightfully obtained by the Party, without any obligation of confidence, from a third-party who had the right to transfer or disclose it to the Party free of any obligation of confidence; (iii) a Party can demonstrate to have been rightfully known to or in the possession of the Party at the time of disclosure, free of any obligation of confidence when disclosed; or (iv) is independently developed by a Party;

“Contract” means the aggregate of: (a) the Master Agreement; (b) the Purchaser-specific Bus Purchase Agreement; (c) the RFP, including any addenda; (c) the proposal; and (d) 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;

“Dispute” has the meaning ascribed thereto in Section 40 (Legal Remedies for Disputes);

“Dispute Notice” has the meaning ascribed thereto in Section 42 (Three-Tiered Dispute Resolution);

“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) a legal entity that provides public transit services for persons with disabilities within a municipality and on behalf of that municipality; or

c) a legal entity in receipt of Provincial funding for its provision of transit services for persons with disabilities within the Province of Ontario; or

d) 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 a Bus Purchase Agreement or failed to exercise an Option Year.

“Event of Default” has the meaning ascribed thereto in Section 31 (Event of Default);

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

“Force Majeure” has the meaning ascribed thereto in Section 58 (Force Majeure);

“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 27(f) (Roles and Responsibilities of Metrolinx);

“Master Agreement” means the contract, including its schedules, to be entered into between Metrolinx and the Supplier to deliver the Specialized Transit Buses as they will be described in an RFP and any other related supplies and services, or any part thereof;

“Member” means a person designated by a Party as set out in Section 2 (Steering Committee Membership) and who is deemed authorized by virtue of such designation 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;

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

“**Metrolinx Member**” has the meaning ascribed thereto in Section 2 (Steering Committee Membership);

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

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

“**Option**” means a component or material that is proposed and priced by the Proponent as an alternative to the Proponent’s standard component/material;

“**Option Year**” has the meaning ascribed thereto in Section 1(c) (Key Principles);

“**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 Specialized Transit Buses as they will be described in the RFP and any other related supplies and services in accordance with this Agreement including without limitation the Project Engineer and the Bus Inspector;

“**Procurement Documents**” means the Request for Proposals and any documents related thereto;

“**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 Engineer**” means the project engineer hired by Metrolinx pursuant to Section 21 (Project Engineer) to assist each Steering Committee and the Purchasers on technical issues from the time the Master Agreement is awarded up until the point Specialized Transit Buses are accepted by respective Purchasers;

“**Project Manager**” means the Metrolinx representative responsible for the overall facilitation and administration of the Procurement initiative under Section 27 (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;

“Proponent” means the legal entity that submits a proposal in response to this RFP;

“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;
- b) a legal entity that provides public transit services for persons with disabilities within a municipality and on behalf of that municipality;
- (c) a legal entity in receipt of Provincial funding for its provision of transit services for persons with disabilities within the Province of Ontario; or
- (d) GO Transit;

and includes each Party to this Agreement and any Eligible Purchaser that has subsequently complied with the requirements of Section 28 (Steps Required to Become a Purchaser);

“Purchaser’s Choices” means components or materials that are included in the Proponent’s Base Bus Price at no additional cost, as identified either in its proposal or in the Technical Specifications e.g. driver’s seat, orientation, set-up, layout etc. that will be selected by Purchasers during the pre-production process;

“Request for Proposals” or **“RFP”** means the request for proposals to be issued by Metrolinx for the Procurement;

“Required Terms” has the meaning ascribed thereto in Section 26(d) (No Metrolinx Liability);

“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 to this Agreement listed in Section 47 (Entire Agreement) and attached to this Agreement;

“Specialized Transit Bus” means a fully accessible motor vehicle that is designed and intended to be used for the public transportation of persons with disabilities;

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

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

“Technical Specifications” means the specific operating, vehicle and other requirements for the Specialized Transit Buses to be included in the RFP and to form part of the Master Agreement with the Supplier; and

“Term” has the meaning ascribed thereto in Section 55 (Term).

SCHEDULE B: DISPUTE RESOLUTION

1. High-Level Negotiation

Subject to Section 42 (Three-Tiered Dispute Resolution), in the event a Party issues a 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.

2. Mediation

If the Dispute has not been resolved through high-level negotiation as contemplated in 1 above (High-Level Negotiation), 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.

3. Arbitration

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

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

SCHEDULE C: 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 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:
 1. public reports, or
 2. Internet pages providing information for transit agencies, municipalities, contractors and members of the public on this Agreement.

SCHEDULE D: CONFIDENTIALITY PROVISIONS

1. Injunctive and other relief

Each Party acknowledges that breach of any provisions of this Schedule (Confidentiality Provisions) may cause irreparable harm to any of the other Parties, or to third parties to whom any of the Parties owes a duty of confidence, and that the resulting injury to a Party, or to any third party may be difficult to calculate and adequately compensate in damages. Each Party agrees that any other Party, is entitled to obtain injunctive relief (without proving any damage sustained by it or by any third party) or any other remedy available to it by law against any actual or potential breach of the provisions of this Schedule (Confidentiality Provisions), subject to any applicable statutory exemptions and acknowledging that any request for equitable relief is within the discretion of a court.

2. Notice and protective order

If a Party or any of its advisors, agents, directors, commissioners, officers, partners, Personnel, representatives or contractors becomes legally compelled to disclose any Confidential Information, that Party shall provide each of the other Parties, with prompt notice to that effect to allow any of the Parties, to seek one or more protective orders or other appropriate remedies to prevent or limit such disclosure, and it shall co-operate with the other Parties, and their respective legal counsel to the fullest extent legally possible. If such protective orders or other remedies are not obtained, the Party will disclose only that portion of the Confidential Information which the Party is legally compelled to disclose and only to such person or persons to which the Party is legally compelled to disclose.

3. Parties' advisors, agents, Personnel and contractors

Each Party shall limit the disclosure of the Confidential Information to only those of its advisors, agents, directors, commissioners, officers, Personnel, representatives or contractors who need to know it in order to perform the Party's obligations under this Agreement and who have been specifically authorized by the Party to have such disclosure. Each Party shall advise its advisors, agents, directors, commissioners, officers, Personnel, representatives and contractors of the requirements of this Schedule (Confidentiality Provisions) and take appropriate action to ensure their compliance with its terms. In addition to any other liabilities of a Party pursuant to this Agreement or otherwise at law or in equity, that Purchaser 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 Schedule D (Confidentiality Provisions) by the Party's advisors, agents, directors, commissioners, officers, Personnel, representatives or contractors. Each Party shall execute or require each of its advisors, agents, directors, commissioners, officers, Personnel and contractors involved in any way in fulfilling the Party's

obligations under this Agreement to execute Schedule "G" (Confidentiality Agreement) with respect to each Purchaser, where applicable.

**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

hereby authorizes the future signing by _____,

_____ of a

(title of agent)

“Governance Agreement for the Joint Procurement of Specialized Transit Buses” (the “Agreement”) for the purpose of purchasing Specialized Transit Bus(es) on an exclusive basis pursuant to a process and on terms and conditions set out in the following RFP. In addition, the Council/Board/Commission authorizes _____ (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 36 (Termination Without Cause by a Purchaser) of the Agreement.

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

Name of legal entity

on _____, 2011

Member of Council/Governing Board/Commission

Member of Council/Governing Board/Commission

SCHEDULE G: CONFIDENTIALITY AGREEMENT

[Instructional note: To be signed by each Steering Committee Member and submitted to the Project Manager.]

In consideration received of the undersigned's receipt of Confidential Information (as defined below) and other good and valuable consideration the receipt and sufficiency is hereby acknowledged, the undersigned hereby acknowledges and agrees and undertakes as follows:

1. The undersigned shall maintain the absolute confidentiality of all Confidential Information, and, except as expressly permitted herein, shall not directly or indirectly copy, distribute, disclose, use or allow access to, the Confidential Information, or obtain any benefit from the Confidential Information or permit anyone to do any of these things. The undersigned agrees not to disclose any of the Confidential Information to any person for any reason whatsoever other than to those persons who actually need to have knowledge of the Confidential Information for the purpose of facilitating participation in the Procurement. In this event, the undersigned shall disclose such part of the Confidential Information to those persons as is reasonably necessary. Prior to disclosure, however, the undersigned shall issue appropriate directions to those persons to whom it proposes to lawfully disclose the Confidential Information to satisfy the undersigned's obligations herein.
2. The undersigned shall maintain the security and integrity of any Confidential Information in the possession or control of the undersigned, and shall keep such Confidential Information in a physically secure location to which access is restricted. The undersigned shall use measures to protect the Confidential Information, which are no less stringent than the measures used to protect information of a confidential nature in his/her place of employment. The undersigned shall not have, or acquire, any right, title or interest, including intellectual property rights, in such Confidential Information.
3. 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.
4. On expiration or termination of the undersigned's engagement or participation in the Procurement, or anytime upon a Party's request, the undersigned agrees to ensure all copies and partial copies of any Confidential Information (in any form or media) in the undersigned's possession or control are either returned to the requesting Party or permanently destroyed.
5. In this Confidentiality Agreement, "Confidential Information" means (i) the Procurement process and solicitation documents and any information relating to or arising from the process and the solicitation documents, including, without limitation, any Request for Proposals 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* (Ontario) or the *Municipal Freedom of Information and Protection of Privacy Act*; (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 nature. "Confidential Information" shall not include (i) information that is or becomes generally available to the public without fault or breach on the part of a Party of any duty of confidentiality owed by the Party to Metrolinx or to any third-party; (ii) a Party can demonstrate to have been rightfully obtained by the Party, without any obligation of confidence, from a third-party who had the right to transfer or disclose it to the Party free of any obligation of confidence; (iii) a Party can demonstrate to have been rightfully known to or in the possession of the Party at the time of disclosure, free of any obligation of confidence when disclosed; or (iv) is independently developed by a Party.

6. 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 the undersigned is participating in or 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 the Request for Proposals process or (ii) the final abandonment or cancellation of the Request for Proposal by Metrolinx.

7. No delay or failure by a 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.

8. This Confidentiality Agreement shall survive (i) the term of any agreement with the successful Supplier resulting from the Request for Proposals process relating to the Procurement, including any renewal periods, or (ii) the final abandonment or cancellation of the Request for Proposal by Metrolinx, as applicable.

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

10. This Confidentiality Agreement shall enure to the benefit of any successors and assigns of Metrolinx.

11. Defined terms denoted by initial capital letters shall have the meaning ascribed to them in the "Governance Agreement for the Joint Procurement of Specialized Transit Buses" unless otherwise defined in this Confidentiality Agreement.

Signed: _____

Appendix A
Report PW12012

Name: _____

Title: _____

DATED: _____

**SCHEDULE H:
CONFIRMATION AGREEMENT**

THIS INSTRUMENT of accession forms part of an agreement made as of the ____ day of _____, 20____ between Metrolinx and the signatories thereto (the "Governance Agreement"), which agreement permits the addition of parties as Purchasers in accordance with its terms and the execution of the Governance Agreement by such Purchasers by way of counterpart;

AND WHEREAS the undersigned hereby acknowledges having received a copy of the Governance Agreement (which is annexed hereto as Schedule "A") and having read the Governance Agreement in its entirety;

AND WHEREAS all of the capitalized terms used herein have the meanings ascribed to them in 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, the undersigned agrees that:

- a) all of the provisions of the Governance Agreement shall be binding upon the undersigned and such provisions shall enure to the benefit of and be binding upon the undersigned's heirs, executors, administrators, successors and permitted assigns; and
- b) the undersigned represents and warrants that it has all necessary power and authority and has taken all necessary actions to enable it to enter into the Governance Agreement and perform its obligations thereunder.

IN WITNESS WHEREOF the undersigned has executed this Instrument this ____ day of _____, _____.

[Name]

Per: _____
Name: _____
Title: _____

Address of Party for Purposes of Notice:

[insert Address for Notice Purposes]

SCHEDULE I:

**MINISTRY OF TRANSPORTATION CANADIAN CONTENT FOR
TRANSIT VEHICLE PROCUREMENT POLICY**

Issued September 2008
Amended November 2010

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Effective Date

The Canadian Content for Transit Vehicle Procurement Policy is effective as of September 1, 2008.

CANADIAN CONTENT FOR TRANSIT VEHICLE PROCUREMENT POLICY

1. DEFINITIONS

When used in this document, the words set out below that import the singular include the plural and vice versa:

“Canadian content policy” means this Canadian Content for Transit Vehicle Procurement Policy”, as amended from time to time, issued by the Ministry of Transportation.

“component” means any article, subcomponent, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the transit vehicle.

“dealer” means an agent who distributes transit vehicles on behalf of a manufacturer.

“eligible cost” means the compensation paid by a manufacturer for:

- (a) labour performed in Canada that is directly related to the manufacturing process of transit vehicles;
- (b) work performed in Canada in relation to freight, manuals, special tools, test equipment, or warranties; or
- (c) components, subcomponents and raw materials produced in Canada in respect of transit vehicles or any of the items listed in (b) above.

“engineering” means the application of scientific and technical knowledge to the design, analysis, and/or construction of a subcomponent, component or transit vehicle.

“entity” means a person, firm, corporation, municipality, local board of a municipality, or transit or transportation commission, or authority, acquiring transit vehicles on behalf of a transit operator.

“freight” means the cost for transportation within Canada, and/or paid to a Canadian carrier for a) delivering a subcomponent or component to a manufacturer and b) delivering a transit vehicle to a transit operator or an entity.

“GO Transit” means a division of Metrolinx, established pursuant to the *Metrolinx Act, 2006*, S.O. 2001, c.16.

“irreversible manufacturing process” means a manufacturing process which transforms subcomponents into a component which cannot be separated back into the subcomponents without destroying the subcomponents’ integrity.

“labour” means the compensation paid for work performed by a manufacturer or, a manufacturer’s supplier of subcomponents and components, that is directly related to the manufacturing process of transit vehicles, including project management and engineering, plus any benefits paid or general administration and similar expenses recognized and allowed by Canadian accounting rules.

“manual” means a handbook or guidebook, specific to a transit vehicle, that a manufacturer may provide to a transit operator, or an entity.

“manufacturer” means the manufacturer of a subcomponent, component or transit vehicle acquired, or that may be acquired, by a transit operator or an entity and, as applicable, includes a dealer for such manufacturer.

“manufacturing process” means the application of processes to alter the form or function of components or subcomponents to create a component or a transit vehicle.

“Metrolinx” means the corporation continued pursuant to the *Metrolinx Act, 2006*, S.O. 2006, c.16.

“Ministry” means the Ministry of Transportation.

“project management” means the application of knowledge, skills, tools, and techniques to the manufacturing process, distribution and acquisition of transit vehicles.

“public transportation” means any service for which a fare is charged for transporting the public by transit vehicles operated by or on behalf of a transit operator, or under an agreement between a transit operator and an entity, and includes special transportation facilities for the physically disabled, but does not include transportation by special purpose facilities such as school buses or ambulance.

“special tools” means an engineered tool that a manufacturer may provide to a transit operator or an entity to service a transit vehicle after delivery.

“subcomponent” means a part of a component which cannot be further separated into its constituent parts without destroying its integrity.

“submission” means a response from a manufacturer to a fair, open and transparent procurement process.

“test equipment” means the diagnostic equipment a manufacturer provides to a transit operator or an entity.

“transit operator” means a municipality, Metrolinx or GO Transit.

“transit vehicle” refers to a street car, bus, trolley bus, subway car, light rail car, or passenger locomotive used for public transportation, made up of subcomponents and

components, and acquired by a transit operator, or an entity under a contract with a manufacturer and for which the Province of Ontario may provide, in whole or in part, funding.

“warranty” refers to the promise under a contract between a transit operator, or an entity, and a manufacturer that the material and workmanship of the transit vehicle is defect-free and will perform a specified level of performance over a specified period of time.

2. INTRODUCTION

On March 20, 2008, the Government of Ontario announced that all transit vehicles procured with provincial funding must have at least 25 per cent Canadian content. The Canadian content policy is a mandatory requirement for provincial funding of transit vehicles. The policy is expected to promote job retention and creation, foster economic development, protect skilled manufacturing jobs and continue to promote a fair, open and transparent procurement process that ensures value for taxpayers’ dollars.

The Ministry of Transportation has conducted extensive stakeholder consultations with municipalities, transit industry manufacturers, suppliers, dealers, as well as its own transit agencies. As a result of the stakeholder consultations, the 25% Canadian content policy will include exemptions and waivers as laid out in this document.

The Canadian content policy is effective as of September 1, 2008. Procurements issued publicly, prior to September 1, 2008, to solicit submissions from manufacturers are exempt from complying with the terms and conditions of the Canadian content policy. The Province took the lead on implementing this policy, through Metrolinx’s Request For Proposals for Urban Transit Buses under the 2009 Transit Procurement Initiative.

As outlined above, the Ontario government is committed to a transparent, fair and open process for transit vehicle procurement that ensures value for taxpayers’ dollars. The Canadian content policy will apply to the procurement of transit vehicles acquired with funds received from the Province.

Although a minimum of 25% must be achieved and attested to in order to receive provincial funding, a municipality may require a higher percentage of Canadian content for its transit vehicle procurements.

3. CALCULATING CANADIAN CONTENT

Under the Canadian content policy, the overall Canadian content of a transit vehicle is calculated as a percentage of the total final costs to the manufacturer, less any applicable taxes.

The Ministry will only consider, as Canadian content, expenditures for eligible costs in respect of transit vehicles for the items listed below and which are directly related to transit vehicles manufacturing process, distribution and acquisition:

labour;
subcomponents and components;
project management;
engineering;
manuals;
special tools;
test equipment;
freight; and
warranty.

In addition, the percentage of Canadian content for expenditures (see above list of items for which expenditures may be considered eligible) related to transit vehicles, components or subcomponents will be calculated as follows:

100% Canadian for a component that has undergone an irreversible manufacturing process in Canada.

100% Canadian for a component that contains 60% or more Canadian content through any combination of expenditures that may be considered eligible, as described above, if such expenditures are made in Canada.

The exact Canadian percentage for a component that contains between 0% and 59% Canadian content through any combination of expenditures that may be considered eligible, as described above, if such expenditures are made in Canada.

Where a component or subcomponent is procured from a Canadian supplier, a minimum Canadian content of 15% will be assumed, without the requirement of certifying the percentage of Canadian content of the component or subcomponent in a manufacturer's declaration of compliance with the Canadian content policy. Simply handling the component or subcomponent is not sufficient to qualify. The Canadian supplier must provide added value through the procuring, manufacturing or-after sales support of the component or subcomponent.

4. CANADIAN CONTENT DECLARATION & CONSENT FORM

Transit operators, and entities, must ensure that each manufacturer demonstrates how it will comply with the Canadian content policy requirements, and obtain a written declaration from the manufacturer:

certifying the percentage of Canadian content of the transit vehicles described in the manufacturer's submission, calculated in accordance with this policy; and

providing the manufacturer's consent to the disclosure, verification and audit of the information forming the basis of the declaration, both before the contract award and, for the successful manufacturer, during and after the term of the contract. (See Part 9 below for additional details regarding disclosure, verification and audit.)

In addition, transit operators, and entities, must ensure that manufacturers provide such progress reports, during the term of the contract, as they or the Ministry or the Auditor General, or any of their designates, may require, and written declarations of ongoing compliance with the 25% Canadian content requirement.

Should it appear at any time that a manufacturer might not meet the 25% Canadian content level, a transit operator or entity may require the manufacturer to submit a revised plan indicating how it will achieve compliance.

Transit operators, and entities, must ensure that the successful manufacturer demonstrates, upon final delivery of the transit vehicle(s), how it complied with the Canadian content policy requirement, and obtain a written declaration from the manufacturer, certifying the percentage of Canadian content of the transit vehicles, calculated in accordance with this policy.

5. EXEMPTIONS

Through the consultation process, concerns were raised regarding the continued availability of certain types of transit vehicles and the ability to procure transit vehicles in an open and fair and fair procurement process in compliance with the 25% Canadian content requirement.

In consideration of the transit operator's efforts to comply with the *Accessibility for Ontarians with Disabilities Act, 2005*, and to procure specific transit vehicles to meet their individual strategic requirements to improve transit services, the following five vehicle types will be exempted from the 25% Canadian content requirement:

- specialized transit buses;
- conventional transit buses under 40 feet in length;
- diesel multiple units (DMUs);
- double decker buses; and
- passenger locomotives.

Despite the above and to encourage Canadian content for the exempted transit vehicles listed above, transit operators and entities will apply a 5% price preference to the price for the submission with the highest percentage of Canadian content. In practice, this will result in the submission with the highest percentage of Canadian content being evaluated as if the price submitted in the manufacturer's offer were 5% lower than that which was actually submitted. The 5% price preference will be applied for evaluation

purposes only, and will not represent an effective reduction in the price submitted by the manufacturer.

6. WAIVERS

In the event that no Canadian content compliant submissions are received as part of a fair, open and transparent procurement process for non-exempted vehicles, a transit operator may formally request a waiver to comply with the Canadian policy from the Ministry by providing:

a letter from the Chief Administrative Officer or Chief Executive Office to the Deputy Minister of Transportation supporting the request for a waiver;
a resolution from the transit operator (e.g., municipal Council or Metrolinx Board resolution) requesting a waiver; and
a detailed report outlining the procurement process that was used.

Upon receipt of the waiver request, the Ministry will have the above-noted documents reviewed by a Ministry-appointed fairness monitor to determine whether a fair, open and transparent procurement process was used. If the procurement process was determined to be fair, open and transparent, the Ministry may waive the requirement for compliance with the Canadian content policy for that specific procurement. The Ministry intends to communicate its decision in writing and within 20 business days upon receipt of the fairness monitor's determination on whether it will provide a waiver. If the Ministry decides that the procurement process is not fair, open and transparent, the transit operator will have to decide to either initiate, or have the entity initiate, a new procurement process or proceed without provincial funding.

Where the Ministry issues a waiver, transit operators and entities will apply a 5% price preference to the price for the submission with the highest percentage of Canadian content. In practice, this will result in the submission with the highest percentage of Canadian content being evaluated as if the price submitted in the manufacturer's submission was 5% lower than actually submitted. The 5% price preference will be applied for evaluation purposes only, and will not represent an effective reduction in the price submitted by the manufacturer.

7. PROVINCIAL ENFORCEMENT

If, in the opinion of the Ministry, a transit operator, or an entity, fails either to comply with or to ensure manufacturers' compliance with any of the Canadian content policy requirements, the Ministry may avail itself of any remedies it may have under the terms of the program or arrangement under which the transit vehicle may be funded, or any other remedies it may have at law or in equity.

8. MUNICIPAL ENFORCEMENT

Transit operators, and entities procuring transit vehicles on their behalf, are responsible for ensuring the manufacturers' compliance with the Canadian content policy. As such, transit operators and entities are expected to include, in their contract documents, provisions that set out the manufacturers' obligations to comply with the Canadian content policy and remedies should a selected manufacturer default in meeting these obligations. Such remedies may include termination for breach of such requirement. In addition, transit operators and entities may require an indemnity from the selected manufacturer for any liability the transit operator and/or entity might incur in the event of such breach. Transit operators and entities should obtain independent legal advice in order to adequately address related issues.

The Province shall not incur any liability whatsoever, expressed or implied, resulting from a transit operator's or entity's implementation of this Canadian content policy.

9. DISCLOSURE, VERIFICATION AND AUDIT

Transit operators and entities are required to ensure manufacturers from whom they acquire transit vehicles are in compliance with this Canadian content policy. Despite the above, and unless provided otherwise under the terms of a program or arrangement under which provincial funds are provided for a transit vehicle, the Province and/or the Auditor General, or any of their designates, may also perform a verification or compliance audit to ensure manufacturers from whom transit operators and entities procure transit vehicles comply with this Canadian content policy, the costs of which the Province will assume.

10. WHERE TO REQUEST OR PROVIDE INFORMATION

Any questions from transit operators regarding the Canadian content policy are to be directed to the Ministry's Transit Policy Branch at telephone (416) 585-7360 or fax (416) 585-7343.

Any questions from manufacturers regarding the Canadian content policy for a specific transit operators' procurement should be directed to the transit operator, or entity, responsible for the procurement.