



CITY OF HAMILTON

PUBLIC WORKS DEPARTMENT
Transportation, Energy & Facilities Division

TO: Chair and Members Public Works Committee	WARD(S) AFFECTED: CITY WIDE
COMMITTEE DATE: April 4, 2011	
SUBJECT/REPORT NO: City of Hamilton/Metrolinx Governance Agreement for the Joint Procurement of Conventional Transit (HSR) Buses (PW11026) - (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 General Manager of Finance and Corporate Services (City Treasurer) be authorized and directed to enter into a Governance Agreement, attached as Appendix "A" to report PW11026, for the joint procurement of replacement Conventional Transit buses for 2011-2013 in accordance with the Transit ten year capital fleet replacement plan, with Metrolinx, with the understanding that staff is required to report back to Council for authority to enter into a purchase agreement;
- (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 40-foot diesel and/or 40-foot diesel hybrid Transit buses for 2011 and 2012, 2013 optional years with Metrolinx and fourteen other Ontario municipalities. The benefits of the joint procurement 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 the 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 Conventional Transit Buses. Under the conditions of the agreement, a By-Law is required to authorize the Mayor and City Treasurer 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 Transit 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 Transit Fleet in 2011. 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 2011.

The Province first offered this program in 2007 for a two year period in response to the need to provide the opportunity for small and medium size transit systems to gain efficiencies and economies in the purchase of conventional transit fleet at the best price through effective use of shared resources. This objective translates to benefits for transit systems, the related municipality, the Province, as well as the manufacturers. Council granted staff the authority to participate in the second year of the initial offering of the program in acquiring the replacement fleet for 2008. Further Council granted staff the ability to participate in 2009/2010. Based on our successful experience, staff is recommending that Hamilton renew its commitment for 2011 with an option to participate in 2012 and 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 Conventional Transit (HSR) Fleet of 217 buses based on previously approved service levels. This requires a replacement schedule of 17.5 buses per year based on Council's 12-year replacement cycle. This program offers procurement of 40 foot, low floor, low emission, diesel buses and 40-foot hybrid diesel buses.

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 Transit buses for our 2011/2012/2013 Conventional Transit Bus Purchase.

Staffing: There are no staffing implications.

Legal: There are no legal implications.

HISTORICAL BACKGROUND

This procurement initiative, facilitated by Metrolinx, now involves fourteen transit systems; Barrie, Brampton, Burlington, Durham, Hamilton, Kingston, London, Milton, North Bay, Sarnia, St. Catharines, Welland, Windsor, and York. The initiative calls for the joint purchase of 40-foot low emission diesel transit buses for 2011 -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 2011, for whatever level of 2011 replacement fleet Council authorizes through a future report from staff.
- 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 Manufactures through longer production runs, predictability, and performance-based specifications.

POLICY IMPLICATIONS

City of Hamilton entering into a procurement agreement with Metrolinx.

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 vision drivers: Communities, People, Processes, and Finances. Hamilton's partnership with Metrolinx and other Municipalities demonstrates three of our four strategic commitments:

- "Smart Processes to Match our Needs". Partnering with Metrolinx and neighbouring municipalities saves valuable human resource time and money.
- "Sound Financial Management for the Long Haul". Purchase of replacement 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.
- "Serving our Communities with Trust". The purchase of 40-foot low emission diesel powered fleet that meets the increased emission standard for 2010 and are equipped with particulate filters and further uses 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 Angela Mastandrea in Purchasing and Don Fisher in Legal. Staff has also consulted with the participating municipalities throughout our involvement in the joint bus procurement initiative. All have reported a positive experience. Comments from properties contacted 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 manufactures 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

Transit produces less than 1% of all GHG tailpipe emissions. Diesel engines produced for Transit use after 2010 run on ultra-low sulphur fuel, are equipped with diesel

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particulate traps, and also use diesel exhaust fluid for lowest emissions, and can run on bio-diesel mixture for further improved emissions.

For the years 2011/2012/2013 the Provincial Fleet Procurement initiative includes 40-foot diesel buses and 40-foot diesel hybrid buses. Council's approval of Hamilton's participation in this initiative does not preclude the City from tendering for excluded fleet options such as 60-foot articulated fleet should Council give direction for this type of purchase.

ALTERNATIVES FOR CONSIDERATION

That staff 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

Skilled, Innovative & Respectful Organization

- ◆ A skilled, adaptive and diverse workforce (i.e. more flexible staff)
- ◆ More innovation, greater teamwork, better client focus
- ◆ An enabling work environment - respectful culture, well-being and safety, effective communication

APPENDICES / SCHEDULES

Appendix "A" - Governance Agreement

**GOVERNANCE AGREEMENT FOR THE JOINT PROCUREMENT
OF TRANSIT BUSES
FOR FISCAL YEAR 2011 – FISCAL YEAR 2013**

January 11, 2011

THIS AGREEMENT made as of the 11th day of January, 2011.

B E T W E E N:

METROLINX,

(hereinafter referred to as "Metrolinx")

- AND -

THE CORPORATION OF THE CITY OF BARRIE,
represented by the Mayor and Clerk

(hereinafter referred to as "Barrie")

- AND -

THE CORPORATION OF THE CITY OF BRAMPTON,
represented by the Mayor and Clerk

(hereinafter referred to as "Brampton")

- AND -

THE CORPORATION OF THE CITY OF BURLINGTON,
represented by the Mayor and Clerk

(hereinafter referred to as "Burlington")

- AND -

THE REGIONAL MUNICIPALITY OF DURHAM,
represented by the Regional Chair and the Regional Clerk

(hereinafter referred to as "Durham Region")

- AND -

THE CITY OF HAMILTON,
represented by the Mayor and Clerk

(hereinafter referred to as "Hamilton")

- AND -

THE CORPORATION OF THE CITY OF KINGSTON,
represented by the Mayor and Clerk

(hereinafter referred to as “Kingston”)

- AND -

LONDON TRANSIT COMMISSION,
represented by the Chair and General Manager

(hereinafter referred to as “London”)

- AND -

THE CORPORATION OF THE TOWN OF MILTON,
represented by the Mayor and Clerk

(hereinafter referred to as “Milton”)

- AND -

THE CORPORATION OF THE CITY OF NORTH BAY,
represented by the Mayor and Clerk

(hereinafter referred to as “North Bay”)

- AND -

THE CORPORATION OF THE CITY OF SARNIA,
represented by the Mayor and Clerk

(hereinafter referred to as “Sarnia”)

- AND -

ST. CATHARINES TRANSIT COMMISSION,
represented by the Chair and General Manager

(hereinafter referred to as “St. Catharines”)

- AND -

THE CORPORATION OF THE CITY OF WELLAND,
represented by the Mayor and Clerk

(hereinafter referred to as “Welland”)

- AND -

THE CORPORATION OF THE CITY OF WINDSOR,
represented by the Mayor and Clerk

(hereinafter referred to as “Windsor”)

- AND -

THE REGIONAL MUNICIPALITY OF YORK,
represented by the Regional Chair and the Regional Clerk

(hereinafter referred to as “York Region”)

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WHEREAS Metrolinx has been working with municipal transit managers to develop detailed common vehicle specifications for 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 Transit Bus orders to achieve the volumes required to attain economies of scale for municipal transit systems;
- b. Avoid costs by standardizing the Procurement documents including vehicle specifications, terms and conditions;
- c. Avoid costs and reduce time associated with the bus procurement process by allowing transit systems to focus on core competency;
- d. Improve buying power and delivery schedules for municipal transit systems; and
- 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 all Procurement Policies which it is required to follow, in any RFP issued hereunder whereby proposals will be evaluated.
- b. Participation by Purchasers in the joint Procurement is voluntary up to five (5) Business Days following the relevant Steering Committee recommendations that Metrolinx enter into a Master Agreement with the successful Proponent(s), pursuant to section 25 (Award of a Master Agreement).
- c. The Term of the Master Agreement(s) is for one year (Fiscal Year 2011) with two consecutive one year options (Fiscal Year 2012 and Fiscal Year 2013).
- d. Subject to section 15 (The Request for Proposal (RFP) process), the decision of whether or not to exercise the Option Years and, to the extent the Option Years are exercised, the number of Transit Buses to be purchased, and rests exclusively with each of the respective Purchasers as set out in their respective Municipal Bus Purchase Agreements.
- e. Metrolinx shall work with each Steering Committee in undertaking the Procurement(s).
- f. Metrolinx will facilitate the Purchasers' procurement of Transit Buses in accordance with this Agreement.
- g. Ownership and legal obligations, including without limitation payment, for the Transit Buses shall reside exclusively with the respective Purchasers.

- h. Metrolinx and 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 Transit Bus RFP intended to be issued by Metrolinx pursuant to section 6 (a) (Decisions of a Steering Committee), there shall be a Steering Committee comprised of one representative from Metrolinx and each Purchaser under the relevant RFP. For each Transit Bus Steering Committee, Metrolinx and each Purchaser may also appoint one Alternate Member, who can act on the Member's behalf in their 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 municipality or the 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 shall, through its Member, have one vote on the Steering Committee. For greater certainty and consistent with its role as facilitator, the Metrolinx Member shall have no vote on the 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. Members may be present either in person or by means of such telephone, electronic and other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously.

6. Decisions of a Steering Committee

The following decisions require the concurrence of at least two-thirds of the Steering Committee Members present at a meeting:

- a. recommending to Metrolinx the issuance of any RFP;

- b. recommending to Metrolinx the selection of a successful Proponent under any RFP released pursuant to paragraph 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) and 33 (Termination for Event of Default by Metrolinx).

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.

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 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 of the participating Purchasers wishing 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 proposals and make recommendations to the Steering Committee. Notwithstanding the above, Metrolinx's representation on any evaluation committee shall be restricted to observer status as intended to facilitate the evaluation process.

8. Binding decisions

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

9. Regular Meetings

A Steering Committee shall meet at least quarterly and may meet more often where the chair notifies the Parties in writing of special meetings 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

Each Steering Committee will be responsible for:

- a. approving the appointment of a chair;
- b. approving the common Transit Bus specifications;
- c. recommending the terms and conditions of each RFP including the proposed Supplier agreements forming a part of each RFP;
- d. recommending the issuance of an RFP pursuant to subsection 6(a) (Decisions of a Steering Committee);
- e. consideration of evaluation committee recommendations related to the evaluation of RFP proposals received;
- f. subject to Section 25 (Award of a Master Agreement), recommending that Metrolinx enter into a Master Agreement with the overall highest-rated RFP Proponent, as well as any amendments to that particular Master Agreement;
- g. subject to this Agreement, establishing rules and procedures regarding its own meetings;
- h. approval of the relevant implementation schedule for each Procurement;
- i. establishing a Communication Plan in cooperation with Metrolinx; and
- j. any other matter required to be approved by the Steering Committee in order to carry out the intent and purpose of this Governance 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

Each 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; however, Purchasers will have the ability to select an alternative component(s) to that (those) specified, based upon an Options list provided by the successful Proponent. Each Proponent's proposal must include pricing for these optional components.

15. The Request for Proposal (RFP) 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 Transit Bus for the Term of the relevant Master Agreement for Purchasers who do not elect to terminate their participation pursuant to section 37 (Termination without cause by a Purchaser). The option to extend for the Option Year(s) will be at the discretion of each Purchaser each of whom shall have the right to exercise the option or not in accordance with the Master Agreement. Upon exercise of a right of extension by any Purchaser under section 56 (Right of Extension), the successful Proponent will be the exclusive Supplier of Transit Buses to such Purchaser(s) during the Option Year(s) in accordance with the terms of the Master Agreement.

16. Supplier

A Supplier procured pursuant to an RFP:

- a. will be given an exclusive contract for Fiscal Year 2011; therefore, Purchasers that plan to procure a Transit Bus in Fiscal Year 2011 and that have not withdrawn in accordance with section 37 (Termination without cause by a Purchaser) must purchase from the successful Supplier on an exclusive basis;
- b. will not be contractually guaranteed the purchase of a particular number of Transit Buses under the relevant Master Agreement; and
- c. will be advised by Purchasers of their respective Transit Bus orders upon approval of funding from their respective municipal councils on or around March 31, 2011 to facilitate Transit Bus delivery in Fiscal Year 2011.

17. Master Agreement

On the recommendation of a Steering Committee issued 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 participating municipalities will be contained in each Master Agreement. Two consecutive one year options will be provided in the Master Agreement that can be exercised by each Purchaser in accordance with section 56 (Right of Extension).

18. Municipal Bus Purchase Agreement (MBPA) with Supplier

Subject to the Master Agreement, each Purchaser will enter into a Municipal Bus Purchase Agreement directly with the Supplier that will provide details of delivery times for their respective 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 Municipal Bus Purchase Agreement between a Purchaser and the Supplier is subject to review by the Project Engineer prior to execution. The Project Engineer will review each Municipal Bus Purchase Agreement to ensure it is consistent with the respective Master Agreement. Should it be found to be inconsistent, the Project Engineer will report the inconsistency to the Steering Committee and to Metrolinx. Purchasers are required to enter into a Municipal Bus Purchase Agreement with the Supplier for each year of the Option Years if they choose to exercise the right of extension contained in the Master Agreement.

19. Timing

Subject to the terms of this Agreement, the RFP(s) are anticipated to be issued by Metrolinx no later than February 2011 to accommodate delivery of Transit Buses in the Fiscal Year ending March 31, 2012. The Supplier will be selected for a term ending March 31, 2012 with a right of extension under the Master Agreement to each individual Purchaser for the Option Year(s). 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 applicable law. The Procurement shall include:

- a. open advertisement through MERX™;
- b. Proponent information session;
- c. 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 in the committee.

The costs of the joint Procurement processes shall be borne by Metrolinx provided however that Metrolinx shall not be responsible for any costs incurred by the Parties or any Purchaser relating to such process(es) including without limitation those of Purchasers who elect not to participate under section 37 (Termination without cause by a Purchaser) of this Agreement.

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 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 Purchaser MBPAs prior to execution by the 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;
- d. overseeing the work of the Bus Inspector where retained by Metrolinx hereunder, including without limitation establishing the bus inspection schedule based upon the Project Engineer's timely receipt of Transit Bus orders from the Purchaser(s) in accordance with this Agreement; and
- e. rejecting work from the Supplier that does not conform to the relevant Municipal 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 Purchaser Transit Buses at the Supplier's manufacturing location from the start of production until delivery for the current term of the Master Agreement, for Transit Buses ordered prior to June 15, 2011 and June 15 of each Option Year, a copy of which order(s) shall be provided by the Purchaser 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 Transit Bus order received in accordance with the foregoing. Orders received subsequent to the dates identified herein may not qualify for bus inspection services hereunder.

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

- a. performing in-plant inspection services during all phases of the manufacturing, production and assembly of 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;
 - iii. ensuring all deficiencies are corrected prior to release of Transit Buses to Purchasers and witnessing pre-delivery tests;
- b. monitoring and reporting to the Project Engineer compliance by the Supplier with the Technical Specifications, the quality assurance, production and delivery provisions contained in the Master Agreement and the Municipal Bus Purchase Agreement(s), and all applicable Regulations at the time of manufacture;
- c. working with the Supplier, Purchasers and/or Project Engineer to address any issues related to the Supplier's quality and performance of work and production schedule;
- d. reviewing all manufacturer production requests for waiver, requests for deviation and engineering change proposals and submit 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 Municipal Bus Purchase Agreement; and,
- g. providing a final inspection summary for each Purchaser detailing production and inspection information for the Transit Buses ordered.

23. Fairness Commissioner

Metrolinx shall 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

The Parties agree that:

- a. An evaluated award approach will be used in awarding each Master Agreement.
- b. An evaluation committee, consisting of representatives from each Purchaser who chooses to participate in the 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 Proponent will be opened and the Base Bus price(s) 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 Proponent.

Proponents must successfully complete each stage prior to proceeding to the next stage of the evaluation as listed above. If mandatory requirements are not met, proposals may be rejected and not evaluated further.

Metrolinx 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-rated Proponent identified in relation to each respective evaluation process by sending written notification thereof to Metrolinx.
- b. Notwithstanding paragraph 25 (a), each Steering Committee reserves the right not to proceed with recommendation of award to any qualified Proponent if, in the view of two-thirds or more of Steering Committee Members, no Proposal is acceptable based on the terms and conditions of the RFP. If at least two-thirds of the Members of a Steering Committee 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 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 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 no less than three (3) Business Days prior to 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) of this 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 Municipal Bus Purchase Agreement. In no case whatsoever will Metrolinx be responsible or liable for the cost of any Deliverables under an MBPA.
- b. Metrolinx shall not be liable or responsible in any way whatsoever and the Purchasers agree that they shall satisfy themselves as to the suitability of the Deliverables for their purposes, including without limitation the Deliverables compliance with applicable laws, policies, safety, licensing, funding and insurance requirements as such may apply to the Purchaser's provision of transit services in its jurisdiction and/or its acquisition of Transit Buses hereunder, and including without limitation and by way of example only, the Ministry of Transportation's Canadian Content for Transit Vehicle Procurement Policy, a copy of which is attached as Schedule I.
- 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 Municipal Bus Purchase Agreement, if any. Each Purchaser may include such additional business and legal terms and conditions to the Municipal Bus Purchase Agreement as it sees fit in the circumstances provided that the required terms of the Municipal 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 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 Municipal 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 will 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 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, to 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 Transit Bus specifications;
 - II. development of common RFP terms and conditions for each Transit Bus RFP;
 - III. development of each Transit Bus Master Agreement and Municipal Bus Purchase Agreement;
 - ii. assist in the consolidation of 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 Transit Buses on the basis of the existing terms and conditions of each Master Agreement.
- e. Metrolinx shall not:
 - i. evaluate proposals;
 - ii. mediate disputes between the Purchaser and the Supplier following the execution by a Purchaser of a Municipal 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 Municipal 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:
 1. a Purchaser information sheet (attached as Schedule "E" (Purchaser information sheet));
 2. a certified copy from a Purchaser's clerk or other authorized officer, confirming passage and enforceability of a by-law or resolution, 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
 3. 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) required to carry out the Procurement including without limitation recommending award of contract to the successful Proponent, and completing and executing any MBPA under a Master Agreement;
 - 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 or subject;
 - 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 the Governance 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 Municipal 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 of this Agreement, add Eligible Purchasers as Parties to this Agreement. Each proposed additional Eligible Purchaser must first:

- i. receive confirmation from the Project Engineer that the Supplier has sufficient capacity to accept additional Purchasers without impacting on the delivery of Transit Buses already on order by existing Purchasers;
- ii. confirm in writing to Metrolinx that it has not issued an RFP or a tender or subsequently cancelled an order for Transit Buses in Fiscal Year 2011, Fiscal Year 2012 or Fiscal Year 2013 in order to participate in this Procurement; and
- iii. 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 thereunder excepting only the services of Metrolinx's Bus Inspector which shall be subject to the availability of Metrolinx funds. The Purchaser may then enter into a Municipal 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.

ARTICLE VII: 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:

- i. if any representation or warranty made by the Purchaser in this Agreement or any documentation delivered to Metrolinx by the Purchaser pursuant hereto shall be materially false or misleading in any respect;
- ii. if the Purchaser is in default in carrying out any of the material terms, covenants, or obligations of this Agreement;
- iii. if Metrolinx is in default in carrying out any of the material terms, covenants, or obligations of this Agreement; or
- iv. if Metrolinx, the Purchaser or any of their respective advisors, partners, directors, commissioners, officers, Personnel, agents, representatives, or contractors has breached the requirements of Article XII (Conflict of interest) and Article XIII (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 as determined by the Steering Committee under section 6(d) (Decisions of the Steering Committee), 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 or such longer period of time as Metrolinx may consent in writing, Metrolinx, may, at its option, 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:

- the defaulting Purchaser shall no longer participate in the Procurement;
- subject only to its obligation to comply with terms surviving the expiry or termination of this Agreement, the defaulting Purchaser shall no longer be a Purchaser for the purpose of this Agreement; and
- 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. Termination for Event of Default by Metrolinx

If an Event of Default by Metrolinx has occurred, as determined by the Steering Committee in accordance with section 6(d) (Decisions of 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 a Steering Committee, the Steering

Committee shall have 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 or such longer period of time as that Steering Committee may approve in writing:

- a. The Purchaser may, subject to section 38 (Obligations survive), terminate 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 IX (Notice), 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 under this Agreement 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 Transit Buses for the initial year of the RFP and a Purchaser shall not purchase Transit Buses from any party other than the successful Proponent during this period. In addition to any other

remedies which may be available to Metrolinx, failure to comply with this provision may result in Metrolinx and/or 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 Party 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 point of termination or early termination.

Notwithstanding a Purchaser's termination of its participation in this Agreement under this Article VIII, the Purchaser shall continue to be bound by the terms and conditions of any MBPA which may have been executed by it prior to such termination and any termination of an MBPA 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) and, in the case of Metrolinx to:

Attn.: Project Manager
Transit Partnerships Innovation
20 Bay Street, Suite 600
Toronto, ON M5J 2W3
Fax: (416) 874-5901

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 which 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. Purchasers shall share equally the costs related to any disputes with the Supplier arising out of a dispute related to the Master Agreement.

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 be responsible for their own costs for any dispute arising out of this Agreement. 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 described herein and supersedes all prior understandings, discussions, negotiations, commitments, representations, warranties and agreements, written or oral, express or implied, existing between the Parties at the date of execution 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 and Attachments 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 Vehicles 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, officers, agents, Personnel, 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 to this Agreement.

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 respective 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 (actually or potentially) with the terms and conditions set out in this Agreement or any of the Procurements, RFPs, Master Agreements and MBPAs 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 or otherwise, 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 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 of this Agreement, each Purchaser shall abide by the terms and conditions set out in Schedule “D” (Confidentiality Provisions), and 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 Transit Bus shall be in effect until the termination or expiration of the relevant Master Agreement (the “Term”).

56. Right of Extension

Each Purchaser may exercise the right(s) of extension contemplated by sections 17 (Master Agreement) and 18 (Municipal Bus Purchase Agreement with Supplier), by providing to Metrolinx notice in writing of its intention to do so no later than 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 an upcoming 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 either Party may waive

any or all of its rights in the event of a breach of any provision of this Agreement by the other 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 the 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 so that the other Party may verify same.
- d. If an event of a Force Majeure continues for a period of more than forty-five (45) calendar days, a Party shall have the right to terminate this Agreement upon five (5) Business Days written notice to the other Parties. This right shall not affect that Purchaser's obligations to a Supplier under a Municipal Bus Purchase Agreement which shall be determined in accordance with the terms of that agreement.

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 this 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, Metrolinx and each of the Purchasers have respectively executed and delivered this Agreement as of the date set out above.

Date: _____

METROLINX

Per: _____

Name:
Title:

Per: _____

Name:
Title:

We have the authority to bind the corporation.

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

Per: _____

Name:
Mayor

Per: _____

Name:
Clerk

We have the authority to bind the corporation.

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

Per: _____

Name:
Mayor

Per: _____

Name:
Clerk

We have the authority to bind the corporation.

Date: _____

**THE CORPORATION OF THE CITY OF
BURLINGTON**

Per: _____

Name:
Mayor

Per: _____

Name:
Clerk

We have the authority to bind the corporation.

Date: _____

THE REGIONAL MUNICIPALITY OF DURHAM

Per: _____

Name:
Mayor

Per: _____

Name:
Clerk

We have the authority to bind the corporation.

Date: _____

THE CITY OF HAMILTON

Per: _____

Name:
Mayor

Per: _____

Name:
Clerk

We have the authority to bind the corporation.

Date: _____

THE CORPORATION OF THE CITY OF KINGSTON

Per: _____

Name:

Mayor

Per: _____

Name:

Clerk

We have the authority to bind the corporation.

Date: _____

LONDON TRANSIT COMMISSION

Per: _____

Name:

General Manager

Per: _____

Name:

Chair, London Transit Commission

We have the authority to bind the corporation.

Date: _____

THE CORPORATION OF THE TOWN OF MILTON

Per: _____

Name:

Mayor

Per: _____

Name:

Clerk

We have the authority to bind the corporation.

Date: _____

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

Per: _____

Name:
Mayor

Per: _____

Name:
Clerk

We have the authority to bind the corporation.

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

Per: _____

Name:
Mayor

Per: _____

Name:
Clerk

We have the authority to bind the corporation.

Date: _____

ST. CATHARINES TRANSIT COMMISSION

Per: _____

Name:

Chair, St. Catharines Transit
Commission

Per: _____

Name:

General Manager

We have the authority to bind the corporation.

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

Per: _____

Name:
Mayor

Per: _____

Name:
Clerk

We have the authority to bind the corporation.

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

Per: _____

Name:
Mayor

Per: _____

Name:
Clerk

We have the authority to bind the corporation.

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

Per: _____

Name:
Regional Chair

Per: _____

Name:
Regional Clerk

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 and Attachments to 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;

“**Attachments**” means the attachments listed in section 47 (Entire agreement) and attached to some of the Schedules to this Agreement;

“**Base Bus**” means the Transit Bus proposed by a Proponent, with the Proponent’s choice of standard components/materials that meet the mandatory minimum requirements specified in the RFP, without Options, but including the Purchaser’s choice of driver’s seat;

“**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 retained by Metrolinx under Article III (Procurement Approach) to perform in-plant inspection services during all phases of the manufacturing, production and assembly of the Transit Buses ordered by the Purchasers;

“**Canadian Content Policy**” means the Ministry of Transportation’s Canadian Content for Transit Vehicles 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”;

“**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 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, excluding Procurement process and

solicitation documents that are generally available to the public; (ii) any proprietary information of Metrolinx or Purchasers; (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) any other information specifically designated in writing by Metrolinx or a Purchaser as being of a confidential nature;

“Contract” means, in respect of any or all of the Transit Buses, the aggregate of: (a) the Master Agreement; (b) the assignment-specific Municipal Bus Purchase Agreement; (c) the RFP, including any addenda; (d) the Proposal; and (e) any amendments executed in accordance with the terms of the Master Agreement;

“Deliverables” means everything developed for or provided to the Purchaser in the course of performing under a Contract or agreed to be provided to the Purchaser under the Contract, by the Supplier or its employees, volunteers, agents or subcontractors, as further defined, but not limited by the Master Agreement or a specific Municipal Bus Purchase Agreement, including but not limited to any goods or services;

“Dispute” means a dispute as described in section 40 (Legal remedies for disputes);

“Dispute Notice” means a dispute notice as described in section 42 (Three-tiered dispute resolution);

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

“Eligible Purchaser” means a municipality, as defined under the *Municipal Act, 2001*, or a transit authority, including a transit commission, or other persons or classes of persons as may be authorized under the *Municipal Act, 2001*, with which a municipality is permitted to enter into an agreement for the Procurement but, for greater certainty, does not refer to Metrolinx;

“Event of Default” means an event of default as described in section 31 (Event of Default);

“Fiscal Year” means the period running from April 1 in one calendar year to, and including, March 31 in the next calendar year;

“Force Majeure” means any circumstance or act as described in section 58 (Force Majeure);

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

“French Language Services Act” means the *French Language Services Act*, R.S.O. 1990, c. F.32, as amended from time to time;

“Master Agreement” means the contract, including its schedules, to be entered into between Metrolinx and a Supplier to deliver Transit Bus(es) 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;

“Moral Rights” has the same meaning as in the *Copyright Act*, R.S.C. 1985, c. C-42, and includes comparable rights in applicable jurisdictions;

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

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

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

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

“Option Year” means either of the two (2) consecutive year periods immediately following the initial term of the Master Agreement, as described in section 56 (Right of Extension) of this Agreement;

“Party” means any one of Metrolinx and each Purchaser, 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;

“Procurement” means the process of procuring any one of the Transit Buses as they will be described in the relevant RFP, and any other related supplies and services procured in accordance with this Agreement;

“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 as the case may be, and includes without limitation the Canadian Content Policy;

“Project Engineer” means the project engineer appointed under Article II (Steering Committees) to represent each Steering Committee and Purchasers on technical issues from the time the Master Agreement is awarded up until the point the Transit Buses are accepted by respective Purchasers;

“Project Manager” means the Metrolinx representative responsible for Metrolinx’s overall facilitation and administration of the Procurement in accordance with this Agreement;

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

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

“Purchaser” means a municipality, as defined under the *Municipal Act, 2001*, 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, 2001*, with which a municipality is permitted to enter into an agreement for the Procurement and which has complied with the requirements of section 28 (Steps required to become a Purchaser) but, for greater certainty, does not refer to Metrolinx;

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

“Schedules” means the schedules to this Agreement listed in section 47 (Entire agreement) and attached to this Agreement;

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

“Steering Committee Members” means a person designated by a Party as set out in section 2 (Steering Committee membership);

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

“Term” means the term of this Agreement as described in section 55 (Term); and

“Transit Bus” means any one or all, as the case may be, of:

- a. a nine-metre, fully accessible, low-floor, diesel-fuelled bus used for conventional urban transit service that meets all applicable Canadian federal and provincial regulations; or
- b. a twelve-metre, fully accessible, low-floor, diesel-fuelled bus used for conventional urban transit service that meets all applicable Canadian federal and provincial regulations; or
- c. a twelve-metre, fully accessible hybrid low-floor bus used for conventional urban transit service that meets all applicable Canadian federal and provincial regulations.

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 officer to which the Transit Partnerships Innovation group 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 to this Agreement. 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; and
- b. The purpose of the Communication Plan is for Metrolinx and 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, the Party shall give the other Parties reasonable notice of ten (10) Business Days prior to media releases, media conferences, public announcements and other events pertaining to the joint transit Procurement, and/or the printing, producing or publishing of:
 1. public reports,
 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. 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, only to such person or persons to which the Party is legally compelled to disclose, and the Party shall provide notice to each such person or persons – in co-operation with legal counsel for the other Parties – that such Confidential Information is confidential and subject to non-disclosure on terms and conditions substantially similar to and not materially less protective than those in this Agreement and shall obtain the written agreement of each such person or persons to receive and use such Confidential Information subject to those terms and conditions.

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 Purchaser 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 (Confidentiality Provisions) by the Purchaser'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 and Schedule "H" (Confidentiality Agreement for execution by Metrolinx) with respect to Metrolinx, where applicable.

**SCHEDULE E:
PURCHASER INFORMATION SHEET**

1. Legal name of organization

2. Contact information

Mailing address and fax number for notices:

Fax: _____

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 _____,
(authorized agent)

(describe RFP)

_____ of a

(title of agent)

“Governance Agreement for the Joint Procurement of Transit Buses for Fiscal Year 2011-Fiscal Year 2013” (the “Agreement”) for the purpose of purchasing 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.]

For sufficient and valuable consideration received from the Parties, including the disclosure to the undersigned of certain Confidential Information (as defined below), the undersigned agrees as follows:

- 1.** The undersigned shall maintain the absolute confidentiality of all Confidential Information (as defined below), 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 with whom the undersigned has an employment relationship 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 may disclose Confidential Information to his/her municipal council provided that (i) an *in camera* meeting of municipal council is permitted under Section 239 (2) of the *Municipal Act*, S.O. 2001, Chapter 25 where the Confidential Information will be disclosed, (ii) the undersigned first brings the confidential nature of the information to council; and (iii) the undersigned discloses the Confidential Information only in the *in camera* meeting. The undersigned shall ensure, at the end of the *in camera* meeting, that copies of the Confidential Information that may have been distributed to members of council are returned to the undersigned for destruction. The undersigned shall use all reasonable efforts to ensure the Confidential Information is not recorded in any minutes of the *in camera* meeting; however, if such information is recorded despite application of all reasonable efforts, the undersigned shall ensure the confidentiality of the information in such minutes is maintained.
- 3.** 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.
- 4.** The undersigned acknowledges that all Parties have disclosed Confidential Information to the undersigned solely in connection with assisting, advising and/or providing feedback to the Procurement (the "Authorized Purpose"). The undersigned may use the Confidential Information solely in connection with the Authorized Purpose and for no other purpose. The undersigned acknowledges and agrees that unauthorized dealings with the Confidential

Information would be detrimental to the interests, business and affairs of any of the Parties (or third parties with respect to third party information), including the integrity of the Procurement.

5. 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 returned to the requesting Party.

6. In this Confidentiality Agreement, "Confidential Information" means (i) the Procurement process and solicitation documents and any information relating to 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, excluding Procurement process and solicitation documents that are generally available to the public; (ii) any proprietary information of any Party; (iii) any personal information as contemplated in the *Freedom of Information and Protection of Privacy Act (Ontario)* or *Municipal Freedom of Information and Protection of Privacy Act*; and (iv) any other information specifically designated in writing by a Party as being of a confidential nature.

7. 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 one year 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.

8. 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.

9. Subject to any confidentiality obligations pertaining to third party materials, this Confidentiality Agreement shall survive for a period of the greater of ten (10) years from its execution and the term of any agreement with the successful Supplier resulting from the Request for Proposals process relating to the Procurement, including any renewal periods. For avoidance of doubt, if the confidentiality obligations pertaining to third party materials survive for a longer period of time as stipulated by the relevant third party, then that longer period of time will govern. In the event responsibility for the Procurement is transferred from Metrolinx to another person or entity, the provisions herein relating to Metrolinx shall enure to the benefit of such person or entity. The provisions herein enure to the benefit of any successors and assigns of the Parties.

10. This Confidentiality Agreement shall be governed by the laws of the Province of Ontario and the laws of Canada applicable in that Province and is subject to the provisions of the

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F. 31, as amended, and the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O.1990, c. M. 56, as amended, as applicable.

11. Defined terms denoted by initial capital letters shall have the meaning ascribed to them in the "Governance Agreement For The Joint Procurement Of Transit Buses for Fiscal Year 2011-Fiscal Year 2013" unless otherwise defined in this Confidentiality Agreement.

Signed: _____

Name: _____

Title: _____

DATED: _____

**SCHEDULE H:
CONFIRMATION AGREEMENT**

THIS INSTRUMENT of accession forms part of an agreement made as of the 1st day of June, 2008 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 POLICY**



MINISTRY OF TRANSPORTATION

Canadian Content for Transit Vehicle Procurement Policy

Issued September 2008

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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. Only the transportation costs incurred within Canada, and/or paid to a Canadian carrier are eligible freight expenditures under this policy.)

“GO Transit” means the Greater Toronto Transit Authority established by the GO Transit Act, 2001, S.O. 2001, c.16, Sched. A.

“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 Greater Toronto Transportation Authority established by the Greater Toronto Transportation Authority 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, GO Transit or Metrolinx.

“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 will be taking the lead on implementing this policy, through its own coordinated procurement in 2008, the Greater Toronto Transportation Authority (“Metrolinx”) Request For Proposals for Urban Transit Buses under the Joint 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 under provincial programs such as the Dedicated Gas Tax Funds for Public Transportation Program (Gas Tax), the Ontario Bus Replacement Program (OBRP), and potentially other programs, as well as separate transit expansion funding commitments.

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:

1. 100% Canadian for a component that has undergone an irreversible manufacturing process in Canada.
2. 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.
3. 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.
4. 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 four vehicle types will be exempted from the 25% Canadian content requirement:

- specialized transit buses;
- conventional transit buses under 40 feet in length;
- 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, GO Transit Board 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.