

**memorandum**

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<b>From</b>	Martin Masse Geoffrey Gilbert Stephen Natrass Benedict Wray	<b>Date</b>	February 6, 2017
<b>Direct line</b>	+1 613.780.1547 +1 613.780.1544		
<b>Email</b>	Martin.Masse@nortonrosefulbright.com Geoffrey.Gilbert@nortonrosefulbright.com Stephen.Natrass@nortonrosefulbright.com Benedict.Wray@nortonrosefulbright.com	<b>Our ref</b>	01002392-0017

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<b>To</b>	<b>City of Ottawa</b>	<b>Your ref</b>	Stage 2 Light Rail Transit Project
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**City of Ottawa- Stage 2 Light Rail Project – Proposed RTG MOU**

This memorandum provides a summary of the procurement law issues relating to the Light Rail Transit (**LRT**) Project run by the City of Ottawa (**City**), and in particular with respect to the memorandum of understanding that is proposed to be signed by the Rideau Transit Group General Partnership (**RTG**) and the City (**Proposed MOU**) to assist with certain aspects of the planned extensions of the Stage 1 LRT Project.

**1 The Facts**

In providing this summary of legal issues, we have relied on the following understanding of the relevant facts, based on information provided to us by the City.

**1.1 Stage 1 LRT and RTG's Role**

Stage 1 of the Ottawa LRT Project consists of a 12.5-kilometre light rail line through downtown Ottawa (known as the Confederation Line) which is under construction and which is expected to be completed in 2018. Following a competitive procurement process, RTG was awarded a 30 year concession to design, build, finance, and maintain (**DBFM**) Stage 1 of the Ottawa LRT system. RTG is a consortium whose partners include SNC RTG Partner Inc., ACS RTG Partner Inc., and EllisDon RTG Partner Inc. The fleet of 32 Alstom trains included in the Stage 1 procurement will be maintained by Rideau Transit Maintenance (**RTM**). The maintenance and storage facility is located at Belfast Road (**Belfast MSF**).

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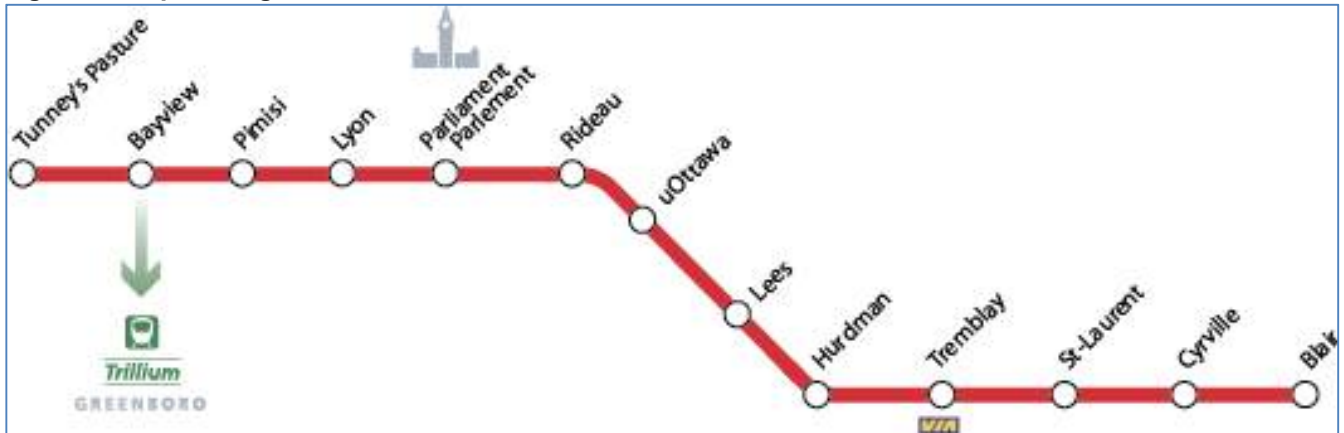
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The City engaged Infrastructure Ontario (IO) as a commercial procurement advisor for Stage 1, whereby IO is providing procurement advice to the City, while the City is leading the procurement and construction portions of the project.

**Figure 1: Map of Stage 1 LRT**



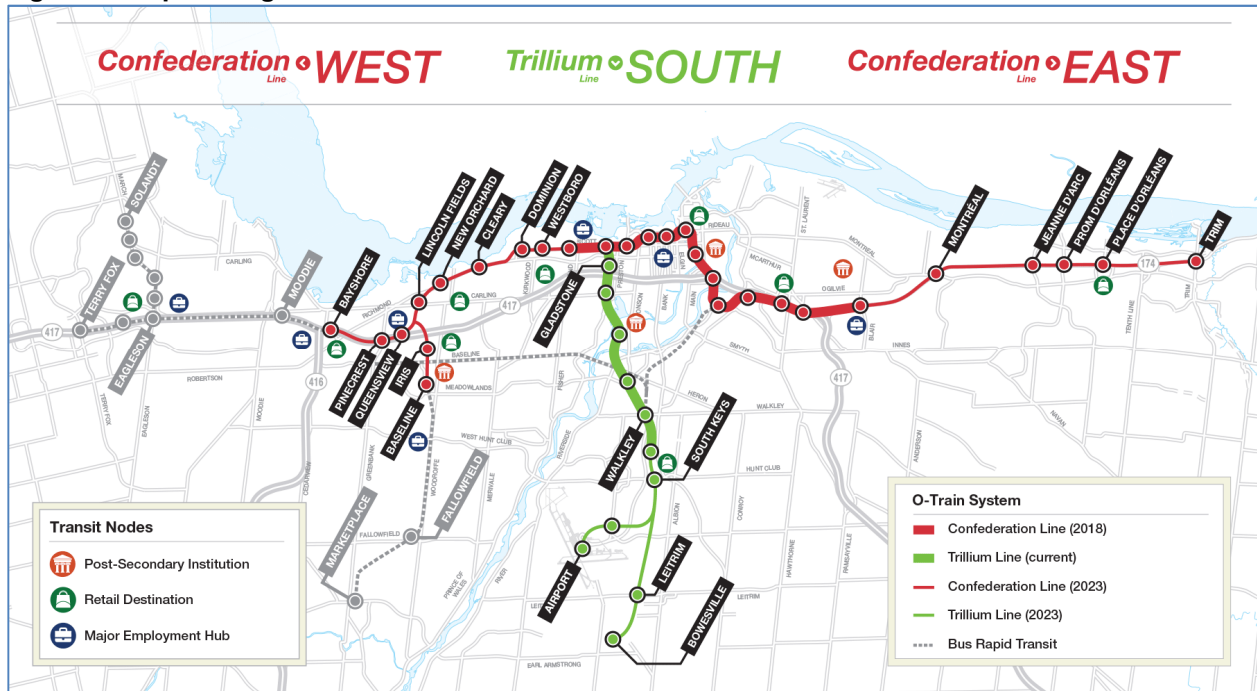
There were three final proponents in the Stage 1 RFP process, all of which were provided with a copy of the Project Agreement (PA) at the time they submitted final and binding bids for the project. RTG ultimately signed the PA in substantially the same form as it was provided to the other two final proponents.

## 1.2 Stage 2 LRT Planned Extensions

Stage 2 of the Ottawa LRT Project will expand Stage 1 farther east, west, and south, more specifically:

- West to Bayshore Station (Confederation Line West Extension) and southwest to Baseline Station;
- East to Place d'Orléans Station (Confederation Line East Extension); and
- South to Riverside South at Bowesville (Trillium Line Extension).

Figure 2: Map of Stage 2 LRT



### 1.3 Proposed MOU between City and RTG

#### (a) Options Under Consideration

A number of options were considered by the City with respect to the procurement of Stage 2. In November 2016, a preliminary market sounding exercise was also undertaken to determine the market's reaction to various scenarios and options.

Initial discussions between the City and RTG took place in the context of the Stage 1 PA. More specifically, the City and RTG conducted discussions pursuant to Schedule 38 – Extension and Additional Phases, but outside the formal framework of a System Extension initiated by a Notice of Extension (as defined in Schedule 38) and outside the formal framework of a Variation Enquiry (as defined in Schedule 22 – Variation Procedure).

The Proposed MOU would have the City allocate certain strategic vehicle procurement, construction and maintenance responsibilities to RTG through a Stage 1 Schedule 22 Variation and a Schedule 38 System Extension. The remainder of the Stage 2 project, including the Trillium Line Extension, would be competitively procured. Following that procurement, it is envisioned that a third party design build company (**DB Co**) would be tasked with the design build portions of the Confederation Line expansion under a Stage 2 Project Agreement.

#### (b) Scope of the Proposed MOU

The Proposed MOU will be binding in nature, and the City and RTG will incorporate its terms and principles into definitive agreements which will include one or more Variations to be initiated by the City under and in accordance with the terms of Schedule 22 to the Stage 1 PA (collectively, the **Stage 1 PA Variations**).

Pursuant to the Proposed MOU, RTG would provide the following:

1. Procurement Support Services: services to govern the process of finalizing the DB Co Works procurement package, including preparing the request for proposals, participating in certain design presentation meetings, undertaking a legal and technical review of the request for proposals, participating in commercial confidential meetings, and participating in the final compliance check to confirm compliance during preferred proponent negotiations, however in each case, only to the extent required to confirm the maintenance and lifecycle assumptions and the fixed pricing provided in the Proposed MOU for the Stage 2 Maintenance Services;
2. Belfast MSF Expansion: design, construct, test, commission and complete the expansion of the Belfast MSF;
3. Rolling Stock: procure, deliver, test, and commission light rail vehicles identical to the current design under the Stage 1 PA;
4. Communications and Train Control for the Expanded System: perform communications (provision of various systems, and acquisition of all additional licenses) and train control (to be fully compatible with the existing Confederation Line system) works;
5. Interface and Design Management for the Expanded System: design and construction oversight for DB Co scope items that will have influence on the maintenance and lifecycle of the Expanded System, including access to relevant tests and audit rights on quality information; and
6. Stage 2 Maintenance Services: Maintenance Services on the Expanded System, in a manner consistent with the Output Specifications of the Stage 1 PA.

The Proposed MOU has a fixed price for all of the above elements which were developed using an “open book pricing” analysis, whereby RTG provided the City with complete transparency as to the source and application of all funds, costs, monies to be expended and profits and margins to be realized in respect of the works and services to be provided. Further, RTG provided the City with transparency as to the original competitive pricing obtained in connection with the Stage 1 PA, as well as for other competitive pricing delivered in similar LRT projects (subject to certain confidentiality restrictions).

### (c) **Stage 2 Competitive Procurement**

With the exception of the Trillium Line Extension (discussed below) the remainder of the Stage 2 would be competitively procured and awarded to DB Co in order to ensure maximum competitive tension and value for money. The following works are intended to be competitively procured (collectively, **DB Co Works**):

1. Design, supply, construct, test and commission the trackwork above the sub-ballast;
2. Design, supply, construct, install, test and commission the pole and cables for the overhead catenary system;
3. Trackwork ballast down;
4. All stations, including all interiors and all necessary and supporting systems and infrastructure;
5. Any tunnels, portals and supporting infrastructure;

6. All civil components including all stormwater and drainage works, structures, any roadworks, detours, utilities, and any other support structures;
7. All surveys, investigations and technical analysis/reporting and monitoring required to support design and construction; and
8. The 417 Highway Improvements and the City Bundled Projects.

In order to ensure an open, competitive procurement, RTG and its constituent members (and affiliates) as well as any subcontractors involved in the Procurement Support Services or Interface and Design Management for the Expanded System will agree that they will be ineligible to submit a proposal for or otherwise participate in the DB Co Works. This restriction will exist as long as the City proceeds with the Stage 1 PA Variations covered in the Proposed MOU, and if RTG is in default of its obligations under the Proposed MOU.

Following completion of the construction of Stage 2, DB Co would hand over maintenance to RTG to maintain on the same basis as RTG will maintain Stage 1. This will be effected via a Stage 1 PA Variation for Stage 2 Maintenance Services.

**(d) Trillium Line Extension**

Expansion of the Trillium Line will be a separate scope from the Stage 2 LRT Project, and the Proposed MOU does not cover the Trillium Maintenances and Storage Facility, Trillium Extension or diesel multiple unit cars. RTG and its constituent members will not be automatically prohibited from competing in connection with the Trillium Line Extension. The City will, however, take measures to remedy any actual or perceived conflict of interest or unfair advantage, including by disclosing to other proponents any information that the City disclosed to RTG that may give rise to a conflict of interest or unfair advantage. The City may also take other actions as required and may be possible.

## **2 Issues**

As part of the consideration of the various options, we have been asked to summarize the procurement law principles applicable to the following issues.

1. What are the procurement or other legal issues that permit the City to issue the Stage 1 Variations to expand the scope of the Stage 1 PA?
  - (a) What are the terms of the PA that generally allow the proposed PA Variations?
    - (i) What are the terms of the PA that demonstrate that the services contemplated in the Initial Stage 1 PA Variations are within the scope of the PA?
    - (ii) What are the terms of the PA that demonstrate that the services contemplated in the Stage 1 PA Variations for Stage 2 Maintenance Services are within the scope of the PA?
    - (iii) What are the terms of the PA that demonstrate that the Procurement Support Services are within the scope of the PA?

- (iv) What are the terms of the PA that demonstrate that the interface services in the Proposed MOU are within the scope of the PA?
  - (b) What other rights and obligations of the City affect its ability to procure the services directly from RTG?
  - (c) What steps has the City otherwise taken to ensure that the Stage 1 Variations comply with the general objectives of the City's public procurement policies, that is to say to provide fairness to suppliers and maximum value to taxpayers?
2. What has the City done and what will it do to ensure fair procurement of the Trillium Expansion and to address concerns of potential bidders regarding the possible involvement of RTG?
  3. Are there any procurement law concerns relating to the competitive bidding of the DB Co Works?

### **3 Analysis**

#### **3.1 What are the procurement or other legal issues that permit the City to issue the Stage 1 Variations to expand the scope of the Stage 1 PA?**

Notwithstanding any other procurement requirements, the City is generally allowed to procure additional goods or services from a proponent when the proposed variation or extension is permitted under the original contract, and the goods and services can be found to be within the scope of the goods and services procured under the original procurement.<sup>1</sup> In this case, the PA formed part of the Stage 1 RFP process, as it was provided to all proponents prior to the final Stage 1 bids. As a result, in order to assess the propriety of the variations proposed in the Proposed MOU, we will assess: (i) whether the PA generally allows variations to expand the scope of the Stage 1-work to extensions of the Confederation Line; and (ii) whether the goods and services covered in the proposed variations can be said to be within the scope of the PA.

##### **(a) What are the terms of the PA that generally allow the proposed PA Variations?**

The PA makes provision for a number of situations which permit the proposed PA variations. First, the Extension and Additional Phases procedures in Schedule 38 grant a wide discretion to the City "to pursue one or more System Extensions during the Project Term or default".<sup>2</sup> The Project Term is defined as the entirety of the 30 year term subject to any earlier elective termination.

The City may choose to pursue a System Extension by using the Variations procedure in section 39 and Schedule 22 PA (Schedule 38, 2.1(b)), by procurement (Schedule 38, 2.1(c)) or by negotiation (Schedule 38, 2.1(c)).

Until now, the initial discussions have taken place outside of the formal framework of a System Extension negotiation initiated by a Notice of Extension under Schedule 38, Section 2.2. However, formalizing negotiations through use of Notice of Extension is not precluded. As Section 2.1(d) of Schedule 38 provides:

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<sup>1</sup> See, e.g. *Microsoft Canada Co. v Canada (Public Works and Government Services)*, Doc. PR-2009-056, 2010 CanLII 15680 (CITT), where Health Canada expanded an existing contract to include a new unified portal software solution, which the CITT determined was not a sole source but within the terms of the original procurement.

<sup>2</sup> Schedule 38, 2.1(a)

In the event the City has elected to pursue a System Extension in accordance with this Section 2.1, the City may, at any time prior to entering into a binding agreement in respect of the System Extension, in its Discretion, elect to cease pursuing the System Extension under the chosen alternative and pursue the same System Extension under a different alternative process.

In other words, as between RTG and the City, the choice as to which method to use to pursue a System Extension is entirely in the City's discretion, and, even if it has already begun one process, it may elect to switch to another at any time prior to executing a binding agreement. It is open to the City to issue a Notice of Extension, should it wish to, prior to entering into the Proposed MOU.

It is also apparent, given the wide discretion afforded to both parties in Schedule 38, that they may mutually agree to vary the formal procedure initiated by a Notice of Extension. Section 2.2(g) provides:

Notwithstanding anything contained in this Schedule 38, except as may be the subject matter of a competitive procurement process, no agreement relating to the subject matter of this Schedule 38 shall be effective unless entered into in writing by each of the Parties and the entering into of same shall be subject to each Party's Discretion. Either Party may in its Discretion elect to cease negotiations at any time in the process set out in this Section 2.2 prior to the signing of such written agreement.

The Proposed MOU, which covers the subject matter of Schedule 38 insofar as it concerns a System Extension, clearly falls within the purview of the written agreement anticipated by Section 2.2(g). Given that the Proposed MOU, which is binding in nature, satisfies the endpoint of the Schedule 38, procedure, it must be seen as varying – by mutual agreement – the timelines and formal notice requirements of Section 2.2.

The formal procedure laid down by Section 2.2 of Schedule 38 was entered into to protect the contracting parties, RTG and the City. From a procurement perspective, the relevant question is whether the System Extension was foreseen by the PA, and whether the binding agreement entered into by RTG and the City is within the scope of the PA. In our view, insofar as the RTG Expanded Scope is within the scope of the PA, the Proposed MOU complies with the endpoint envisaged by Section 2.2, notwithstanding the joint decision to negotiate outside the formal framework. The issue of whether the scope of each of the variations is within the scope of the PA is discussed in greater detail below.

As noted above, the PA was provided to all three final proponents of the Stage 1 tender process and was signed in substantially the same form by RTG. It was made clear to proponents, as part of the original Stage 1 competitive tender process, that the possibility of carrying out System Extensions and other Phase 2 works through the Schedule 38 procedures was available to the City and the winning bidder.

In this case, the City is proposing to put in to effect the System Extensions contemplated in the Proposed MOU by using the Variation procedure in Schedule 22 PA. This is explicitly permitted by Section 2.1(b) of Schedule 38, at the discretion of the City. The procedure laid down in Schedule 22 is similar to the formal Notice of Extension procedure in Schedule 38, but the timelines are much shorter. In our view, it is open to the City and RTG to use a series of Variations pursuant to Schedule 22 in order to give effect to the Proposed MOU. Again, assuming the RTG Expanded Scope and the Variations envisaged are within the scope of the PA, this would in our view be within the contemplation of the parties to the original tender process. As with the negotiation option under Schedule 38, all three final Stage 1 proponents were aware of the possibility of carrying out System Extensions using the Variations procedure, and also of the possibility of variations more generally.

- (i) What are the terms of the PA that demonstrate that the services contemplated in the Initial Stage 1 PA Variations are within the scope of the PA?

This Proposed MOU addresses the following issues relating to scope:

- (a) Expansion of the Belfast MSF
- (b) Communications and train control
- (c) Acquisition and commissioning of additional rolling stock

As noted above, Schedule 38 PA grants a wide discretion to the City to pursue “one or more System Extensions during the Project Term” with RTG or another contractor, and may choose to negotiate with RTG directly, use a sole-source contract, competitively procure, or use another transaction structure as appropriate.<sup>3</sup> Given that Schedule 38 is specifically titled “Extension and *Additional Phases*” (emphasis added), it is clear that items within the scope of Stage 2 of the LRT Project were within the contemplation of the original PA, through the use of the System Extension methodology.

(A) MSF and Communications and Train Control

The output specifications for the Belfast MSF in Schedule 15-2, Part 6 of the PA were premised on the original geographical scope of the Stage 1 Output Requirements, including in particular the Operational Performance Requirements. That said, Schedule 15-2 PA the MSF makes clear that the MSF is to be designed and constructed “[t]o satisfy all Operational scenarios of the Agreement” [emphasis added].<sup>4</sup>

Clearly, therefore, the possibility of expanding the MSF to accommodate the additional requirements of any System Extension pursued under Schedule 38 was a possibility that RTG was contractually bound to bear in mind when designing the MSF. It follows that expansion work necessary to give effect to a System Extension was within the contemplation of the Stage 1 PA. It is also relevant that the Belfast Road MSF was always envisaged as providing certain support beyond the Stage 1 requirements. The Output Specifications also specify that the MSF had to accommodate:

All necessary functions to support the initial LRT line and *several functions for the entire planned network* (emphasis added).<sup>5</sup>

For the Train Control and Communications, RTG was required, in accordance with the detailed specifications in Schedule 15-2, Part 4 of the PA, to:

provide for a CBTC system integrated with the wayside portion of the system.<sup>6</sup>

Again, the Output Specifications contemplated the possibility of expansion and considered the train control requirements which would need to be integrated from Stage 1 onwards:

Future extension of the System beyond these Stations into partially segregated rights-of-way with at grade crossings shall require Trains to operate with ATP only in those areas.<sup>7</sup>

In respect of Communications, the Output Specifications provide that:

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<sup>3</sup> Schedule 38 PA, section 2.1(a)

<sup>4</sup> Schedule 15-2 PA, Part 6, section 1.2(a)(i)

<sup>5</sup> Schedule 15-2 PA, Part 6, section 1.2(a)(ii)

<sup>6</sup> Schedule 15-2 PA, Part 4, section 5.1(a)

<sup>7</sup> Schedule 15-2 PA, Part 4, section 5.1(e)



The communications systems for the OLRT will provide vital and non-vital support to daily operations and emergency services. *The communications systems are designed to be integrated throughout the entire OLRT System [...]* (emphasis added)

Taken together, the provisions of Schedule 38, the specific provisions cited above, and the wording of Schedule 15-2 Part 4 PA generally support the view that, where any System Extension or expansion is pursued, this could include expansion of the MSF and the train control and communications provisions, in order to accommodate the increased needs of the system consistent with the original requirements.

(B) Additional Rolling Stock

For the additional rolling stock, insofar as the City should decide to pursue a System Extension, this is within the scope of Schedule 38 since these items are necessary to any extension and were included in the scope of the PA. However the original PA also made specific provision for additional vehicles to be supplied by RTG pursuant to the Stage 1 PA. Schedule 35 PA set out three alternative options available to the City: an option to purchase exercisable for 7 years from financial closing of the contract,<sup>8</sup> negotiated purchased from RTG,<sup>9</sup> and a right to procure additional vehicles using competitive, sole-source or other forms of procurement methodology.<sup>10</sup>

It is important to note that, pursuant to section 29.7 PA, the provisions of Schedule 35 are exercisable independently of Schedule 38, although Schedule 38 also provides for the application of Schedule 35 as part of a proposed System Extension.<sup>11</sup> Thus, it was expressly in contemplation of the original Stage 1 PA that the City could acquire additional rolling stock from RTG by either exercising its Option to Purchase or through negotiations with the incumbent, RTG.

The terms of Schedule 35 PA also specify that the use of any vehicles so purchased could be used by the City for any expansion. Under the Option to Purchase, it was provided that:

The Additional Vehicles that are purchased by the City pursuant to Section 2.1(a) may, at the City's option, be used for the System and any System Extension.<sup>12</sup>

In respect of any vehicles acquired by negotiation, an identical clause was inserted into Part 3 of Schedule 35.<sup>13</sup> Taken together with the provisions of Schedule 35, the purchase of additional rolling stock contemplated in the Proposed MOU can therefore be said to be within the scope of the Stage 1 PA.

- (ii) What are the terms of the PA that demonstrate that the services contemplated in the Stage 1 PA Variations for Stage 2 Maintenance Services are within the scope of the PA and therefore capable of being procured from RTG via variation?

Schedule 15-3 to the Stage 1 PA defines RTG's maintenance obligations as follows:

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<sup>8</sup> Schedule 35 PA, Part 2

<sup>9</sup> Schedule 35 PA, Part 3

<sup>10</sup> Schedule 35 PA, Part 4

<sup>11</sup> Schedule 38 PA, section 2.3(a)

<sup>12</sup> Schedule 35 PA, section 2.1(b)

<sup>13</sup> Schedule 35 PA, section 3.1(b): "(b) The Additional Vehicles that are purchased by the City pursuant to Section 3.1(a) may, at the City's option, be used for the System and any System Extension."

Project Co will have complete control of (subject to the rights and obligations of the City pursuant to the Project Agreement) and responsibility for the Maintenance of the System during the Maintenance Term.<sup>14</sup>

The System is defined as:

[...] the light rail rapid transit system to be Designed, Constructed, supplied, tested, commissioned and Maintained by Project Co in accordance with this Project Agreement [...]<sup>15</sup>

Where a System Extension (within the meaning of the PA) is planned, it therefore expands the meaning of the “System”, such that any System Extension that complies with Schedule 38 will then form part of the “System”. It is therefore open to the City and RTG to provide for the corresponding extension of maintenance services to include maintenance of the System Extension.

Furthermore, Schedule 38 makes explicit provision for additional maintenance obligations either on a standalone basis or as part of a System Extension. Section 2.1 of Schedule 38 PA provides:

The City may in its Discretion elect to procure or negotiate, as the case may be, the performance of *Extension Work and Extension Maintenance Services* in respect of a System Extension through consolidated or separate procurements or negotiations.<sup>16</sup> (emphasis added)

Likewise, section 2.2 of Schedule 38 expressly provides for the City to negotiate with RTG, if it should choose to, for additional maintenance services in the same way as for a System Extension. In our view, considering these provisions together with the general features discussed above, the extension of the PA to include Stage 2 Maintenance Services was within the contemplation of the Stage 1 PA procurement.

(iii) What are the terms of the PA that demonstrate that the Procurement Support Services are within the scope of the PA?

By virtue of Schedule 38, Article III, RTG is required to cooperate with the City and any other contractor brought in as part of a System Extension. Thus, RTG is obliged to “provide such assistance to the City as the City may request, acting reasonably”.<sup>17</sup> Specifically, this includes assistance with:

the development of technical specifications in respect to the Extension Work or the Extension Maintenance Services, as applicable, and the evaluation of designs proposed by prospective Extension Contractors to ensure compatibility with the Fixed Facilities, E&M, MSF, Vehicles and any Additional Vehicles already supplied, and other items as specified by the City;<sup>18</sup>

and,

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<sup>14</sup> Schedule 15-3 PA, Appendix A, section 1.2(a)

<sup>15</sup> Schedule 1 PA, section 1.634

<sup>16</sup> Schedule 38 PA, section 2.1(c)

<sup>17</sup> Schedule 38 PA, section 3.1(a)

<sup>18</sup> Schedule 38 PA, section 3.1(a)(i)

advising the City on potential modifications to the Extension Work or the Extension Maintenance Services, as applicable, that could result in cost savings or other benefits to the City.<sup>19</sup>

It is also foreseen that the City will pay RTG reasonable consulting fees for its assistance.<sup>20</sup> It is therefore provided that in the event the City decides to procure any element of a System Extension from another contractor, RTG is obliged to provide such assistance necessary to enable that procurement to take place.

In addition, although not strictly relevant to the provision of the procurement support services for Stage 2 under discussion, the PA requires RTG to provide analogous services under Schedule 35 in the event that the City decided to procure Additional Vehicles from a third party.

Thus, it was within contemplation of the Stage 1 PA and the parties to the original procurement that, in the event of a System Extension, RTG could be retained to provide procurement support services for any or all elements of that Extension being put out to tender.

- (iv) What are the terms of the PA that demonstrate that the interface services contemplated in the Proposed MOU are within the scope of the PA?

The Stage 2 Interface Agreement will be substantially based on the Stage 1 Interface Agreement, subject to certain adjustments and drafting amendments necessary to give effect to the general intent of the Proposed MOU.

Schedule 38 of the Stage 1 PA contemplates the development of an interface protocol between the City, RTG, and the contractor that performs any part of a System Extension where necessary. As part of its assistance to any element of a System Extension which is being procured, RTG must assist with “the development of an interface protocol between the City, Project Co and the Extension Contractor”.<sup>21</sup> Schedule 38 continues as follows:

As soon as practicable after the City provides notice to Project Co that the City has reached a binding agreement with an Extension Contractor, the City and Project Co shall meet with the Extension Contractor and, in good faith and reasonably, negotiate and execute an interface agreement and/or construction procedures agreement to govern matters relating to the coordination of Project Co’s activities in respect of the Project Scope and the Extension Contractor’s activities relating to the Extension Work and/or the Extension Maintenance Services as applicable...<sup>22</sup>

Thus, not only is it open to the City to use RTG for the interface services as contemplated in the Proposed MOU, there is in fact an obligation on RTG to develop an interface agreement and assist the City so far as reasonably necessary to do so, subject to its contractual right to receive reasonable consulting fees.<sup>23</sup> Furthermore, in our view given the fact that interface requirements are essential to any integrated System Extension, it can be implied that the provision of interface services is part of the PA, as a matter of business efficacy. On any view, therefore, interface services for Stage 2 were within the contemplation of the Stage 1 PA.

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<sup>19</sup> Schedule 38 PA, section 3.1(a)(iii)

<sup>20</sup> Schedule 38 PA, section 3.1(b)

<sup>21</sup> Schedule 38 PA, section 3.1(a)(iv)

<sup>22</sup> Schedule 38 PA, section 3.1(c)

<sup>23</sup> See Schedule 38 PA, section 3.1(b)

**(b) What other rights and obligations of the City affect its ability to procure the services directly from RTG?**

As discussed in the section (a) above, the RTG Expanded Scope and work included in the Proposed MOU were contemplated as part of the original RFP procurement and the ability to extend the scope of RTG's work was specified in the PA. This squarely addresses the principle concern, under procurement law, that the variations proposed under the Proposed MOU constitute impermissible sole source contracting. In the sections that follow, we have also considered other arguments that might be available to the City in the event of a legal challenge to the Proposed MOU.

**(i) Common Law**

In the event of a challenge under the common law that the Proposed MOU amounts to an impermissible sole-source contract, the best argument available to the City is that there is no requirement at common law that a public institution engage in a competitive tendering process.<sup>24</sup> Until a competitive process is begun, there is generally no requirement to treat prospective bidders fairly. Courts have traditionally been reluctant to grant plaintiffs standing to bring a claim challenging a sole source procurement. While some provinces have passed procurement legislation which is binding upon municipalities,<sup>25</sup> this is not the case in Ontario. Instead, the *Municipal Act, 2001* merely requires the City to develop procurement by-laws, but sets out no mechanism by which a frustrated potential bidder may complain.<sup>26</sup> Insofar as it relates to procurement, the *Municipal Act, 2001* does not otherwise create obligations on the City, the breach of which could found a cause of action.

When a public institution such as the City implements internal procurement rules, such as the City's Purchasing By-law, there is an argument that the institution is subject to those self-imposed rules.<sup>27</sup> However, where a statute does not lay down mandatory criteria but leaves the content of the rules themselves in the discretion of the municipality, then absent bad faith, a technical breach of those rules will not invalidate a municipality's decision.<sup>28</sup> The Ontario Superior Court has recently found (which finding was upheld by the Ontario Court of Appeal) that a technical failure to follow the City's Purchasing By-Law did not invalidate its decision to sole source a project, so long as the City is found to be acting in good faith.<sup>29</sup>

As discussed above, any proposed extensions or additional work which are within the scope of the PA, no question of any obligation to procure those extensions by a competitive process (or otherwise) arises. The relevant duties have already been satisfied in the Stage 1 RFP. Even if it is agreed that part of the proposed extension of work is beyond the scope of the PA, the City can that it retains, at common law, the discretion to

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<sup>24</sup> *Kamloops Office Systems Ltd. v Board of School Trustees of School District No. 73*, 34 BLR (3d) 129, 2003 BCSC 619, para 61; *Friends of Lansdowne Inc. v Ottawa (City)*, 107 OR (3d) 104, 2011 ONSC 4402.

<sup>25</sup> See, for example, the Newfoundland and Labrador *Public Tender Act*, RSNL 1990, c P-45, discussed in *Exploits Valley Air Services v. Board of Governors of College of the North Atlantic*, 2005 NLTD 33

<sup>26</sup> *Municipal Act, 2001*, SO 2001, c 25, s 270(1)(3). The Ontario government has also published *A Guide to Developing Procurement Bylaws*, online at: [www.mah.gov.on.ca/Asset1201.aspx](http://www.mah.gov.on.ca/Asset1201.aspx).

<sup>27</sup> *Friends of Lansdowne Inc. v Ottawa (City)*, 2012 ONCA 273, [2012] O.J. No. 1860, 110 O.R. (3d) 1, where the City's Purchasing By-law was reviewed and the court considered whether the City had abided by its own self-imposed procurement rules. See also *Canada (Attorney General) v Rapiscan Systems, Inc.*, 2015 FCA 96, regarding the Canadian Air Transport Security Authority's failure to follow its own contracting procedures enacted pursuant to the *CATSA Act*, and its failure to document the basis upon which an alternate procedure was followed.

<sup>28</sup> *Blyth v. Northumberland (County)* (1990), 75 O.R. (2d) 576, 1990 CanLII 6752

<sup>29</sup> *Friends of Lansdowne Inc. v Ottawa (City)* [2012] O.J. No. 1860, 110 O.R. (3d) 1 §96, upheld on appeal 2012 ONCA 273. In *Friends of Lansdowne*, the impugned procurement decision was taken under a separate by-law, but the same reasoning should apply in the case of a decision taken by other means such as by council resolution.

decide how best to procure the additional services. It does not owe any duty of fairness to any prospective Stage 2 bidder at common law unless and until it begins a competitive tender process, and then only in relation to the items within the scope of the competition.

(ii) Purchasing By-law

The Purchasing By-law permits the City to engage in non-competitive purchases (i.e., sole source procurement) in the following relevant circumstances:

22. NON-COMPETITIVE PURCHASES

(1) The requirement for competitive bid solicitation for goods, services and construction may be waived under joint authority of the appropriate Director and Supply Branch and replaced with negotiations by the Director and Supply Branch under the following circumstances:

[...] (c) where only one source of supply would be acceptable and cost effective,

(d) where there is an absence of competition for technical or other reasons and the goods, services or construction can only be supplied by a particular supplier and no alternative exists,

(e) where the nature of the requirement is such that it would not be in the public interest to solicit competitive bids as in the case of security or confidentiality matters, [...]

(g) where the possibility of a follow-on contract was identified in the original bid solicitation. [...]

(A) Follow-on contracts

One of the exceptions for sole source procurement considered in the Purchasing By-law is where “a follow-on contract was identified in the original bid solicitation”.<sup>30</sup> The Purchasing By-law requires the City to include provision for a follow-on contract in the original bid solicitation where there is a “reasonable likelihood” that “it will be necessary to award a follow-on Contract for goods or services to the existing supplier”.<sup>31</sup> The definition of “Follow-On Contract”, at section 3 of the Purchasing By-law, is “situations where the City, in the original contract or bid solicitation document, has communicated the potential for the award of subsequent phases of a project to the successful service provider and fees for any follow-on contract are to be based on the same unit or per diem rates proposed under the original contract or bid”.

As discussed above, the PA makes explicit provision for variations and system extensions throughout the life of the PA (i.e. up to 30 years<sup>32</sup>) on the basis of negotiated agreement based on the contractual rates provided for.

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<sup>30</sup> Purchasing By-law, s 22(1)(g).

<sup>31</sup> Purchasing By-law, s 24(1).

<sup>32</sup> See PA, Schedule 38, 2.1(a) and Schedule 1.

As such, it is arguable that a follow-on contract within the meaning of the Purchasing By-Law was contemplated as part of the PA for Stage 1, and expressly provided for in Schedules 22, 35 and 38.

It might be argued against the City that, strictly speaking, the RTG Expanded Scope is not a follow-on contract because this exception is only available on completion of a contract, and the PA will not complete until it reaches its Term or is terminated by the parties.<sup>33</sup> However, this argument is circular: if the Stage 1 work is only complete at termination, then any work to extend or improve the System is by definition within scope of the PA. If the Stage 2 works are out of scope of the Stage 1 PA, by definition the Stage 1 PA is complete in respect of that work. A purposive interpretation of section 24 would point to the Stage 2 works – if not within scope of the Stage 1 PA – as being a follow-on contract in the sense that the discrete part of the overall project (Phase 1) which preceded it has completed.

(B) Other permissible sole sourcing

There is scope in this case to rely on the grounds in 1(c) to 1(e) of the City's Purchasing By-Law. First, if awarding the Phase 2 extension work to another entity would involve significant cost increases, then ground (c) "only one source of supply would be acceptable and cost effective" would seem to be applicable. The ultimate aim of any procurement is after all to provide value to the taxpayer.

In this case, given the degree of interconnectedness between the existing LRT and the Stage 2 extension of the Confederation Line, there are strong arguments to the effect that the only cost-effective solution would be to have RTG provide the services via the Proposed MOU. In particular, the Proposed MOU affords the City the following cost savings, among others:

- Ability to expand the Belfast MSF rather than have a new proponent construct MSFs for its vehicles at both ends of the Confederation Line;
- Ability to procure light rail vehicles using the existing agreement with the rolling stock supplier that are compatible with the current technical requirements of the Confederation Line;
- Ability to procure communications and train control systems compatible with the existing System; and
- Maintenance of the entirety of the Confederation Line by a single provider.

Second, as the market consultations carried out by the City have shown (see further below), at this stage in the project, there would be an absence of competition for a full Phase 2 RFP due to RTG's perceived incumbent advantage. Either RTG must be eliminated from any competition, which may bring with it increased costs, or any competition will need to be restricted to certain areas, failing which many key players may decide not to bid. In our view, it is arguable that this would be sufficient to invoke ground (d).<sup>34</sup>

Third, as regards ground (e), we note that the two examples given of security or confidentiality are non-exhaustive. Thus in circumstances where the City reasonably considers that "the nature of the requirement is such that it would not be in the public interest to solicit competitive bids," it should be able to rely upon this discretionary ground to sole source. Taking a holistic view of the various factors as described above, in particular cost considerations and market consultations, and in view of the stage negotiation has reached with RTG and

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<sup>33</sup> Purchasing By-law, s.24(1)

<sup>34</sup> In the *Friends of Lansdowne* case, one of the grounds for dismissing the complaint which was found by the judge was that the sole source exemption in 22(1)(d) of the Purchasing By-Law was applicable, in circumstances when the technical issues were far less complex than in this case. See 2011 ONSC 4402 §94.

the need to progress the project forward, it is arguable that it is not in the public interest at this stage to solicit competitive bids for RTG Expanded scope under the Proposed MOU.

(iii) Good Faith

As mentioned above, the Ontario Courts have found that, notwithstanding the obligation in s. 270 of the Municipal Act, which requires municipalities to ‘adopt and maintain’ policies with respect to the procurement of goods and services, the City can depart from its Purchasing By-Law if acting in good faith.<sup>35</sup> In our view, a similar argument can be made by the City if challenged because there are cogent arguments that the adoption of the Proposed MOU has not and will not be made in bad faith:

- first, the onus would be on any claimant or challenger to prove bad faith, which is not straightforward and we are not aware of any facts which would demonstrate bad faith on the part of the City in this case;
- second, this situation only arises in the event that our analysis in respect of the scope of the PA, the duties owed at common law *and* the availability of the sole sourcing provisions in the Purchasing By-Law is wrong; and,
- third, the City in proving its good faith, would be able to argue that: (i) it reasonably relied on the provisions of the PA and the sole sourcing provisions of the Purchasing By-Law; and, (ii) it reasonably relied on legal advice to the effect that it could proceed in the manner described in the Proposed MOU.

(iv) The Agreement on Internal Trade

Annex 502.4 of Chapter 5 of the Agreement on Internal Trade (**AIT**) applies to municipalities and to the LRT Project procurement generally.

First, the Proposed MOU is generally consistent with the requirements of the AIT. The principle requirements of Annex 502.4 as they relate to competitive tendering are found at paragraphs 1 and 5 of Part G of the Annex:

1. Procurements covered by this Annex shall be subject to a tendering process.

[...]

5. Entities covered by this Annex shall ensure that their needs, within Canada, of goods, services and construction are met through a fair acquisition process that is based on the highest degree of competition, efficiency and effectiveness, and is consistent with Sections “D” (Non Discrimination) and “E” (Transparency) of this Annex.

As noted above, the works covered in the Proposed MOU are permissible extensions of the existing contract and within the scope of the goods and services provided in the original contract award for Stage 1. As a result, they are permissible extensions of a procurement that was subject to a fair, competitive tendering process (the Stage 1 RFP), in compliance with paragraphs 1 and 5 of Part G of Annex 502.4.

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<sup>35</sup> *Friends of Lansdowne Inc. v. Ottawa (City)*, 2011 ONSC 4402, (2011) 107 O.R. (3d) 104, §96 upheld on appeal 2012 ONCA 273, [2012] O.J. No. 1860, §§77 – 87

Second, to the extent a complainant may try to invoke the AIT, the City may also argue that the sole sourcing exceptions provided in the AIT apply. The relevant provisions are to be found in Annex 502.4, Appendix D, and include:

(b) where there is an absence of competition for technical reasons and the goods or services can be supplied only by a particular supplier and no alternative or substitute exists; [...]

This exception is analogous to ground (d) in the sole source exception of the Purchasing By-Law. For the reasons given above, we consider that the City could also rely on this provision.

Third, and perhaps most importantly, the recourse provisions of the AIT are generally considered to be ineffective and do not provide a remedy of any practical value. The remedial provisions found at Part M of Annex 502.4 do not provide a direct remedy to suppliers. Upon recurring complaints about an entity, only the Province (and not the supplier) can “inform the Province of the entity” of a complaint. The principal goal of the process is “to work with the affected suppliers and entities to resolve the complaints in a satisfactory manner.” While there is the possibility of the appointment of three person expert panel, this right has rarely, if ever, been invoked vis-à-vis a municipal entity. The ultimate remedy is directed not at the municipality, but at the Province. Notably, paragraph 7 of Section M of Annex 502.4 is clear that a complaint under the AIT cannot affect the timing of the award of a contract: “The dispute resolution process shall not cause delay in the awarding of a contract by an entity covered by this Annex”.

Finally, the ability to have recourse to the this limited dispute resolution process is limited to only Canadian suppliers as defined in at Article 518 of the AIT. A foreign supplier cannot claim rights under the AIT because it is a domestic agreement.

**(c) What steps has the City otherwise taken to ensure that the Stage 1 Variances comply with the general objectives of the City’s public procurement policies, that is to say to provide fairness to suppliers and maximum value to taxpayers?**

(i) Preliminary Market Sounding Consultations

The City and IO, together with a number of the City’s advisors for the Stage 2 Project, conducted market sounding consultations with potential Public Private Partnership (**P3**) partners on options for the Stage 2 project from November 14-16, 2016 (**Market Consultations**). The objective was to engage in confidential interactive sessions with potential partners, to hear their perspective on options considered by the City, possible P3 deal structures, and to understand the impact of different P3 delivery options on market capacity and interest in the Project. The Market Consultations sought input on key topics including project scope, transaction structure, and risk allocation.

Because of the unique nature of the Stage 2 project as an extension to the Confederation Line that is currently under construction and is being delivered by RTG, it was considered appropriate to hold market consultations at an earlier stage than it would normally be held in order to present options for the Stage 2 project and to gather market input on the impact of these various options.

The preliminary Market Consultations indicated that there are currently a number of large infrastructure projects in Canada, and that there could market capacity issues, in particular with regards to the resourcing requirements for the transit specific elements as there are not that many transit specific specialists in Canada. They also reflected the general reluctance of proponents to engage in the Stage 2 procurement given the perceived



incumbent advantage of RTG. The designation of the DBF Co as a separate procurement that would exclude RTG and its members was therefore included in the Proposed MOU as a way to expand the number of proponents willing to bid on a significant portion of the work required for the Confederation Line expansion.

(ii) Fixed Pricing for Stage 1 PA Variations

In order for the City to benefit from the efficiencies of the Stage 1 PA and associated infrastructure, it will negotiate one or more Variations to the Stage 1 PA for project elements that demonstrate value for money, including by reference to the original competitive pricing for the Stage 1 project. Certain elements of the Stage 2 LRT project will potentially be sourced through RTG without competitive tension on a fixed price basis (where such fixed price has been developed and determined through the open book principles described above), with appropriate and reasonable audit rights for the City until the relevant Stage 1 PA Variation is agreed.

The fixed price was developed with RTG providing complete transparency as to the source and application of all funds, costs, monies to be expended and profits and margins to be realized in respect of the works and services to be provided. The open book pricing comes in addition to the potential cost savings achieved under the Proposed MOU as itemized above in section 3.1(b)(ii)(B).

Further, RTG provided the City with transparency as to the original competitive pricing obtained in connection with the Stage 1 PA, as well as for other competitive pricing delivered in similar LRT projects.

**3.2 What has the City done and what will it do to ensure fair procurement of the Trillium Expansion and to address concerns of potential bidders regarding the possible involvement of RTG?**

The Proposed MOU contemplates that the Trillium Line Extension will be procured separately, and not form part of the services provided by RTG under the Proposed MOU. Notably, the Procurement Services provided by RTG under the Proposed MOU do not include services related to the Trillium Line or the Trillium Line Extension. The Proposed MOU will not prohibit RTG from bidding on any portion of the Trillium Line Extension. In fact, the Trillium Line Extension is not included in the definition of the DB Co Works (on which RTG and its constituent members cannot bid). Further, the City states in the Proposed MOU that neither the City, nor any advisor to the City (including IO), will declare RTG or any of its constituent members ineligible from participating in the Trillium Line project.

The City has included in the Proposed MOU a requirement that the City will structure any Trillium Line Extension project in a manner which remedies any actual or perceived conflict of interest or unfair advantage. This will include disclosing to all potential proponents any information that the City has disclosed to RTG that may give rise to a conflict of interest or unfair advantage. The Proposed MOU also contemplates that the City can use any other means or measures to address any potential unfairness that might flow from the possible involvement of RTG in Stage 1 or Stage 2.

As detailed below, the City can take steps to remedy any actual or perceived conflict of interest or unfair advantage resulting from the participation of RTG in the bidding for the Trillium Line Extension project.

**(a) Remedying Incumbent Advantage**

The fact that RTG has familiarity with the Stage 1 process, technical specifications of the Confederation Line and its trains, geology of the terrain, labour force advantages is a “natural” advantage that the that is generally permissible at law. RTG will also have familiarity with the City, its processes, and with individuals at the City.

Familiarity between parties or specialized knowledge is an advantage that is not necessarily unfair. More specifically, the Canadian International Trade tribunal (“CITT”) has stated:

Although there may be some subjectivity in the application of these types of evaluation criteria, this is not prohibited by the AIT and, in fact, in the opinion of the Tribunal, professional judgement is perfectly normal and to be expected for any type of procurement. There is a question as to whether or not the Incumbent has an unfair advantage in this or other like procurements. The Tribunal is of the view that, indeed, the Incumbent may have an advantage from the experience that it has gained in past contracts, but that, in itself, is normal and is not considered to be unfair. Sometimes being an incumbent is a disadvantage, in that it may lock a supplier into a particular mode of operation with attendant costs, and leaves it unable to react when a new supplier puts forth an innovative approach for consideration.<sup>36</sup>

As a result, the City is not required to “level the playing field” and remedy natural advantages that RTG may gained by having acted as proponent for the Stage 1 LRT. That is particularly the case here given that the extent of the incumbent advantage for RTG as a potential bidder on the Trillium Line Extension is far from clear. RTG was not the proponent for the existing Trillium Line and there are significant differences in the technical specifications for the Confederation Line (including in relation to the type of railcar, diesel vs. electric power, and differences in track and signalling specifications). Any experience gained in delivering the Stage 1 LRT will not necessarily translate to an advantage in bidding on the Trillium Line Expansion.

#### **(b) Minimizing Informational Advantage**

While the City may not be required to take any steps to remedy any advantage conferred on RTG that results merely because RTG delivered Phase 1 of the LRT (to the extent there is any such advantage), the City must be mindful to avoid any unfairness resulting from any other type of advantages that might have been conferred on RTG via its relationship with the City.

While the City is not required to “level the playing field”, it must be mindful that its discussions with RTG in relation to the Proposed MOU might provide RTG with an “informational” advantage over other proponents. In order to remedy this potential advantage, anything relevant to the Trillium Line Extension that was shared with RTG during the Proposed MOU preliminary discussions must also be shared with every other bidder in an RFQ or RFP process.<sup>37</sup> In a frequently cited decision of the CITT, it stated that

[...] all bidders are entitled to receive any information that could reduce the natural advantage of an incumbent in this respect. The Tribunal is not satisfied that the Department did achieve this goal in this instance. Indeed, the Tribunal believes that the Incumbent had available to it certain information that was not available to the other bidders. When conducting competitive procurements in the field of research and development, where new developments are conditioned by recent advances, it is critical that the latter be reasonably documented and made equally available to all potential suppliers.<sup>38</sup>

In this case it is unclear whether there was information relevant to the Trillium Line Extension exchanged with RTG. The discussions mainly concerned the Confederation Line Extensions, and were framed as proceeding under Schedules 22 (Variation Procedure) and 38 (Extension and Additional Phases).

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<sup>36</sup> *Array Systems Computing Inc. (Re)*, Doc PR-95-024, 1996 CanLII 7881 (CITT).

<sup>37</sup> *Envoy Relocation Services Inc. v Canada (Attorney General)*, 2013 ONSC 2034. See also *Bureau d'études stratégiques et techniques en économique v Canada (Canadian International Development)*, Docs PR-2007-010 and PR-2007-012, 2007 CanLII 55898 (CITT), where the bid winner “had information in his possession that was not available to [...] the other bidders.”

<sup>38</sup> *Tactical Technologies Inc. (Re)*, Doc PR-97-037, 1998 CanLII 14546 (CITT).

To the extent there was an exchange of relevant information, the City will be able to include it as part of the Trillium Line Extension RFP. Prior to its discussions with RTG relating to the Stage 1 Extension, the parties agreed that any information that the City shared with RTG could be shared with any bidder in a Stage 2 procurement. Not only does RTG agree to it, it insisted on a provision by which the City agrees:

“where possible and where within its powers, to structure any Stage 2 Public Procurement in a manner that remedies any actual or perceived conflict of interest or unfair advantage, including by disclosing to other proponents any information, including confidential information, that the City has disclosed to RTG or any RTG Party that may give rise to a conflict of interest or unfair advantage for the purposes of responding to any Stage 2 Public Procurement, or other such actions as may be possible in the circumstances.”

It is our understanding that that the City also kept a log of all information given to RTG as part of its discussions. This will facilitate the identification of any information relevant to Trillium Line Extension that was shared during the MOU negotiation process that should be included in the Trillium Line Extension RFP.

### **(c) Other Steps**

Given that RTG continues to have a recent and close working relationship with the City, in order to avoid the perception of any unfairness,<sup>39</sup> the City should have an independent and objective team evaluate any submissions received as part of a Trillium Line Extension RFP process.<sup>40</sup> In other words, the City employees and consultants involved in MOU discussions with RTG should not also evaluate the RFP submissions. The evaluation team should also not include any individuals who have had significant dealings with RTG during Phase 1 of the contract. We also suggest that the City insist that the RTG team putting together the Trillium Line Extension bid be a “clean” bid team, that is to say consisting of individuals without involvement in the MOU discussions, or in the delivery of the Phase 1 LRT.

The City should also be mindful not structure the Trillium Line Extension RFP in such a way that it contains technical or financial specifications that could be seen to favour RTG. The evaluation of bids should also be made in relation to clear, established criteria and not vague, intangible criteria that can only be deciphered by RTG as the incumbent.<sup>41</sup> RTG should not be involved in any way in the development of the Trillium Line Extension RFP. In that regard, the Procurement Support Services contemplated in the Proposed MOU should not extend in any way to the Trillium Line Extension. It is our understanding that this is the intention of the parties.

### **3.4 Are there any procurement law concerns relating to the competitive bidding of the DB Co Works?**

In the Proposed MOU, RTG and its constituent members will agree not to bid on the DB Co Works. This is necessary. RTG would be in a clear conflict of interest if it bid on a procurement for which it provided Procurement Support Services and Interface and Design Management, since both of these services involve providing input on the design of the DB Co. Works RFP. According to section 1.3 of Part F of Appendix 3

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<sup>39</sup> *Bureau d'études stratégiques et techniques en économie v Canada (Canadian International Development)*, Docs PR-2007-010 and PR-2007-012, 2007 CanLII 55898 (CITT), where the bid winner “had close and longstanding ties with the unit responsible” for the project.

<sup>40</sup> *Bureau d'études stratégiques et techniques en économie v Canada (Canadian International Development)*, Docs PR-2007-010 and PR-2007-012, 2007 CanLII 55898 (CITT), where the CITT found that one element of bias was the key role played by the lead evaluator who had a prior relationship with the bid winner, and who likely influenced the other evaluators.

<sup>41</sup> While the City cannot create any sort of competitive advantages for the incumbent, it can choose to procure services in a combination of its choosing even if it would have the effect of excluding some suppliers. See *Daigen Communications (Re)*, Doc PR-2011-021, 2011 CanLII 93790 (CITT), paras 16-17.

(“Agreed Parameters”), the Procurement Support Services include RTG being engaged to “work alongside the City to assist it with the procurement of the DB Co Works”. Moreover, the Interface and Design Management work given to RTG requires it to be involved in the design and construction oversight for certain DB Co scope items. The agreement by RTG and its members not to bid on the DB Co Works RFP addresses this conflict of interest concern. The Proposed MOU goes further and excludes not only RTG and its constituent members but also any subcontractor working with RTG in relation to the Procurement Support Services and the Interface Services because these subcontractors may also have influence over the preparation of the DB Co RFP.

As with all procurements, the City should avoid structuring the DB CO Works RFP in such a way that it contains technical or financial specifications that could be seen to favour any specific proponent. The evaluation of bids should also be made in relation to clear, established criteria and not vague, intangible criteria.