SUBJECT: City of Hamilton/Ministry of Transportation Governance Agreement for the Joint Procurement of Conventional Transit (HSR) Buses (PW08040) - (City Wide)

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 PW08040, for the Joint Procurement of replacement Conventional Transit Buses for each of 2008/09, in accordance with the Transit ten year capital fleet replacement plan, with the Province of Ontario, 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 the Ministry of Transportation 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 2009 and (2010 option year) with the Province of Ontario and seven other Ontario municipalities. The benefits of the joint procurement include;
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 the Minister of Transportation for the Province of Ontario 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 2009. 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 2009.

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 this program in acquiring the replacement fleet for 2008. Based on our successful experience, staff is recommending that Hamilton renew its commitment for 2009 with an option to participate in 2010.

The Province 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 209 buses based on previously approved service level enhancements including 2008. This requires a replacement schedule of 17.5 buses per year based on Council’s 12-year replacement cycle. For 2009/10, this program offers procurement of 40-foot, low floor, low emission, diesel buses, and 40-foot hybrid/diesel buses.

BACKGROUND:

The procurement initiative, facilitated by the Ministry of Transportation, now involves seven transit systems; Burlington, York Region, Durham Region, Barrie, London, North Bay, and Orillia. For the 2009/10 a further eight Transit systems have expressed interest in joining this initiative. The initiative calls for the joint purchase of 40-foot low...
emission particulate trap equipped, diesel transit buses for 2008. Other transit systems can participate in the program subject to the terms and conditions of the governance agreement. The terms and conditions of those participating are set out in a governance agreement which is predicated on the following key principles:

- The Ministry, 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 from this agreement for 2009, for whatever level of 2009 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.
- Providing the opportunity to improve product quality, given potential for vehicle inspection during bus build process.
- 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.

**ANALYSIS/RATIONALE:**

Transit produces less than 1% of all GHG tailpipe emissions. Diesel engines produced for Transit use after 2007 run on ultra-low sulphur fuel, are equipped with diesel particulate traps for low emissions, and can run on bio-diesel mixture for further improved emissions.

For 2009/10 the Provincial Fleet Procurement initiative has been expanded from 40-foot Diesel buses only, to include 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 desire to purchase this type of fleet for any reason as may be the case with a previous announcement by the Province of their intent to consider funding the purchase of Articulated Fleet for Hamilton’s Rapid Transit line(s).
ALTENRATIVES FOR CONSIDERATION:

That staff be directed to enter into a dedicated Tender Process for the City of Hamilton.

FINANCIAL/STAFFING/LEGAL IMPLICATIONS:

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 2009/10 Conventional Transit Bus Purchase.

POLICIES AFFECTING PROPOSAL:

City of Hamilton entering into a procurement agreement with the Province of Ontario.

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 the Province of Ontario and other Ontario Municipalities demonstrates three of our four strategic commitments:

- “Smart Processes to Match our Needs”. Partnering with the Province 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 and/or 40-foot hybrid fleet that meets the increased emission standard for 2007 and are equipped with particulate filters to ensure the lowest tailpipe emissions is in accordance with Public Works Strategic Plan commitment to be a leader in the “greening” of the City.

RELEVANT CONSULTATION:

Staff has consulted with the participating municipalities for the 2007 procurement and comments from the 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 manufacturers 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”.


CITY STRATEGIC COMMITMENT:

By evaluating the “Triple Bottom Line”, (community, environment, economic implications) we can make choices that create value across all three bottom lines, moving us closer to our vision for a sustainable community, and Provincial interests.

Community Well-Being is enhanced. ☑ Yes ☐ No
A Modern fleet adds to the customer acceptance and support of the Transit program. Increased automobile usage contributes to traffic congestion, high number of vehicular and pedestrian accidents.

Environmental Well-Being is enhanced. ☑ Yes ☐ No
A Low-emission Diesel fleet is an effective and measurable contributor to lower emissions.

Economic Well-Being is enhanced. ☑ Yes ☐ No
2009 and future Fleet Maintenance Budget extraordinary cost increases associated with fleet maintenance are mitigated to the greatest extent possible. Diesel buses still represent the most economic technology, and competitive pricing through the Ontario Joint Bus Procurement process.

Does the option you are recommending create value across all three bottom lines? ☑ Yes ☐ No

97% of the Fleet will be Low Floor/Accessible. The new Low Emission Diesel engines will meet the more stringent 2007 emission requirements. Diesel buses still represent the most economic Transit technology.

Do the options you are recommending make Hamilton a City of choice for high performance public servants? ☑ Yes ☐ No
Staff is engaged. Staff is empowered to be innovative and seek out new ways of doing business.
GOVERNANCE AGREEMENT
FOR THE
JOINT PROCUREMENT OF TRANSIT BUSES

June 2008

THIS AGREEMENT made as of the _____ day of ____________, 2008.

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO,
represented by the Minister of Transportation for the Province of Ontario

(hereinafter referred to as the “Ministry”)

- AND -

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

(hereinafter referred to as “XX”)

- AND -

THE CORPORATION OF THE CITY OF ____________
represented by the Mayor and Clerk

(hereinafter referred to as “______”)

- AND -
THE REGIONAL MUNICIPALITY OF _________
represented by the Regional Chair and the Regional Clerk

(hereinafter referred to as “__________”)

- AND -

__________ TRANSIT COMMISSION,
represented by the Chair and General Manager

(herinafter referred to as “__________”)

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WHEREAS the Ministry of Transportation (MTO) has been working with municipal transit managers to jointly develop detailed common vehicle specifications for Transit Buses that can be used for a joint Transit Bus 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.
b. avoid costs by standardizing the Request for Proposal (RFP) documents including terms and conditions.
c. avoid costs and reduce time associated with the bus procurement process allowing transit systems to focus on core competency.
d. improve buying power and delivery schedules for transit systems.
e. reduce uncertainty for manufacturers through longer production runs, predictability, and performance-based specifications.

ARTICLE I: PRINCIPLES OF TRANSIT BUS PROCUREMENT

1. Key principles

This Agreement shall be guided by the following key principles:

a. The Ministry shall comply with Ontario Procurement Policies when issuing any RFP whereby proposals will be evaluated and the Proponent with the highest overall score shall be selected to enter into a Master Agreement.
b. Participation by Purchasers in the joint Transit Bus Procurement is voluntary up to seven (7) calendar days following the Steering Committee recommendations that the Ministry enter into the Master Agreement with the successful Proponent, pursuant to section 24.
c. the decision on whether or not to exercise the option year and, to the extent the option year is exercised (i.e. number of Transit Buses to be purchased), rests exclusively with each of the respective Purchasers.
d. The Ministry shall work with each Steering Committee in undertaking the Procurement.

ARTICLE II: STEERING COMMITTEES

2. Steering Committee Membership

For each RFP intended to be issued by the Ministry pursuant to section 6 (a), there shall be a Steering Committee comprising one representative from the Ministry and each Purchaser under the relevant RFP. For each Steering Committee, the Ministry
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 council 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**

Each Purchaser and the Ministry shall have one representative who shall have one 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 who are 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 Steering Committee**

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

a. recommending to the Ministry the release of any RFP;

b. recommending to the Ministry the selection of a vendor pursuant to an RFP released pursuant to paragraph 6(a)

c. recommending to the Ministry any amendments to a Agreement; and

d. determining whether any Party is in default for the purposes of section 32 (Ministry remedies for Event of Default by Purchaser).

Where a Steering Committee exercises its authority under section 6(d), 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.
7. **Sub-committees**

Each Steering Committee will establish sub-committees, as needed, which will include representation from Purchasers wishing to participate on such sub-committees. 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 respective proposals and make recommendations to the Steering Committee.

8. **Binding decisions**

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

9. **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.

10. **Meeting requisition**

Any two (2) Steering Committee Members can, with at least ten (10) 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.

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 shall provide overall management, direction of the Procurement and, where necessary, undertake appropriate action to ensure the successful completion of the Procurement. In particular, each Steering Committee will be responsible for:

- approving the appointment of a chair;
- approving the common Transit Bus specifications;
- recommending the terms and conditions of each RFP;
- recommending the issuance of an RFP pursuant to subsection 6(a);
- consideration of recommendations by the evaluation committee related to the evaluation of proposals;
f. recommending the Ministry to enter into a Master Agreement that sets out the terms and conditions of the Procurement with the overall highest-rated Proponent, as well as any amendments to that particular Master Agreement;
g. establishing rules and procedures regarding its own meetings;
h. approval of the relevant implementation schedule for each Procurement;
i. establishing a Communication Plan;
j. cost sharing agreements, if applicable, between all Parties and the Ministry; and
k. 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. establishing and distributing the agenda at least twenty-four (24) hours prior to each meeting;
b. presiding over each meeting; and
c. arranging for the recording, distribution and storing of the minutes of such meetings.

14. **Project Engineer**

   A Project Engineer shall represent 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 respective Purchasers.

   In each case, the Project Engineer will report to and take direction from the respective Steering Committee and shall be responsible for:
   
a. being the central point of contact for the Supplier with the Purchasers;
b. identifying any issues to the Parties and/or Supplier related to the performance of work; and
   c. rejecting work from the Supplier that does not conform to the relevant Master Agreement.

**ARTICLE III: PROCUREMENT APPROACH**

15. **Vehicle specification**

   The Transit Bus specification 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. Proposals will have to include pricing for these optional components.

16. The Request for Proposal (RFP) Process

The Procurement will identify a Supplier as the exclusive Supplier over the term of the relevant Master Agreement (one year with an option to renew for one year). The option to renew for the second year is at the discretion of each of the Purchasers (i.e., some or all Purchasers could exercise the option or not).

17. Supplier

A Supplier procured pursuant to an RFP:

a. will be given an exclusive contract for 2009; therefore, Purchasers that plan to procure a Transit Bus in 2009 and that have not withdrawn in accordance with section 36 (Termination without cause by a Purchaser) must purchase from the successful Supplier;

b. will not be contractually guaranteed the purchase of a particular number of 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, 2009 to facilitate bus delivery in 2009.

18. Master Agreement

On the recommendation of a Steering Committee, and in compliance with Governing laws (section 45) and Ontario Procurement Policies, the Ministry will sign a Master Agreement with the successful Proponent for each completed RFP that will establish the Supplier for each Master Agreement. The Master Agreement will specify the terms and conditions of the Procurement and costing for the Base Bus as well as additional pricing for Options that can be selected by Purchasers. General terms and conditions that apply to all participating municipalities will be contained in each Master Agreement. An option year will be provided that can be exercised by each Purchaser.

19. Municipal Bus Purchase Agreement with Supplier

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 each Purchaser, pricing and other appropriate terms and conditions consistent with 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. Purchasers are required to enter into another Municipal Bus Purchase Agreement with the Supplier if they choose to exercise the option year.
20. **Timing**

The RFP is anticipated to be issued by the Ministry no later than summer 2008 to accommodate delivery of Transit Buses in 2009. The Supplier will be selected for a term ending December 31, 2009 with an option to each individual Purchaser for an additional year ending December 31, 2010.

21. **Issuance of RFP**

The Ministry shall conduct each Procurement in accordance with any applicable laws, Ontario Procurement Policies, and the terms of this Agreement. The Procurement shall include:

a. open advertisement through MERX;

b. Proponent Information Session;

c. posting of Proponent Qs & As through addenda on MERX; and

d. an evaluation committee to review and evaluate all proposals, comprising one representative from the Ministry and representatives of each Purchaser, who choose to participate on the committee.

The Ministry shall pay for the cost of the RFP process.

22. **Fairness commissioner**

The Ministry 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 the Ontario procurement policies.

23. **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 choose to participate in the committee and the Ministry, will conduct the evaluation of proposals in compliance with OPS procurement policies which include the following:

   i. Stage I will consist of a review to ensure the mandatory corporate requirements have been met.

   ii. Stage II will consist of a review to ensure the minimum mandatory technical requirements have been met.

   iii. In stage III, the RFP 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 price evaluated and scored.
v. At the conclusion of stage IV, all scores from stage III and stage IV will be added to provide the overall highest scoring Proponent.

24. Award of a Master Agreement

a. Each Steering Committee shall recommend in writing that the Ministry award a Master Agreement to the overall highest-rated Proponent identified in relation to each respective evaluation process.

b. Each Steering Committee reserves the right not to proceed with an award to any of the Proponents if, in the view of two-thirds or more of Steering Committee members, the proposal is not acceptable. If at least two-thirds of the Members of a Steering Committee agree that no proposal is acceptable, they may agree to recommend to the Ministry that the RFP should be cancelled and each Purchaser shall be free to obtain that particular transit bus on its own.

ARTICLE IV: LIABILITY

25. No Ministry liability

Where the Ministry has entered into a Master Agreement upon the recommendation of a Steering Committee, each Purchaser acknowledges and agrees that the Ministry shall not be liable or responsible to any other Party or the Supplier for any matter arising under this Master Agreement or through the provision of the deliverables, except to the extent to which such matter relates to the negligence or wilful misconduct of the Ministry in the performance of its duties, and without limiting the generality of the foregoing, each Purchaser acknowledges and agrees that:

a. The Ministry will not be liable or responsible for any act or omission of the Purchaser in relation to deliverables under any Master Agreement and/or any Municipal Bus Purchase Agreement.

b. The Ministry has not endorsed, recommended or approved the suitability of the Supplier or its products or services for a Purchaser.

c. Each Purchaser shall be responsible for obtaining its own professional advice, including its own independent legal advice, and for including any additional business and legal terms and conditions to the Municipal Bus Purchase Agreement provided such terms and conditions are consistent with the terms and conditions of the relevant Master Agreement and with the required terms of the Municipal Bus Purchase Agreement, as may be necessary and appropriate in its specific circumstances.

d. Each Purchaser shall be responsible for the administration of its own Municipal Bus Purchase Agreement with the Supplier and shall not direct any Supplier service issues that may arise to the Ministry.
e. The Ministry shall not be liable for any loss or damages suffered by any of the Purchasers, the Ministry, or any other person as a result of any act or inaction of the Ministry including, without limitation, the execution of this Agreement by a person purporting to have authority to act on the Purchaser’s behalf where the Purchaser or a Steering Committee, as applicable, has approved such action or inaction. The previous section shall not relieve the Ministry from liability of its own negligence or wilful misconduct.

ARTICLE V: ROLES AND RESPONSIBILITIES

26. Roles and responsibilities of MTO

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

a. The Ministry shall facilitate all aspects of each RFP issue, evaluation and award and to administer the provisions contained in a Master Agreement on behalf of the Parties.

b. The Ministry 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 Transit Bus Procurement, including any meetings of a Steering Committee and/or sub-committee(s) established by a Steering Committee.

d. The Project Manager shall exercise the Ministry’s vote on each Steering Committee.

e. The Ministry, as Facilitator of the Procurement and administrator of each Master Agreement, will work with each Steering Committee to coordinate the:

   i. development of common Transit Bus specifications;
   ii. development of common RFP terms and conditions for the Transit Bus RFP;
   iii. development of each Master Agreement and Municipal Bus Purchase Agreement; and
   iv. consolidation of multi-year Transit Bus orders on behalf of the Purchasers. Ownership of vehicles will continue to reside with municipalities.

f. The Ministry will be responsible for notifying the Supplier and respective Steering Committee if other municipalities wish to participate in the Procurement. At such time, the Ministry 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.

ARTICLE VI:
PURCHASERS

27. Steps required to become a Purchaser

a. A municipality becomes a Purchaser when:

   i. the person or persons authorized to execute this Agreement on behalf of the municipality has or have duly executed this Agreement or a counterpart to this Agreement; and

   ii. the municipality has provided to the Project Manager the following documents:
       1. an information sheet on the Purchaser (attached as Schedule “E” (Purchaser information sheet); and
       2. a certified copy from a Purchaser’s Clerk, 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.

28. Representations and warranties of Purchaser

a. Each Purchaser covenants, represents and warrants to the Ministry, acting as Facilitator, that until such time as the Purchaser has withdrawn from this Agreement:

   i. 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;

   ii. it will take all necessary steps to ensure that it has all approvals (including budget approvals) which are required in order to carry out the Procurement; and
iii. it has not entered into any agreement or arrangement that would restrict the ability of the Ministry, acting as Facilitator, to perform its obligations under this Agreement, and

iv. unless it has withdrawn from the Governance Agreement per section 36 (Termination without cause by a Purchaser) it will not enter into any new contract or contract extension with any supplier outside of the Supplier for the deliverables specified in the Master Agreement without the prior written approval of the Ministry 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 representations and warranties each time it provides instructions for the Procurement. The Ministry, acting as Facilitator, shall have no obligation to make any further inquiry to confirm the truth or accuracy of any representation or warranty.

29. Addition of Purchasers to this Agreement

The Ministry, acting as Facilitator, may from time to time after the Effective Date of this Agreement, add Eligible Purchasers as Parties to this Agreement following written notice to each Purchaser. Each proposed additional Eligible Purchaser must first:

i. receive confirmation from the Project Engineer that the Supplier has sufficient capacity to accept the order without impacting on the delivery of buses already on order by Steering Committee members;

ii. confirm in writing to the Ministry that it has not issued an RFP or a tender or subsequently cancelled an order for delivery in 2009 or 2010 in order to participate in this Procurement; and

iii. execute a counterpart to this Governance Agreement, completing section 27 (Steps required to Become a Purchaser) in full.

Upon executing a counterpart to this Agreement and delivering it to the other Parties, an Eligible Purchaser shall become a Purchaser once the counterpart to the Governance Agreement has been signed by the Minister and shall enjoy all of the rights and obligations thereunder. The Purchaser can 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 the Ministry as Parties to this Agreement.
ARTICLE VII
MINISTRY’S PARTICIPATION & SUCCESSOR(S)

30. Change in Ministry’s participation

Upon providing all other Parties with ninety (90) days prior written notice, the Ministry may at any time as determined by the Ministry in its sole discretion, assign, in whole or in part, its rights and obligations under this Agreement to any Successor(s) with the financial and technical capability to take on these rights and obligations. When the Successor(s) accept(s) the assignment from the Ministry, this Agreement shall be assigned, in whole or in part, to the Successor(s) who shall succeed to and become vested with any of the rights, powers, responsibilities, obligations and liabilities of the Ministry that have been assigned to it, and the Ministry shall be discharged from any such rights, powers, responsibilities, obligations and liabilities under this Agreement. After the appointment of any Successor(s), this Agreement or, as set out in the assignment, any part of the Agreement shall continue in effect for the benefit of the Successor(s) and the Purchasers in respect of any actions taken or omitted to be taken by the Ministry. In no event shall any such assignment result in any of the costs of the Project Engineer, the RFP process or the fairness commissioner, which the Ministry has agreed to fund under Sections 14, 21 and 22, respectively, being borne by any Purchaser.

ARTICLE VIII:
DEFAULT, ENFORCEMENT AND TERMINATION

31. Event of Default

a. Each of the following events is an Event of Default in respect of either a Purchaser or the Ministry (“Event of Default”), as applicable:

i. if any representation or warranty made by the Purchaser in this Agreement or any documentation delivered to the Ministry 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 to be carried by the Purchaser;
iii. if the Ministry is in default in carrying out any of the material terms, covenants, or obligations of this Agreement to be carried by the Ministry;
iv. if the Ministry, 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. Ministry remedies for Event of Default by Purchaser
a. Notwithstanding any other rights which the Ministry, may have under this Agreement, if an Event of Default by a Purchaser has occurred, the Ministry shall have the following remedies provided that, in the case of an Event of Default which is curable, the Ministry 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) Business Days or such longer period of time as the Ministry may consent in writing:

i. the Ministry, may, at its option, terminate the defaulting Purchaser’s right to participate in the Procurement by giving the defaulting Purchaser at least thirty (30) Business Days prior written notice of the termination date. As of the termination date:
   − the defaulting Purchaser shall no longer participate in the Procurement;
   − the defaulting Purchaser shall no longer be a Purchaser for the purpose of this Agreement;
   − the defaulting Purchaser shall, forthwith, pay to the Ministry, any outstanding payment obligations owed to the Ministry in relation to any cost-sharing arrangements as a result of the Procurement, if applicable;
   − subject to Article X (Dispute Resolution), the Ministry 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 Ministry

If an Event of Default by the Ministry has occurred, as determined by a 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 the Ministry and the Ministry has failed to correct the Event of Default within thirty (30) Business 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 the Ministry at least thirty (30) Business 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 the Ministry

The Ministry 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) days following delivery of the notice by the
Ministry. Any outstanding payment obligations of the Purchasers remaining as of the date of termination without cause shall remain in effect.

35. Effect of Termination without cause by the Ministry

Where the Ministry has provided notice pursuant to section 34 (Termination without cause by the Ministry), the remaining Parties may request that the Ministry 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 the Ministry).

36. Termination without cause by a Purchaser

A Purchaser may terminate its participation under this Agreement without cause up to seven (7) days following the Steering Committee recommendations the Ministry enter into the Master Agreement pursuant to section 24, by delivering written notice to that effect to the other Parties which notice shall be effective immediately. Where a Purchaser gives such notice, it shall no longer have any rights with respect to participation on the Steering Committee. 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. Failure to comply with this provision may result in the Minister, at his or her discretion, withholding any applicable Provincial vehicle funding as may be applicable.

38. Obligations survive

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

Where the Ministry terminates this Agreement pursuant to section 34 (Termination without cause by the Ministry), it shall remain responsible for all costs to which it is obligated under this Agreement up to the point of termination or early termination.

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) to the addresses or facsimile numbers set out in Schedule “E” (Purchaser information sheet) and, in the case of the Ministry to:

Attn.: Project Manager
Transit Procurement Office
Ministry of Transportation
2nd Floor, Bldg. B
1201 Wilson Avenue
Downsview, ON
M3M 1J8

Fax: (416) 235 – 4180

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.

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. 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. 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. Subject to section 59 (Remedies cumulative), this Agreement shall constitute the entire Agreement and understanding between the Parties relating to the matters dealt with and supersedes all prior understandings, discussions, negotiations, commitments, representations, warranties and agreements, written or oral, express or implied, existing between the Parties at the 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.

c. In the event of a conflict, the part that precedes the signatures of the Parties will take precedence over any of the Schedules and Attachments.

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, contractors and employees are not, nor are they deemed to be, officers, agents, employees or officials of the Ministry.

50. **No fiduciary duties**

   The Ministry 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. 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 the Ministry has not specifically authorized such use unless the Confidential Information relates solely to that Purchaser and has been provided by that Purchaser.

ARTICLE XIII:
CONFIDENTIAL INFORMATION

54. Confidential Information

During and following the term of this Agreement, each Party in accordance with the terms and conditions set out in Schedule “D” (Confidentiality Provisions), shall ensure that its advisors, agents, directors, commissioners, officers, partners, Personnel, representatives and contractors keep all Confidential Information confidential in accordance with the terms and conditions set out in the Confidentiality Agreement, as set out in the instructional notes to the agreement.

ARTICLE XIV:
Term

55. Term

Subject to any extension or termination of 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 early termination

a. Notwithstanding section 55, each Purchaser may terminate its participation in this Agreement, including its rights and obligations, by providing to the
Ministry notice in writing of its intention to do so no later than 45 days prior to the last day of the twelfth (12th) month from the Effective Date. Such notice may be provided by that Party’s Member.

b. Despite a termination under this clause 56 (a), each Party agrees that certain rights and obligations (whether contingent or matured, absolute or not), as set out in section 60 (Survival), of each Party existing immediately before the termination shall survive such termination.

c. Notwithstanding that any Purchaser has exercised its rights to early termination in accordance with clause 56(a), this Agreement remains in force and binding on the Ministry and any Purchaser who has not so exercised its rights.

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 the other 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; and

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 the Ministry if the Ministry 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 45 days, a Party shall have the right to terminate this Agreement upon 7 days written notice to the other Parties.

59. Remedies cumulative

All remedies, rights, undertakings, obligations and agreements of the Parties by law or under this Agreement or otherwise 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 by law or under this Agreement or otherwise 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 28 (Representations and warranties of Purchaser), excluding subsection 28.a.iv, shall survive the expiration or termination of this Agreement.

61. Amendment

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

62. No assignment

Except as otherwise provided in this Agreement, including section 30 (Change in Ministry’s participation), the Ministry, acting as Facilitator, 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 the Ministry, which consent shall not be unreasonably withheld.
63. **Further action**

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

64. **Enurement**

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

65. **Time of the essence**

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

66. **Counterparts**

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

Date: _____________________

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO, represented by the Minister of Transportation for the Province of Ontario

Per: _______________________

Name: _____________________
Minister

Date: _____________________

THE CORPORATION OF THE CITY OF ____________

Per: _______________________

Name: _____________________
Mayor

Per: _______________________

Name: _____________________
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 (“Schedules” has the meaning given to it in this Schedule A (Definitions)) and Attachments (“Attachments” has the meaning given to it in this Schedule A (Definitions)) 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 (Schedule A (Definitions)) and has all the rights, responsibilities and obligations of the Member;


“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 Purchaser Options, but includes the Purchaser’s choice of driver’s seat;

“Broader Public Sector” means public bodies in the Province of Ontario, other than agencies, boards, commissions and Crown corporations, receiving funding from the Crown or a municipality, or both and as determined by the Ministry, acting reasonably, at any time and from time to time;

“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;

“Communication Plan” means the communication plan for any major joint communication event developed by the Ministry 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
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Issued, by the Ministry relating to the Project, excluding procurement process and solicitation documents that are generally available to the public; (ii) any proprietary information of the Ministry 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 the Ministry as being of a confidential nature;

"Confidentiality Agreement" means the confidentiality agreement attached as Schedule "G";

"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 the Ministry, acting as Facilitator;

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

"Facilitator" means the Ministry, acting as a facilitator for the Purchasers, or any Successor ("Successor" has the meaning given to it in this Schedule A (Definitions)) facilitator(s) appointed under section 30 (Change in Ministry’s participation) to facilitate the most efficient and effective means of procuring municipal Transit Buses;

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

"French Language Services Act" means the French Language Services Act, R.S.O. 1990, c. F.32;

"Master Agreement" means the contract to be entered into between the Ministry, acting as Facilitator, and the Supplier to deliver the Transit Vehicles 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);

"Minister" means the Minister of Transportation
“Ministry” means Her Majesty the Queen in Right of the Province of Ontario, as represented by the Minister of Transportation for the Province of Ontario;

“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


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

“Ontario Procurement Policies” means the Ontario government policies and directives in effect from time to time respecting the procurement of equipment, services and supplies applicable to Ontario Government ministries and Crown agencies;

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

“Party” means any one of the Ministry, as the Facilitator, 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 the Transit Buses as they will be described in the RFP and any other related supplies and services in accordance with this Agreement;

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

“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 transit vehicles are accepted by respective Purchasers;

“Project Manager” means the MTO representative responsible for the overall facilitation and administration of the Procurement initiative under section 26 (Roles and Responsibilities of MTO);
“Project Office” means the office designated by the Ministry as such from time to time by notice in writing to the other Parties;

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

“Purchaser” means a 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 27 (Steps required to become a Purchaser) but, for greater certainty, does not refer to the Ministry, acting as Facilitator;

“Request for Proposals” or “RFP” means the request for proposals to be issued by the Ministry, acting as Facilitator, for the Procurement;

“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);

“Successor” means:

   a) any ministry, agency, board, commission or Crown corporation of the government of Ontario; or
   b) any entity of the Broader Public Sector;

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

“Term” means the term as described in section 55 (Term);

“Transit Bus” means:

   a. a nine-metre, fully accessible, low-floor, diesel-fuelled bus used for conventional urban transit service; or
   b. a twelve-metre, fully accessible, low-floor, diesel-fuelled bus used for conventional urban transit service; or
   c. a twelve-metre, fully accessible hybrid diesel-electric low-floor bus used for conventional urban transit service.
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 Party 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) Business Days of the delivery of a Dispute Notice and shall, unless all Parties agree otherwise, be concluded within thirty (30) Business 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) Business 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 the Ministry, 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) Business 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 the Ministry and Purchasers to communicate with the public about the joint Transit Bus Procurement initiative and to enhance opportunities for appropriate, continuous and consistent recognition of the co-operative efforts of the Parties.

   c. Each Purchaser and the Ministry 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 fourteen (14) days prior to media releases, media conferences, public announcements and other events pertaining to the Joint Transit Procurement Initiative, 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 Party pursuant to this Agreement or otherwise at law or in equity, that Purchaser shall be liable for any and all liability, losses, costs, damages, expenses (including all reasonable legal, expert and consultant fees), causes of action, and proceeding arising from any non-compliance with this Schedule (Confidentiality Provisions) by the Party’s advisors, agents, directors, commissioners, officers, Personnel, representatives or contractors. Each Party shall execute or require each of its advisors, agents, directors, commissioners, officers, Personnel and contractors involved in any way in fulfilling the Party’s obligations under this Agreement to execute a Confidentiality Agreement, 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)
__________________________________________________ of a

(title of agent)

“Governance Agreement for the Joint Procurement of Transit Buses” (the “Agreement”) for the purpose of providing a Transit Bus(es) as specified in the 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 clause 56(a) of the Agreement.

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

Name of legal entity

on _______________________, 2008

_______________________________________
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 Members and submitted to the Project Manager.

For sufficient and valuable consideration received from Her Majesty the Queen in right of Ontario as represented by the Minister of Transportation (the “Ministry”) and 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 the Ministry 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 the Ministry.

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 the Ministry to another person or entity, the provisions herein relating to the Ministry shall enure to the benefit of such person or entity. The provisions herein ensure 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
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 unless otherwise defined in this Confidentiality Agreement.

Signed: _____________________________________________

Name: _____________________________________________

Title: _____________________________________________

DATED: ____________________________________________