

# **STUDENT TRANSPORTATION COMPETITIVE PROCUREMENT REVIEW REPORT**

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## MANDATE

The Student Transportation Competitive Procurement Review Team (“Review Team”) consisting of The Hon. Colin L. Campbell (Chair), Paul Emanuelli and Leo Gotlieb was engaged (or contracted) by the Ministry of Education for the Province of Ontario in the fall of 2014, with the following mandate:

A review of current competitive procurement practices and student transportation Requests for Proposals (RFPs) that have been issued since December 31, 2011 to identify best business practices and opportunities for improvement in competitive procurement of student transportation in Ontario; and to explore options other than RFPs for competitive procurement of student transportation that are in compliance with the Broader Public Sector Procurement Directive (BPSPD) for the consideration of the school board sector in Ontario.

We were provided with two volumes of background material from Ministry officials, which included, among other things, the legislative framework, the Agreement on Internal Trade (AIT), the Broader Public Sector Procurement Directive (BPSPD), and various documents relating to contracting practices and the status of competitive procurement in student transportation in Ontario.

We were also provided with copies of the Report of the Student Transportation Competitive Procurement Task Force to the Ontario Minister of Education chaired by The Hon. Coulter Osborne, dated January 25, 2012.

We have reviewed much of the material that was before the Osborne Task Force, together with the RFPs from the prescribed review period referred to in the mandate statement above. Given the history of student busing cited in the Osborne Task Force Report, this review will not attempt a complete history of student transportation in Ontario as it is well known to the stakeholders.

As noted below, consultation with various stakeholders has drawn our attention to previously issued RFPs and some of the problems associated therewith.

Suffice to say, all participants recognize that competitive procurement has brought about a significant change to contracting for student transportation in Ontario.

What previously was often collegial non-competitive negotiation received legitimate criticism for being not only less than transparent but also not demonstrative of value of money.

Competitive procurement is, however, by its very nature an adversarial process, which can, unless carefully designed, result in the elimination of competitors from the market instead of promoting competition.

Lack of competitive procurement, in addition to being less than transparent, can result in the exclusion of potential competitors. Collusion can arise when there is little or no competition. Without competitive procurement, public accountability with respect to the value for the money being spent cannot necessarily be assured. Lowest price does not always ensure a competitive market for the future.

## **PROCESS**

By e-mail on January 6, 2015, the Review Team sought input, comments, recommendations and suggestions from all industry stakeholders.

Given the history of this matter, the Review Team decided that a public hearing process would likely not advance our review and would likely inhibit individual discussion.

We have, over the last five months, had numerous interchanges with all the stakeholders who wished the opportunity to communicate. This included individual operators, operator groups, OASBO transportation managers, OASBO supply chain managers, and school board business officials.

We both received written submissions and held teleconference meetings with many of these individuals and groups who contacted us, either individually or together as time permitted. This contact included one or two elected trustees. Hopefully all who wished to communicate with us have had the opportunity to do so.

What became quickly apparent was that some individuals, and indeed groups of stakeholders, were reluctant to come forward either because they did not think our terms of reference sufficient or because they were concerned to share their views in what could be considered a public forum.

In order to obtain the widest and most complete consultation and suggestions possible, we assured those who contacted us that their comments would not be specifically identifiable and they themselves would not be referred to in our Report unless they wished to be so mentioned.

Following receipt of written submissions and extensive teleconference meetings between February and the end of April 2015, we met with representatives of major stakeholders. These included the Independent School Bus Operators Association (ISBOA), the Ontario School Bus Association (OSBA), the Council of Senior Business Officials (COSBO), the Ontario Association of School Business Officials (OASBO) and Unifor. In addition, we reviewed with procurement managers and transportation consortia managers, both before and after, the development of the principles that form the basis of this report. By research and telephone contact, we have been made aware of transportation practices in other jurisdictions in Canada and the U.S.

As provided for in our terms of reference, our draft recommendations have been reviewed with these groups as well as the Treasury Board Secretariat, supported by representatives from the Ministry of Government and Consumer Services.

We conclude this portion of the report with the observation that there currently exists a significant degree of mistrust and misunderstanding between members of the school bus industry and school boards/consortia. We can only hope that this report and these recommendations may go some distance to dispel those concerns.

## **FINDINGS AND OBSERVATIONS**

### **The Problem with Generalizations**

Ontario is a geographically large and diverse province. These attributes, among others, impact on many government services at the present time but are particularly important with respect to school transportation.

In the north of the province, including both east and west, the distances are large and the populations often small and diminishing, as well as scattered. Poor driving weather, particularly in winter, is a very important factor in the delivery of school bus services.

The middle section of the province has its own unique features and populations. From the windy shores of Lake Huron through to Barrie and on to the Ottawa Valley, there are a variety of rural, suburban and urban landscapes, each with a distinct population and needs.

The Greater Toronto Area (GTA) has the urban crowding that brings its own specific challenges to school busing.

The north and center of the Province have been served by a large number of small and medium-sized operators, of which many have been family-run businesses for generations.

The GTA and other major urban areas tend to be served by large, often multinational companies with large fleets, some into the many hundreds of buses.

The comment we heard from many sources, which is one of the conclusions of our review, will not be news to anyone familiar with student transportation, namely ONE SIZE DOES NOT FIT ALL.

In the days before the consortia were developed and after school busing was largely outsourced, those in charge of transportation (or local boards) dealt with a variety of operators whom they knew and could count on. Contracts were negotiated often between the operators as a group and a board, based on a consensus reached locally.

As many of these contracts were not established through open competition, they did not comply with the requirements introduced by the AIT and subsequently the BPSPD.

The challenge for the industry, for which we hope the following recommendations may assist, is to assure a competitive framework in a viable marketplace compliant with all statutory requirements and directions.

As the next section observes in more detail, the competitive procurement regime presently envisaged if the whole of Ontario were to be under a single RFP process might not sufficiently take into account the dynamics of local markets in a way that would assure viable, sustainable competition.

Price is a hallmark of any RFP competitive process, and certainly this is consistent with the BPSPD. However, price should not be the exclusive consideration in an industry as complex and with such diverse goals as the school bus industry in Ontario.

## **Unintended Consequences**

The strongest voice in opposition to what they regard as the disruption created by the RFP model comes from the small operators and their association.

We have received detailed descriptions from a very large number of these operators, whose families have been in the school bus business often for two or more generations, of the problems they have faced since introduction of RFPs.

Many of those responding complained that the RFP process has put them at a disadvantage in terms of both assets at risk and lack of resources, such that many of the family-owned bus operations have ceased, either because they have been forced to

sell due to loss of routes or because they did not have the assets to compete at a price that would be above their cost.

We think it safe to say and as the Osborne Task Force concluded, school busing is to some extent an “artificial market” in that there is only one buyer – the board or consortia – with many sellers of service. The intention of the competitive solicitation process should be to enhance, not inhibit, competition, as is the risk as the numbers of operators decreases.

Unlike the supply of other goods or services to a consortium for school transportation, many sellers (the small operators) have only one market in which to sell. They are unable to bid or shift their operations to another region if unsuccessful in their home region. Most were unprepared for the loss of a substantial portion or the totality of their business.

### ***Small Operators***

There are many voices among what may be regarded as small operators. There is no easy definition of what might be regarded as a small operator. In some regions this will be operators with fewer than 10 buses, and in other regions those with fewer than 50 buses.

Competitive procurement changes the way in which these operators conduct business, in many cases in ways for which they were not or still are not prepared.

Of those who were used to dealing with school board officials directly with very simple negotiated contracts, many were unprepared to complete what they regarded as daunting and overwhelming RFP processes (upward of 100 pages), even with the limited assistance and training available to them.

Several of those associated with consortia recognized that in a number of cases, lack of ability to complete a complex RFP – rather than negotiating price – led to loss of business for many small operations. Each of the members of the Review Team concluded that the clarity and transparency of many of the RFPs could be significantly improved.

Many operators assert that the RFP process does not adequately take into account, if at all, their local service to the community above and beyond the transportation of students to and from school.

A review of the many operators’ submissions highlights the concern of distinguishing between those legitimate elements of local service (such as providing back-up for other

operators) that may be part of the competitive environment, and those that, while admirable from the viewpoint of community support, do not form part of a competitive contracting process.

Time and again small operators and even their association urged that this Review Team recommend a policy exemption for school busing, urging that such an exemption could find authorization in both the AIT and in the BPSPD.

Early on in our deliberations, we concluded that a policy exemption for the entire school bus sector would not achieve the purposes of the BPSPD and would promote neither competition nor transparency in this sector that costs Ontario taxpayers \$1 billion per year.

We recognize that in many of the more remote and rural areas of the province, consistency and availability of service are necessary in circumstances quite different than in the urbanized southern portions of the province. Open competition may not be realistic in some rural areas.

There are small operators other than those located in rural areas, and in our view consortia will have to be mindful of the effects on overall competition should the small operators be eliminated from their markets as a result of an inflexible RFP process. The idea of competitive procurement should be to enhance, not deter, competition.

Competitive procurement of school bus transportation services is not only complex given its inherent need for flexibility, it is quite different from the purchase of other assets in a competitive process.

When a supplier bids for the sale of a particular piece of equipment to a government entity, in most instances that supplier will find other markets in which to participate if it is not successful in its tender.

Many school bus operators are only equipped to participate in their local area. If they are unsuccessful in a tender process, their assets may well be stranded.

This is why many small operators have not been able to continue and have been forced to sell their assets or businesses at distressed values.

Our recommendations are intended to enhance competition, but within a BPSPD-compliant regime.

## ***Medium-Sized Operators***

Several of the companies that would fit into the category of medium-sized operators, which defies exact definition but seems to vary from 30 to 300-plus buses, have their own unique problems, as well as some in common with either small or large operators.

Many of those with whom we communicated started out as what might be called small operators and expanded by acquisition of the business and/or assets of other small operators, some of them even at distressed prices.

The major problem identified by those classified as medium-sized operators is financing of bus purchases. In order to respond to RFPs in larger centers, such operators have to be in a position to serve routes that may comprise an uncertain number of buses. They have to make arrangements to finance an uncertain number of buses in advance of an RFP award with an uncertainty of future for use of those buses over their useful lifetime.

With RFPs that require an average fleet age of for example seven years and the potential to gain or lose 30 or 40 routes at one time, the cost of financing often places these operations in an uncompetitive position compared to multinational companies with large and more secure sources of financing and the ability to shift resources across regions if not borders.

Financing has become even more difficult for members of this group with the decline in value of the Canadian dollar and the lack of bus manufacturers in Canada, particularly for large numbers of units.

The second part of financing that is problematic for the medium-sized operators or for those seeking to enlarge their fleet is the cost of purchase or lease of real estate in large urban centers sufficient to safely and routinely maintain buses.

The cost of stranded assets should large numbers of routes be lost at one time may not be recoverable for medium-sized operators, whereas larger operations can ship stranded assets to other markets in which they operate.

## ***Large Operators***

Even those among the largest of operators, several with multinational operations of thousands of buses carrying millions of students in multiple jurisdictions, have the same concerns about the contracting process in Ontario as do their smaller competitors.

In discussion with members of this group and in our own research, we have been unable to find another jurisdiction in North America like Ontario where all school busing is purchased entirely in response to an RFP process.

Many jurisdictions have a combination of district-owned and employee-operated contracted negotiations with some RFP processes. None that we are aware of have entirely RFP-based service acquisition. Local funding and input contributes to success in many jurisdictions. For example, the cost of enhancements to service, such as reduction in walking distance, are added to local tax bills in some areas, rather than being the subject of district or state funding.

In the largest group of operators, the most vocal concern revolves around what they regard as an undue focus on fixed price over the lifetime of a multiyear contract, with little ability to adjust to increased costs over the expected contract lifetime. As a result, some large operators have decided not to compete in some markets.

We note that in this group, as in others, there is significant driver turnover particularly but not restricted to the urban and suburban areas. Some of the information received suggests that this figure exceeds 20% in each of the last 3 years in some areas.

We recognize there are a number of factors contributing to this issue that stand out. The first is the uncertainty associated with the winner-takes-all approach, where a large number of routes may change hands due to RFP award. This is particularly the case when all routes in a region are the subjects of tender at the same time.

The second is the downward pressures on wages (the cost of buses and fuel being relatively more predictable and fixed as between operators), where price rather than service is the key to contract award. We have received numerous examples of driver wages being just above minimum wage, often less than half of that paid to public transit drivers. Some jurisdictions mandate a wage rate that is higher than minimum wage to allow school busing to be more competitive with other forms of transportation.

This topic of this section is unintended consequences. As reported by the Osborne Task Force, the move from negotiated contracting, which in many cases entrenched incumbents in contracts that were believed by many on the procurement side to be highly lucrative and rewarding, to contracts where long-standing operators with significant investment in bus and repair facilities lost their entire business, has continued to create in some quarters suspicion, distrust and emotional animosity towards the process.

The public goal is a process of competitive procurement in an open and objective way that achieves value for money. This requires a rebuilding of the process and of trust.

We are satisfied from our review that all those we have heard from, whether operators or consortia, want to see students transported safely in a timely manner and at a cost that is fair both to the taxpaying public and to the stability of suppliers of that service in a

competitive market. The question is how to achieve this goal while making services, as well as price, a recognized component.

A rethinking is required to reduce the existing tensions. There are elements of both service and contract terms that are common across the province. In order to have an understandable and accepted competitive process, the purchasers of student busing and the suppliers of that service must take into account the service needs particular to the regions served by various consortia in the contracting process.

A flexible process should be in place with considerable variation for local situations, as one size will not fit all circumstances of a complex service supply arrangement with ever-changing elements. Local oversight within a framework of competitive contracting can achieve this.

### **Procurement vs. Transportation**

The RFP process in the acquisition of school transportation has brought together two different disciplines that until recently did not have a history of working closely together.

Those involved in government procurement familiar with the RFP process are used to a regime whereby the Contract “A” legal framework of competitive bidding, with its unconditional, uniform and standardized terms, leads to the Contract “B” of performance at arm’s-length relations in a formalized arm’s-length process.

Those with a background and history in transportation management are used to juggling many variables, often on a daily basis, such as school closures, amalgamations, bus breakdowns and frequent changes over the life of a contract. These are resolved by working in a co-operative collegial fashion with many of the operators. Where student transportation services are provided in an adversarial atmosphere, school bus transportation management is more difficult.

A recurring observation from discussion with those involved in both the procurement and transportation sides of consortia is that, when both procurement and management functions are performed by those who are knowledgeable in their individual fields but also work in a complementary fashion with their supplier counterpart, the result tends to be harmonious operation that includes the relationship with the operators and satisfactory service to the students and the public.

Much of the difficulty in the application of procurement principles to student transportation is that the services to the paying public of busing students safely and efficiently to meet the requirements of students, teachers and boards are not

only complex and difficult to manage, but give rise to a fluid situation that of necessity has to consider a variety of factors on an ongoing basis, including the lifetime of buses and frequently changing needs in relation to routes and buses.

## **Price vs. Cost**

The most vocal and consistent criticisms from operators of all sizes – small, medium and even the largest – deal with what they regard as the undue focus on price at the expense of both service and competition. Some even in transportation management acknowledge the negative effect on competition when an inordinate emphasis is placed on price during bid evaluations.

We recognize, as do many of those to whom we have spoken, that it is not the function of the consortia or boards to perpetuate the existence of individual operators in the market. On the other hand, we are concerned that the current RFP process does risk reducing the number of operators in many areas and over time will result in the elimination of at least a significant portion of the competitors in any region.

Competitive procurement that focuses on local service and is aware of the cost of that service in pricing can encourage rather than reduce competition. It is not an easy task, but those responsible for the purchase of transportation service should be made aware of the cost of the various elements of that service that are important to their region.

Some consortia representatives that the Review Team has spoken to do not accept that safety of students or service would be at all at risk in an RFP process, but others do recognize the potential for significant reduction in competition if operators continue to be eliminated from the market and the pool of available drivers continues to reduce.

Owners and operators have but little control over the two most significant fixed- cost components of school transportation: buses and maintenance. In particular:

- While large as opposed to small operators may have some control over the cost of financing of buses and have the advantage of bulk buying, even this group is adversely affected with the fairly sudden drop in value of 20% for the Canadian dollar (the vast majority of buses being manufactured in the U.S.).
- Maintenance costs may be adversely affected by the RFP process if operators are required to operate at considerable distance from their garage facilities.

Driver wages, due to price pressure, become a variable cost. In Ontario at present, there is no minimum wage for bus drivers (other jurisdictions do establish minimums)

and wages vary from region to region, not only to reflect local conditions but also as a result of bidding pressures in RFPs.

Many operators and indeed some transportation managers complain that there is a risk to the service components of contracts suffering where overall price is an unduly significant part of the bidding process. We hope that a transparent and respected contracting process can assist in dealing with what will remain for the future a significant problem, namely funding.

### **Improving Consortia-Operator Relationships in a Competitive Environment**

The rules of engagement for public sector procurement tend by their nature to introduce a degree of tension to any competition, and the situation has been further strained by legal challenges that have been brought against various competitions in parts of the province. In the next section, we offer a number of suggestions aimed at defusing the tension and mistrust that have arisen in the course of competitions. Most are technical, dealing with aspects such as design, content, rules and protocols, the aim being to enhance openness, equitability and transparency. However, three in particular are aimed directly at the buyer- supplier relationship:

- The establishment of an Industry Committee, comprised of members representing consortia managers, school board procurement managers, school business officials and bus operators. This committee would serve as a vehicle for discussing issues relevant to all stakeholders on an ongoing basis, including systemic issues, technical matters and contract terms and conditions. It would not play a role in specific disputes or intervene in procurements underway. Please see item 27 below for further details.
- The implementation of a standing Independent Procurement Panel to quickly address procurement issues that arise during and as a result of specific competitions. This expert panel would be a resource to consortia, available to help them fulfil their obligation under mandatory requirement 25 of the BPSPD to maintain a bid dispute resolution mechanism. The idea would be to, as much as possible, “head off” by timely intervention potential disputes before they result in court actions that would invariably be disruptive to the competition. Please see item 7 below for further details.
- The establishment of an expedited, efficient, low-cost arbitration process where required. As noted below, most of the contracts have some terms that are potentially contentious and could lead to arbitration. A panel of available

arbitrators with industry knowledge would be a valuable resource to consortia and operators, helping both to avoid escalation of disagreements into court actions. Please see item 29 below for further details.

The section that follows contains our recommendations of opportunities for improvement and what we consider sound practices that will enhance the competitive environment for all parties.

## **RECOMMENDATIONS FOR THE CONSIDERATION OF THE SCHOOL BOARD SECTOR IN ONTARIO**

In our deliberations, the Review Team considered a broad range of potential alternative strategic approaches to the procurement of student transportation services across Ontario. Those alternatives ranged, at one end of the spectrum, from the complete outsourcing of the services to a single large service provider responsible for large sections of the province encompassing geographic zones currently administered by multiple purchasing consortia, to alternatives at the other end of the spectrum that would entail a partial or complete repatriation of the services so that major components of the currently contracted-out services – ranging from the procurement of buses, to the creation of bulk transportation fuel group purchasing arrangements, to the retention of staff, to the administration of operational logistics – would be administered at the provincial level (by, for example, institutions such as the Ontario Education Collaborative Marketplace (OECM), Infrastructure Ontario or a new special-purpose agency).

For the purposes of our recommendations, we have adopted the principle of minimal intrusion and have identified areas for immediate and short-term improvement that result in the least possible change to the administration of existing procurement practices. However, we also acknowledge these broader alternatives and suggest that they be more fully explored in future years.

The recommendations that follow are thus intended to achieve the following procurement policy objectives:

- To achieve compliance with the AIT and BPSPD, rather than recommending policy relief that would exclude the procurement of school bus transportation services from the obligations of open public procurement

- To maintain local operational flexibility in the delivery of student transportation services in order to recognize the need to respond to changing student demographics
- To maintain a sustainable, competitive base of local suppliers that enables future open public procurement across the province
- To identify best business practices and opportunities for improvement in competitive procurement of student transportation in Ontario that would be minimally intrusive to existing procurement practices

The recommendations have been grouped under four broad strategies:

- I. Opportunities to sustain and enhance a competitive marketplace
- II. Opportunities to increase economy, efficiency and flexibility
- III. Opportunities to increase the effectiveness and defensibility of evaluation and selection
- IV. Opportunities to improve industry relationships

## **I. Opportunities to Sustain and Enhance a Competitive Marketplace**

From a consortia and board perspective, the prospects for quality service and value for money are increased when operators are viable and there is choice in the marketplace. To remain in business, operators need sufficient opportunities to compete in response to competitive bidding solicitation documents and a reasonable expectation of return on their investment when they are awarded contracts. The following recommendations are intended to support these objectives.

### **A) Enhancing Competition**

The following steps can be taken to enable more operators to compete and make them more competitive when they do.

#### 1. Permit responses in which two or more proponents participate together

All of the RFPs examined included a restriction against joint ventures or partnerships. This restriction may reflect a concern to remain within the bounds established by the *Competition Act*. However, a response in which two or more proponents openly join together – structured in a way to make accountability and liability unambiguous and clear – is different from collusion or conspiracy, where two or more operators agree in

secret and in advance of a competition about whether and how they will respond or not respond as independent entities, with the intention of creating a more favourable outcome for one or more of them.

Permitting collaboration could provide small operators the opportunity to compete where they cannot currently do so and would represent a major step in making competitions more open. The RFP for Student Transportation Services issued May 11, 2015, by the Calgary Board of Education is an example of a solicitation document that permits operator combinations for bidding purposes. Please refer to **Appendix 1** for other student transportation procurement practices of note from this RFP.

If there is a concern that joint ventures or partnerships might not establish the necessary degree of financial responsibility and indemnity, then collaboration should be permitted through subcontracting. This is a well-established practice in government procurement, where the necessary degree of accountability is ensured by making the appropriate terms and conditions in the main contract also applicable to subcontractors.

## 2. Develop strategies for route bundling that reflect opportunities offered by local markets

Route bundling – requiring groups of routes to be bid together – can be beneficial to consortia because operators can take advantage of economies of scale in their pricing, in effect offering volume discounts. This can be an important consideration, particularly in areas of high population density where there are hundreds of routes.

On the other hand, bundling can limit competition – because not all operators may have the required capacity to respond and because bundling replaces many competitions with a single one. As a result of the latter, the opportunity to achieve best value for money can actually be lost, as the following example shows.

Route	Operator 1	Operator 2	Operator 3	Lowest per route
Route 1	\$10	\$9	\$11	\$9
Route 2	\$10	\$11	\$10	\$10
Route 3	\$10	\$13	\$10	\$10
Bundle Cost (3 Routes)	\$30	\$33	\$31	N/A

Best price (based on lowest cost bid for each route): \$29

In the above example, each operator adopted a different strategy to arrive at a bundled price for the three routes – Operator 1 used its lowest route price (3 x \$10), Operator 2 used its median route price (3 x \$11) and Operator 3 used its average route price (3 x \$10.33). The result is that the best bundled cost (\$30) is higher than the cost would have been if each route had been individually competed (\$29).

For the above reasons, it is recommended that route bundling be deployed strategically, taking local market conditions into consideration. Information gathering to support the strategy could take the form of operator consultations, or a Request for Information (RFI) in which tentative route bundles are published.

### 3. Eliminate average fleet age requirements and consider setting standards for maximum allowable vehicle age

All of the competitions have set maximum permissible ages for each vehicle type. This being the case, the additional requirement that fleets of each vehicle type have an average fleet age and the practice of favouring fleets with lower ages are unnecessarily restrictive of competition. Operators with fleets where each vehicle is deemed acceptable for student transportation purposes should have equal opportunities to compete and should not be forced to become less competitive by having to make purchases of newer buses that are not required to meet service requirements. This would be the result of requiring the provision of equipment that is newer than necessary.

In the interests of clarity and simplicity, consideration should also be given to standardizing maximum allowable vehicle age by vehicle category and perhaps by region of the province.

Allowing respondents to be as competitive as possible within acceptable vehicle age limits will also contribute to better value for money for consortia.

4. Under the auspices of the technical subcommittee of the Industry Committee (item 27 below), establish standardized requirements in terms of service, performance and capacity

The benefit of defining requirements in terms of service, performance and capacity is that it makes competitions more open and ensures greater consistency with the AIT, which prohibits both local preference and unnecessarily restrictive requirements. Consider the example of a proponent who is required to have, or be willing to relocate to, a maintenance facility in their region. The requirement can instead be expressed in terms of performance. What is the underlying requirement that a local facility would meet? Time to provide a spare bus in the event of a breakdown? Time within which a vehicle must be repaired? Assurance that vehicles are properly warmed up on very cold mornings? These can be made contract obligations and proponents can be required to provide evidence of their ability meet them.

For similar reasons, proponents should not be evaluated on the way they have chosen to organize. The following is commonly included in the RFPs:

Through the inclusion of an organizational chart, describe your administrative team including the roles and responsibilities and location of each member of the team. It is acknowledged that one individual may accomplish multiple roles.

For example, please address the typical roles and personnel required to run a business that provides services for the transportation of students which may encompass the following functions:

- Dispatcher,
- Operations Manager,
- Contract Manager,
- Financial Manager,
- Driver Trainer,
- Safety Officer

For each team member identified above, the Proponent should describe how it will ensure that its key resources, which would be responsible for the Services on a day to day basis, understand and are informed of the Agreement.

The above text implies that there may be service requirements related to the individual roles, but the requirements are not stated here. More typically, these requirements are found instead in the standard contract, which is included, often at the RFP document. In the case of the contract associated with the example cited above, there are various requirements related to vehicle communications and dispatch. For evaluation purposes, then, proponents should therefore be requested to provide a) evidence of experience meeting these requirements, and b) evidence that they have the capacity to do so should they be awarded the present contract. Proponents should also be given some specific guidance as to what they would have to provide to score well under this particular criterion. The general requirement to describe their organization does not address any of the foregoing.

Once the technical subcommittee has drafted service, capacity and performance standards, it can consult with the broader stakeholder group, for example through an RFI, to solicit feedback.

#### 5. Do not include operator cost structure as part of the evaluation

One of the reviewed RFPs assigned ratings to different cost categories so that proponents could be penalized if their cost in a particular category fell outside of a predetermined range. The risk to open competition here arises because, in order to be competitive, operators attempt to distinguish themselves in different ways. For example, one might pay its drivers more and thus have higher retention rates, which could lead to better service; another might invest in capital costs to make its operating costs and thus its kilometre rate more attractive.

Proponents should be able to compete to provide the service in the best way they can. The requirement is the service, not how they choose to fund that service.

Creating incentives or disincentives relating to the latter will inevitably favour some operators at the expense of others without being rationally connected to the required service standard.

6. Stagger competitions, e.g., a portion of consortia each year, not all routes for each consortium at once

If all the consortia were to put all their routes up for bidding in one year, it would be challenging even for the largest operators to respond, and all operators would face the risk of losing a significant number of routes within a short period of time. Since this situation is clearly not conducive to the maintenance of a stable market, we recommend that competitions be staggered. Consortia should agree among themselves on the cycle by which they will hold their competitions, and even within a consortium, we advise that all routes not be tendered in one cycle.

7. Implement a standing Independent Procurement Panel that could be a resource available to consortia to quickly address procurement issues that arise during and as a result of competitions, at least for the next procurement cycle

If operators perceive that there is an impartial forum where they can be heard when it is not too late to submit a response, they should be more inclined to compete, which will be beneficial for the market as a whole. It is also possible that some of the existing legal actions could have been avoided if such a mechanism were in place.

The object here is to deal with those issues of dispute that can be resolved before formal response to an RFP. Disputes arising after a contract is signed following an RFP process are properly dealt with through the arbitration provisions of such contracts (see item 29 below).

Bid protest mechanisms for pre-contract disputes are common. For example, a bid protest process was recently introduced under the New West Partnership Trade Agreement (NWPTA) between the provinces of British Columbia, Alberta and Saskatchewan in order to provide a streamlined, efficient means of resolving disputes relating to specific procurements. The model envisages two stages: the first being consultation following a complaint made in writing, and the second being arbitration if a complaint is not resolved.

Under the NWPTA model, complaints must be made within 10 days after the date on which the supplier knew or ought to have known of the issue. This requirement not only facilitates timely resolution, but also provides a defence against after-the-fact claims from proponents who had the opportunity to address concerns about the procurement process before damages were incurred, but chose not to.

A pre-contract award bid dispute process has also been in effect at the federal level in Canada since the late 1980s under the Canadian International Trade Tribunal and its predecessor, the Procurement Review Board.

Both the Western Canada and federal examples run in coordination with and are compatible with Ontario's AIT obligations and would not be incompatible with the requirements of the BPSPD. Similar in-process mechanisms are also present at the federal and state levels throughout the United States and in the United Kingdom.

To facilitate expeditious resolution of issues arising before completion of an RFP process and reduce the need for later recourse to the courts, we urge that an Independent Procurement Panel be established as a resource that consortia can use to address and resolve pre-award complaints in a timely and efficient manner.

#### 8. Permit the sale of businesses and transfer of contracts

The nature of competition is that operators will gain and lose routes at each round. Larger operators typically have the capacity to "smooth" out the variations, but small operators could easily be put out of business by a loss or consecutive losses. If, facing this prospect, they wish to capitalize on their existing contracts and good will by selling their business or transferring some contractual obligations, they should be permitted to do so. Allowing the sale of a business or transfer of routes is a prudent policy that can serve as a pressure valve to the risks of stranded assets and we therefore recommend that blanket prohibitions against these sales be revisited to allow for the sale of a small bus operator's business and for route transfers for all operators so long as appropriate assurances are provided that business continuity will be maintained and that service levels will not be adversely impacted.

#### ***B) Ensuring that Competitions and Contracts reflect the Nature of the Service Relationship***

While the contracting out of student transportation services by consortia is similar to an outsourcing arrangement, certain characteristics of this arrangement for student transportation services are greater in scale and scope. In outsourcing, an organization may contract out the operation of its facilities and transfer employees to the outsourcers, but still retain ownership of the capital assets employed for the operation. In Ontario, in addition to supplying drivers, operators of student transportation also provide the fleets, which together with their infrastructure represent virtually the entire capital cost of the investment required to deliver the service. Student transportation is

not an on-demand service, nor one where entry and exit costs are negligible. The contract recommendations that follow reflect this reality.

9. Align contract lengths to more closely reflect the allowable ages for the asset categories

The maximum allowable age for most of the vehicles provided by consortia is in the 10 to 12 year range. If there are competitions every 5 years, then there is a good chance that on average, a significant number of vehicles that still have a useful life will be stranded after every competition, particularly as there does not appear to be a secondary market for such vehicles, or at least one where the remaining asset life would be properly compensated. Contract lengths need not be set at the maximum age for a vehicle category but we do recommend that durations be formulated to allow for extensions that permit operators a reasonable opportunity to amortize their vehicle investments, subject to performance requirements. An example of a contract that could meet this objective would be a “5+2+2”, that is, an initial five year term with the option for two 2-year renewals provided there is no change in the needs of the consortia.

10. Negotiate and compensate contract changes that result in reduced utilization of assets, under standardized relevant terms that have been established by the Industry Committee

Some contracts we reviewed had provisions that can materially affect the deployment of assets and their compensation. For example, an asset may be stranded when a route is terminated, or the rate may be reduced if a lower- capacity vehicle is needed (even though the operator may not have such a vehicle and may continue to serve the route with the original, higher-capacity vehicle). In the absence of compensatory mechanisms, such contracts may be difficult to enforce. Regardless, they are not consistent with standard practice in long-term contracts where significant investments are involved. Whether in construction, information technology, facilities management or any type of outsourcing or contracting-out arrangement, changes that materially affect assets and compensation must be negotiated and compensated.

Our review process included a review of the legal terms and conditions contained in a sample of 16 RFPs issued for student transportation services across Ontario within the prescribed review period. These included RFPs that were issued in recent months. Without exception, all legal agreements included terms and conditions that, according to current legal standards based on the recent legal developments noted under item 29 below, contained terms that appeared to be either commercially unreasonable, overly

prescriptive or contractually unenforceable. Many had terms and conditions falling into more than one of those categories.

Specific examples of these problematic provisions included:

- Unreasonable and unilateral termination and suspension rights (e.g. termination for convenience, suspension of work for force majeure with inadequate compensation)
- Unilateral rights to cancel, reduce or re-organize routes and adjust rates without operator agreement on resulting price changes or compensation
- Commercially unreasonable overhead obligations (e.g. prescribed average fleet ages that do not address the maintenance conditions of specific buses, obligations to maintain prescribed levels of fleet and spare drivers, restrictions on subcontracting)

Please refer to **Appendix 2** for specific examples falling under these three categories drawn from the RFPs we reviewed.<sup>1</sup>

We therefore recommend that contracts for student transportation include protocols for contract changes, including a mechanism to negotiate compensation for changes that materially affect asset utilization, with associated cost implications for operators. In support of this recommendation, we have further recommended a streamlined dispute resolution regime below. We are aware that most contracts have clauses addressing both mediation and arbitration, and some even require “amicable discussion” before resorting to those two steps. This tiering of escalation does not provide assurance of timely resolution, which could be of the essence where lost compensation is at stake. A proper change mechanism combined with streamlined dispute resolution should go a long way towards restoring the balance that is absent from existing contracts.

To reduce administrative duplication, increase ease of use for school boards and operators, establish consistent and balanced legal agreement terms and conditions and fair, open and transparent competition, we also recommend that the purchasing

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<sup>1</sup> Of the 16 RFPs reviewed, the following 13 included contract provisions and were therefore considered in this evaluation: Student Transportation of Eastern Ontario (STEO) (12-01); Service de transport Francobus – York Region, the Greater Toronto Area and Bruce-Grey County (RFP 12-01); Huron Perth Student Transportation Services (RFP 13-01); Niagara Student Transportation Services (NSTS 2012-01) and (NSTS 2012-06); Simcoe County Student Transportation Consortium (RFP 12-02); Student Transportation of Peel Region (RFP P93 - 2012); Student Transportation Services (Brant, Haldimand, Norfolk) (RFP P112BHNC); Tri-Board Student Transportation Services (RFP 2013-01); Southwestern Ontario Student Transportation Services (RFP 12-001); Consortium de transport scolaire de l'Est (CTSE 11-01); Windsor-Essex Student Transportation Service (2013-01P); Ottawa Student Transportation Authority (2014-5). The examples referred to in Appendix 2 have been anonymized.

consortia rebalance their legal agreement terms on an individual procurement basis and, over time, through a coordinated process that establishes province-wide common standards based on input from both school boards and operators.

#### 11. Fully compensate costs incurred to make assets available

We received considerable industry feedback about the “deadhead” issue, which refers to situations where vehicles and drivers are made available to a consortium but are not fully compensated for the cost of deployment. One example refers to the driving distances required to service routes. We have observed from the RFPs that some consortia compensate for the distance from the end point back to the pickup (the “ministry” or “loop kilometre” standard); it has been reported that others do not, and that in some cases, kilometres between route segments are not covered. Examination of contracts also reveals different compensation practices when service interruptions occur caused by board circumstances (such as labour disruptions) or inclement weather. For example, with respect to the latter, some consortia pay the daily base rate, which we understand to be sufficient to cover operator standby costs, while others cover only a portion of that rate.

We consider the practices of consortia that include the loop kilometre rate and full base rate during interruptions to be exemplary and recommend that this be the standard for all consortia. There may be other examples related to asset availability and we believe that the same principle should be applied; namely, that the cost of making an asset available to a consortia or board be fully compensated.

#### 12. Provide cost of living adjustments based on recognized inflation benchmarks

It is fairly standard for long term contracting-out arrangements to incorporate an annual cost of living adjustment, typically based on or incorporating recognized inflation indexes. The Student Transportation Services RFP from Calgary that was cited above is an example – each year, rates are adjusted according to the Calgary consumer price index. Consortia contracts should incorporate a similar measure, using indexes local to their region. If a commitment to annual inflation adjustments cannot be made because of funding uncertainties, then the level of service that is being acquired should probably be reconsidered. Ultimately, operators need to be compensated at prevailing market rates, and contracts require the flexibility to make the requisite adjustments to reflect this principle.

### 13. Phase in market caps where the immediate impact on operators will be significant

Operators with large fleets have made significant investment commitments to serve their boards and consortia. At the same time, small operators face losing their business if they lose a particular bidding process. Medium-sized businesses also face these same tensions in the current system. Capping (through which the maximum allocation of routes is calibrated at the school board level to take local market conditions into account) is a logical strategy to maintain choice and avoid monopoly, but its operator viability is also an important consideration. For this reason, we recommend that where the impact of capping would be severe, it be spread out over more than one procurement cycle so that large portions of an operator's fleet are not stranded at once.

The phasing in of market caps should also take into account the impact of joint ventures or partnerships, sale of business, and transfers of contracts. In the long term, consideration should be given to implementing this approach under a framework agreement structure that allows for fluid adjustments to overall route allocations and pricing adjustments to take into account many of the long term cost and performance pressures identified in this report.

While the implementation of capping should be performed based on local market conditions, the ultimate policy goal should be to maintain local operational flexibility to set local maximum route allocations for small, medium and large suppliers that maintain a sustainable competitive supplier base based on those local market conditions.

### **C) Addressing Driver Shortages and Retention**

#### 14. Implement operator incentives for driver retention

Many if not most operators face driver shortages and struggle with driver retention. This raises their costs (repeated training, hiring bonuses) and also translates to service problems for consortia – typically in the form of absences and delays. Low wages (in the \$12 per hour range – not far above the Ontario minimum wage) are reported to be the main cause. However, drivers also relate that they are often not compensated for work or time that, in theory, is covered by consortia base rates.

The reality is that as driver wages are a significant portion of operator costs, and as they are one cost element that operators have some flexibility to vary, there will always be pressure to keep them low in an environment where price is part of the competition. For consortia that consider shortages and retention to be a serious problem, the two most

obvious procurement measures to address them are incentives to operators and a prescribed minimum wage. In the spirit of items 4 and 5, we are not advocating the latter, though this approach has been used in Alberta (see Appendix 1). However, an incentive-based approach could prove beneficial.

The logical incentive to operators would be to include driver retention as a selection criterion, an ongoing contract obligation, or both. Driver retention is already a significant scoring component for most competitions but rate data is only part of the information collected about retention and all the information is only rated on a generic “satisfaction” scale. A much more meaningful and effective approach would be to allocate points directly according to a retention percentage. However, ensuring that proponents collect and report retention data in the same way could be a challenge. If driver retention proves too unreliable, proxy measures such as absences or delays could be employed, which are likely closely related and have the additional benefit of objectivity.

With respect to the contracts themselves, we are not aware of contracts that include driver retention as an ongoing contract obligation. If retention is to be used as a way to incent higher wages, it should be measured as part of ongoing contract obligations as well as being included as a selection criterion.

## **D) Alternatives to Benchmarking**

### 15. Publish information about route costs

A benchmark service price, or a set of such regional benchmarks, if established by an independent third party, could be useful as a reference point for competitions and understanding the true cost of student transportation.

However, any benchmark is only an average and costs vary by both operator and route. A benchmark that was prescribed as the allowable cost in a procurement request document would, by definition, undercompensate some operators and overcompensate others.

Rather than a calculated benchmark, an approach that could assist both consortia and operators in arriving at rates that are both competitive and realistic would be for each consortium to publish, in advance of each competition, information reflecting average route costs from the previous competition for each vehicle class. Disclosure of award prices is common practice in the public sector. Municipalities routinely announce winning pricings in construction tenders (often in public openings). The debriefing instructions in section 5.7.2 of the December 2014 Ontario Public Service (“OPS”)

Procurement Directive (which applies to Ontario government ministries and certain agencies) require ministries to “provide the name, address, *and total bid price*, where applicable, of the successful vendor as well as the award notice information” (emphasis added).

If consortia are unwilling to disclose awarded rates, then benchmarking might still, despite the limitations noted above, be the best way to provide some perspective on student transportation costs. In the interests of transparency, we recommend that some means be implemented to convey and update this type of information.

## **II. Opportunities to Increase Economy, Efficiency and Flexibility**

We believe that there are opportunities to achieve greater economy, efficiency and flexibility in the student transportation procurement regime through the application of process improvement principles. The basic concept is to avoid or eliminate activities that do not add value in the eyes of stakeholders (which in this case would be primarily consortia and operators, though as the funding source, the Ministry is also an important party). Non-value-added activities typically include those which add redundancy, introduce delay and lead to errors and rework. Examples often found in procurement include:

- Delays in turnaround on questions, which in turn delay proponents in their responses
- Collection of information that is not evaluated
- Requests for the same information in more than one place in the request document
- Addenda issued to correct errors
- Addenda issued to answer questions because the original request was not clear, or was missing information
- Disqualification for trivial or avoidable reasons
- Errors in evaluation and selection, leading to legal action

The following sections highlight some opportunities we have identified for the implementation of process improvement principles in student transportation procurement.

16. Establish operator qualifications that are common to consortia at the provincial level

The RFPs typically employ a standard set of qualification requirements that originated with the RFP pilot projects launched in 2009. Under this model, operators are repeatedly being evaluated for criteria that they should only need to satisfy once; for example, their capabilities and experience in driver education and training, their ability to retain drivers, their fleet management capabilities.

This repeated effort (on the part of both operators and consortia) would be avoided if operators could be evaluated for criteria common to all consortia at a qualifying procurement round.

Further streamlining could be achieved if the need to evaluate certain qualifications could be replaced by external certifications. For example, it seems plausible that there is a core of driver training that is common. If consortia and operators, through a technical subcommittee as recommended under Part IV, below, were to develop a common driver training curriculum (including a certification regime for trainers), then operators would simply have to provide evidence that each of their operators had taken and passed the required training. Operators might still have to demonstrate limited training capabilities, for example in equipment unique to their operation, but the general training capability would not need to be evaluated.

To reduce administrative duplication, increase ease of use for school boards and operators, and establish consistent province-wide standards, in the long term we recommend that verification of operator licensing and registration requirements be administered through a central automated system coordinated through a technical subcommittee, rather than on a procurement-by-procurement basis.

17. Standardize requirements, service levels and the format for route descriptions and rate adjustments across consortia as much as possible

Variety is desirable in many contexts but in process improvement, standardization and reduction in variation is a key to greater efficiency. Route definitions are perhaps the most prominent example – it seems that each consortium has created its route definitions using its own style and level of detail. Bidding would be greatly simplified, certainly for operators, if a standard route definition format could be established. There is also a divergence in contract terminology and terms. While consortia may have legitimate differences in certain contract terms, it would seem logical to standardize on

common concepts, for example events that lead to cancellations due to inclement weather.

Under item 27 (Industry Committee), a technical subcommittee has been suggested as the forum to address greater consistency in route definition and rate adjustments. It could also investigate the feasibility of charging route costs according to a “metre rate”, that is, a combination of distance and time that is comparable to the fares computed by taxis. It is common that operators are awarded routes that subsequently change. While this may be unavoidable, it presents a transparency problem in public sector procurement – if a proponent is successful, it should be awarded what it bid on. If a time-distance rate mechanism could be established, it might be possible to award blocks of kilometres rather than routes, thus providing greater flexibility for consortia in route assignments and more transparency to operators. The feasibility of this is yet to be determined but it is a natural topic for a technical group.

#### 18. Limit information sessions requiring a physical presence

In a tender for certain construction projects, it is reasonable if not essential to have bidders inspect the site before they submit their bids in order to understand material performance conditions. However, it is difficult to envision many occasions where physical presence would be required for a student transportation proponent meeting held at a school board/consortia office. One exceptional example might be where a consortium wanted to demonstrate how a new piece of equipment that was to become a mandatory requirement should be installed and used. This might also be one of the very few occasions where mandatory attendance is justifiable. Otherwise, we recommend against holding mandatory pre-bid meetings. Meetings to convey information and explanation can be held by webinar, thus avoiding the need for proponent travel. As webinars can be recorded, they can be made instantly available to anyone who could not log on to the original webcasts.

### **III. Opportunities to Increase the Effectiveness and Defensibility of Evaluation and Selection**

The Review Team recognizes the concern raised by many that some of the RFP documents are too long and too vague, with essay-type answers that even those with a procurement background have difficulty completing. Some RFPs look more like surveys than procurement documents.

Future procurements could be made more satisfactory to both consortia and proponents through greater transparency in the request documents, greater clarity in way

requirements and evaluation criteria are stated, and more objectivity and precision in scoring. The following recommendations are offered in support of these objectives.

19. Limit information that is collected to that which will be evaluated according to disclosed criteria

In the RFPs we reviewed, it was common practice to request information that will not be evaluated but is intended to augment the evaluation in some way; for example, “background” in the form of an organization’s history, mission, vision and values, or “innovative” suggestions or “alternative” solutions that might present a degree of “value added”. While usually well intentioned, such requests potentially lack transparency, as there are typically no clear requirements or evaluation criteria associated with them.

We found instances in the RFPs of phrases such as “meet or exceed”, “suggest other innovations”, “not be limited to”, “value added ideas” and “value added innovation”. We have no evidence that these have resulted in actual transparency issues – in fact, such phrases have almost become standard RFP “speak” and are often copied in from other sources rather than consciously inserted. However, we do recommend that future request documents be carefully reviewed to eliminate instances of such wording and that more precision be employed in identifying the use of collected evaluation information.

20. Maintain clear distinctions between mandatory requirements, rated criteria, contract obligations, evidence and evaluations

Solicitation documents should clearly convey what proponents must do to compete and how they will be evaluated. A key element of ensuring clarity is carefully describing the following elements and keeping them as distinct as possible from one another:

- Mandatory requirements
- Contract obligations
- Rated qualifications and criteria
- Evidence
- Evaluation

Please see **Appendix 3** for further detail on distinguishing these elements in competitive solicitation documents.

21. Maintain clear distinctions between different categories of mandatory requirements

Mandatory requirements typically fall into four categories:

- Procedural requirements
- Items to be provided at the submission deadline
- Preconditions to award
- Conditions or minimum qualifications

These categories should form the basis for the organization of all mandatory requirements, as discussed further in **Appendix 4**.

22. Disclose contract obligations clearly and transparently, and in the appropriate place

Contract obligations typically occur as either operational obligations, compliance statements, or general terms and conditions. This distinction should be clearly understood and reflected in competitive solicitation documents. In particular, the practice of including implied operational obligations in evaluation criteria, as illustrated in **Appendix 5**, should be curtailed.

23. Articulate clear evaluation criteria directly linked to ability to perform the required service

As with contract obligations, there are instances in the RFPs reviewed where rated qualifications and criteria were implied but not clearly articulated. We recommend that in any future solicitation documents, clear evaluation criteria be outlined in accordance with the process and standards described in **Appendix 6**.

24. Seek quantitative and objective evidence whenever possible

As much as possible, evidence requested should facilitate evaluation that is objective. Much of the information requested in the RFPs for evaluation purposes consisted of static descriptions (e.g. of an organization), statements of intent, strategies and plans. While there is some place for plans (for example, in a proposed training schedule of operators for the coming school term), quantifiable results enhance the transparency, defensibility and repeatability of evaluations.

Evidence that would support more quantitative evaluation includes:

- Measures of performance, especially ones where there are identifiable benchmarks or comparators (e.g., vehicle-to-spare-parts ratio)
- Results of audits or external assessments
- Scores provided by references
- Assessments from demonstrations and interviews
- Test results
- Assessments of proponent facilities by or on behalf of the consortium
- Actual accomplishment or results, such as examples of how plans were achieved

Greater objectivity leads to greater precision and confidence in scoring and thus better defensibility, which is already a significant benefit. The employment of a variety of objective criteria also enables better differentiation among proponents. We frequently heard from consortia about the frustration that resulted because there was little to distinguish proponents in the scoring. This is a natural consequence of the limited (5 point), subjective evaluation scale that was employed as the scoring standard.

We therefore recommend that in conjunction with the recommendation for criteria in the preceding section, evaluation evidence requested in future solicitation documents be of the varieties listed above; that is, as quantitative and as objective as possible.

#### 25. Where qualitative evidence is necessary, use a checklist method of evaluation

The benefit of quantitative evidence is that it can be scaled to create a numerical score. To the extent that objectivity is an issue, the question lies with the measure being used for evidence, not the assignment of a score – hence the recommendation at the end of the preceding section.

With qualitative evidence – and most of the evidence requested in the RFPs we examined was in this category – the challenge of arriving at a numerical score is greater. In view of the above, we recommend that for future competitive solicitation documents where it is necessary to evaluate qualitative information, a checklist method and incremental scoring approach be applied, as described in **Appendix 7**.

#### 26. Develop standardized accessible and effective operator training

The above recommendations are intended to streamline and clarify competitive solicitation documents to the point that a formal program of classroom training should

not be necessary for operators to be able to respond to such documents. However, we do recommend that orientation and supporting material be developed under the guidance of a technical subcommittee. Different formats should be employed to make the content accessible to a range of audiences, and should include the following:

- A narrative-form guide, with detail where appropriate, explaining what is required to respond to each item where information has been requested
- A Q&A guide, highlighting the most common question and areas where respondents have the greatest areas of difficulty
- A webinar training course consisting of a slide presentation and voice-over, ideally broken up into several modules to cover different topics so that respondents can quickly focus on areas of interest

All content should be downloadable, for printing and playback.

#### **IV. Opportunities to Improve Industry Relationships**

##### 27. Establish an Industry Committee

As noted above, we recommend the establishment of a committee comprised of members representing consortia managers, school board procurement managers, school business officials, bus operator associations and a selection of unaffiliated operators. The overall purpose of the committee would be to help make competition for student transportation in Ontario work more satisfactorily for all its stakeholders, from students, parents and consortia to operators and their drivers. The committee would serve as a source of advice, recommendations and support, but it would not be a governance body, nor would it get involved in individual matters, whether relating to competitions, individual consortia or specific operators. Our hope is that even without binding authority, over time and as a result of its credibility and value, its recommendations would be generally accepted or at least given serious consideration.

We recommend that the committee have both a broad mandate and specific objectives. The broad mandate should be to address issues of a strategic or systemic nature, applying across regions and groups of consortia or operators. Specific objectives should be ones that the committee aims to achieve within a certain period of time. Implementation of recommendations from this report (appropriate for this joint body) should be the first among those objectives.

To be credible, the Industry Committee should include roughly equal representation from the buyer and supplier sides. To function effectively, it should be chaired by an

entirely neutral individual. Manageability could be a challenge because of the potentially large representation. We recommend that rather than try to function as a whole, the committee be structured as a steering group and a number of subcommittees set up to address areas of interest. The steering group would be relatively small (in the 10+ range) and would meet as needed to address broader issues. The subcommittees would operate under the direction and leadership of the steering group, and members of those subcommittees would not generally be steering group members. Project teams or task forces could be set up from time to time as required. Potential subcommittees should include:

- A **technical subcommittee** focused on ways to streamline competitions and improve the collateral material associated with them (e.g., clearer organization of request documents as per item 20 above, standard definitions of performance requirements, standard evaluation criteria, use of evidence rather than opinion in evaluation, standard route descriptors). This committee could also oversee the implementation of the above recommendation on operator training (item 26), and consider which operator qualifications could be established at a province-wide level, so that they do not have to be evaluated each time an individual competition is held.
- A **contract subcommittee** to recommend greater standardization and consistency in contracts, both in wording and, where appropriate, in content (e.g., definition of a “snow day”).
- An **industry economics subcommittee** to consider potential opportunities of a strategic nature; for example, whether it would be practical to establish group purchasing and financing arrangements for fuel or equipment, or whether a secondary market for used vehicles among operators in Ontario would be feasible to enable some mitigation when assets are no longer needed due to service changes.

The first assignment for the Industry Committee would be to document and communicate the roles and responsibilities of stakeholders, including the committee itself and its subcommittees, to ensure regular and ongoing monitoring of industry practices.

The second assignment for the Industry Committee as a whole would be to set out the objectives that would enable the committee itself to monitor and measure the progress of competitive procurement for student transportation across the province on an

ongoing basis. These objectives should include a regular communication and report-out mechanism to the various committee stakeholders.

If the Industry Committee and its subcommittees can operate as envisioned, it should go a long way to defusing current procurement issues and avoiding future ones.

#### 28. Clarify the function of fairness commissioners

There appears to be considerable misunderstanding by some industry participants regarding the role of “fairness commissioners”. By virtue of the use of the term “fairness”, there is a tendency on the part of some to conclude that a fairness commissioner certifies the fairness of the process, taking into account the interests of operators as well as consortia. This is not the case.

As presently constituted, as agents for consortia, “fairness commissioners” merely certify after-the-fact that the RFP process itself was complied with, not whether the outcome may be regarded as “fair” to all. A board or consortia should be at liberty to hire a consultant “fairness commissioner” for its own internal purposes, but any ensuing report should not be put forward as evidence that the results can be regarded as “fair” to all parties involved.

In some jurisdictions, “fairness commissioners” are called “process monitors”, a term which is less likely to create confusion. A “fairness auditor” or some other comparative is then charged with reassuring potential and actual participants in any given procurement process that the entire process is “fair”.<sup>2</sup>

We recognize that the appointment of a fairness commissioner or process monitor can give rise to controversy. However, there may be instances in which the services of a monitor may serve to reduce local tensions. Where such monitors continue to be used, the terms of their engagement should set out their role, the scope of review and the understanding – clearly communicated among all stakeholders – that the report is focused on compliance with the rules, and not on “fairness” in any broader context.

#### 29. Establish an arbitration panel as a resource that consortia could employ to resolve arbitrations in a timely and efficient manner

Most of the contracts we have reviewed contain provisions for the arbitration of disputes. Most of the clauses are in a form standard to many types of contracts.

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<sup>2</sup> Christopher J. O’Connor & Amy J. Davison, “Fairness Personified: The Growing Role of Fairness Monitors in Contract Procurement (Borden Ladner Gervais, Dec. 2005).

As noted in the recommendations above, we found that contracts for school busing, particularly those resulting from an RFP process, contain complex, often contentious terms that require at least some service changes (mostly unforeseeable) on an ongoing basis. The complaint is that these may be made unilaterally by the relevant board or consortium.

Since the introduction of the RFP process to school busing in Ontario, there have been decisions from the Supreme Court of Canada that will inform on an ongoing basis the interpretation of contracts. These decisions support the need for a balance between the requirements of the consortia and the reasonable ability of operators to supply services at a reasonable cost.

Of the recent decisions, the first, *Tercon*,<sup>3</sup> involved a dispute over an RFP bidding process and confirmed that purchasing institutions may remain liable for unfair purchasing decisions notwithstanding the disclaimers they draft into their procurement documents.<sup>4</sup> The second and more recent, *Bhasin*,<sup>5</sup> establishes that “there is an organizing principle of good faith that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.”<sup>6</sup>

What we heard during our review process gave us concern that many of the RFP contracts issued since 2011 might not meet the tests in those decisions. Our detailed look at the RFPs has led us to seriously question the enforceability of some resulting contracts.

It will be some time before the principles in the above cases play out in practice, but it is not difficult to predict that contracts that give an entirely one-sided opportunity to a consortium to dictate the level of performance or risk allocation would become contentious.

It is against this background that there is an opportunity for improvement in the dispute resolution process were there to be the establishment of an industry- specific arbitration panel for disputes.

The existing mechanism in the RFP contracts can provide an insurmountable barrier in terms of timing and cost to the effective and timely resolution of disputes, particularly for small operators.

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<sup>3</sup> *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4.

<sup>4</sup> The split (5-4) decision of the Supreme Court of Canada in *Tercon* has sparked a debate that continues between the public policy of fair, open and transparent bidding for government contracts and the freedom to contract with respect to exclusion clauses in an RFP process.

<sup>5</sup> *Bhasin v. Hrynew*, 2014 SCC 71.

<sup>6</sup> *Ibid.* at para. 63

Model effective dispute resolution can be found in the construction industry, where more uniform type contracts and a variety of dispute resolution processes provide timely, cost-efficient and effective results.

We propose the establishment of a standing panel of qualified, respected, neutral and experienced arbitrators who would be willing to serve in an expedited manner depending on the nature of the dispute. This panel would provide a resource to consortia that they could employ to resolve arbitration in a timely and efficient manner, much as the Independent Procurement Panel in item 7 would support resolution of disputes in the pre-award phase.

If the parties could not agree to an arbitrator chosen from the panel, one would be selected by an official from the Ministry of Education.

There are a variety of rule regimes that could be adopted to provide the framework for an expedited process should our recommendation be accepted. For simple disputes involving little or no evidence beyond the contract terms, an in-writing process might be appropriate.

For others, it may be necessary to adapt existing models that provide for accelerated timetabling, exchange of documents and early hearing, to both lower cost and provide timely resolution.

The conduct of arbitration envisaged in current contracts, in addition to adding time and cost, usually exacerbates adversarial mentality. An expedited, low-cost process we hope would reduce tensions.

Parties may wish to and should be encouraged to mediate instead of arbitrating disputes. Hopefully over time this may take place. Given the present environment, we have only recommended arbitration in order to provide a forum that can inform the industry.

The decisions in most arbitrations are confidential. Since student transportation involves public expense by government entities, we recommend that at least the decisions from arbitrations be made publically available to provide a base to assist the entire industry.

The purpose of this recommendation to lower the cost and ensure timeliness of dispute resolution.

## CONCLUSION

The BPSPD, in conjunction with trade agreements and in particular the AIT, requires that services over certain monetary thresholds procured by clients in the Ontario Broader Public Sector be openly competed, except where it can be clearly demonstrated that the absence of potential respondents makes competition unviable. Open competition requires that any interested respondent be considered, and that the evaluation and selection of respondents be based on some combination of qualification and/or price. The name given to the competition request – whether RFP, RFQ, bid, tender or some other designation is immaterial. The essence of the request is that it must meet the fundamental requirements of open, fair and transparent competition.

In view of the requirements established by the BPSPD and trade agreements, we see no general principle by which student transportation in Ontario can reasonably be exempted from open competition as described above. In some circumstances, it may be possible to demonstrate that there are no competitors for some routes, and thus that sole-sourcing and direct negotiation is justified.

The BPSPD assigns the authority for such justification to the body governing the competition. Outside of these two alternatives – open competition and sole- source awards justified by absence of competition – we do not see any obvious approaches for awarding student transportation services that are trade agreement– and BPSPD-compliant.

In stating the above, we recognize that the history of student transportation in Ontario has led to the situation where suppliers vary greatly in size, reach, and capacity. As a result, competition will inevitably have different impacts on some operators than it will on others. In particular, some operators may not be able to sustain the loss of routes. Smaller operators appear to be the most vulnerable, but frequently repeated competitions could put even larger operators at risk.

Measures such as awarding of longer contracts, allowing operators to sell their businesses when they do have routes, and allowing operators to join together through joint ventures or subcontracting arrangements have been suggested in explicit recognition of this reality. Other suggestions have been aimed at making it easier for all operators to compete, regardless of size. However, in a competitive environment, the continued viability of all interested suppliers cannot be assured.

We do hope that this report has fully captured our review of current competitive procurement practices and RFPs issued since 2011, and that we have identified those

areas where there is agreement on best practices as well as offering solutions for improvement in BPSPD-compliant procurement.

We wish to thank all those who provided us with their submissions and comments. We recognize that the transition to fully AIT- and BPSPD-compliant procurement from the previous model has not been easy for many of those with whom we have been in contact.

We do recognize that all concerned feel strongly the need for a competitive industry that safely provides transportation for students in a manner that is in the public interest.

## APPENDIX 1 – Highlights from Calgary Board of Education RFP

The following chart lists the provisions of the RFP for Student Transportation Services Issued by the Calgary Board of Education (May 11, 2015) that were considered exemplary by the Review Team.

Item	Section	Page
Consortium (joint venture) proposals permitted	2.16	7
Best and Final Offer	2.22	8
May negotiate	3.2(b)	9
Experience included as criterion	5.0(b) (iv)	12
Initial 10 year term plus one or two 5-year extensions	Schedule A	15
Annual Calgary CPI adjustments	10.2	25
Monthly fuel adjustments	10.3	25
Minimum driver rate (placeholder for it but no figure provided)	Exhibit 1	38
100% of daily rate covered for board disruptions and weather days		41

## **APPENDIX 2 – Examples of Problematic RFP Provisions**

### **Category 1**

Unreasonable and unilateral termination and suspension rights.

#### ***Example 2.1***

This Agreement may be terminated by the Consortium without cause at any time upon giving one hundred and twenty (120) days written notice of termination to the Operator.

#### ***Example 2.2***

...the Operator hereby acknowledges that in the event that the Consortium notifies the Operator that transportation services will not be required until further notice owing to circumstances beyond the control of the Consortium, including without limiting the generality of the foregoing inclement weather, the Consortium shall be liable to pay to the Operator an amount equal to the Inclement Weather Rate of the Contract for a period being the lesser of the period during which transportation services are not required by the Consortium or fifteen (15) days next following the delivery of such notice.

Such payment shall constitute the Consortium's only obligation in such event and following the expiration of the period referred to herein the Operator shall not be entitled to any further payment from the Consortium until such time as it receives notice that the transportation services are required by the Consortium and the Operator hereby releases the Consortium for any amounts, claims, expenses, costs, damages, causes of action whether direct or indirect, whatsoever in excess of the amount required to be paid to the Operator by the Consortium under the terms of this sub Article.

## **Category 2**

Unilateral rights to cancel, reduce or re-organize routes and adjust rates without operator agreement on resulting price changes or compensation.

### ***Example 2.3***

...the Operator acknowledges and agrees that, over the Term of this Agreement, the Consortium will be engaged in a process which may result in the reduction of the number of buses and/or runs or Routes required by the Consortium to transport pupils to and from the schools. The Operator further acknowledges and agrees that the Consortium may, acting reasonably in the Consortium's sole and unfettered discretion, reorganize, reduce, alter or eliminate any or all of the runs or Routes awarded to the Operator under this Agreement.

### ***Example 2.4***

A decrease in the number of vehicles used by the Operator to provide such transportation services (whether such decrease has resulted from a consolidation of routes by the Consortium or from the application or use by the Operator of the same vehicle to service more than one route or from any other cause) shall entitle the Consortium at its sole option, to decrease proportionately the amount payable to the Operator under this section.

### ***Example 2.5***

The Fixed Base Rate will vary depending on the size of the vehicle and/or the required features of the vehicle. In the event that the Consortium modified a vehicle size on a Route, and the Operator does not have the appropriate size vehicle in the fleet, the Consortium will be billed at the lower rate of the vehicle requested.

### Category 3:

Commercially unreasonable overhead obligations (e.g. prescribed average fleet ages that do not address the maintenance conditions of specific buses, obligations to maintain prescribed levels of fleet and driver redundancy, restrictions on subcontracting).

#### **Example 2.6**

Vehicle Age will be based on the date contained in the vehicle warranty card, which represents the date on which warranty coverage applies for each vehicle.

Vehicles used in the provision of Transportation Services shall conform to the following maximum and average age specifications as at August 1st in each year:

<b>Seats</b>	<b>Maximum Age</b>	<b>Average age</b>
72 Seat Vehicles	Maximum Age 12 Years	Average age of 7 Year in the Fleet
54 Seat Vehicles	Maximum Age 12 Years	Average age of 7 Year in the Fleet
Wheelchair equipped vehicles	Maximum Age 12 Years	Average age of 7 Year in the Fleet
30 Seat Vehicles	Maximum Age 12 Years	Average age of 7 Year in the Fleet
20 Seat Vehicles	Maximum Age 12 Years	Average age of 7 Year in the Fleet
Minivans and Cars	Maximum Age 9 Years	NA

Where there are fewer than 10 buses in a fleet, the average age shall not apply.

#### **Example 2.7**

The Operator shall not assign this Agreement or subcontract any of the services to be provided hereunder without the prior consent in writing of the Consortium, which consent may be arbitrarily withheld at the Consortium's sole discretion.

**Example 2.8**

The Operator will provide for a number of vehicles that is equal, at minimum, to ten percent (10%) (rounded up to a whole number of vehicles) of the number of school bus vehicles that is required to service the Routes awarded in this Agreement to assist in the case of breakdowns or delays. All spare vehicles must comply with all vehicle requirements, unless otherwise expressly set out herein.

## APPENDIX 3 – Distinguishing Elements of Solicitation Documents

A key element of ensuring clarity in competitive solicitation documents is carefully describing the following elements and keeping them as distinct as possible from one another:

**Mandatory Requirements:** What proponents must do or be to enter into and remain in the competition, up to and including point of award.

**Contract Obligations:** What proponents who win the competition must do, based on the contract they sign. Unlike mandatory requirements, contract obligations apply only after award.

**Rated Qualifications and Criteria:** The proponent characteristics and features that will be rated to assess how well the proponent will be able to meet its contract obligations if awarded the contract.

Examples include skills, experience, staffing, resources, technology and intellectual capital.

**Evidence:** Information requested from the proponent or obtained from other sources for evaluation purposes.

**Evaluation:** How scores will be determined from the evidence.

While these distinctions may seem clear in the above descriptions, they are frequently overlooked in the creation of solicitation documents, including the RFPs reviewed for the purposes of this report.

For example, mandatory requirements and contract obligations can sometimes be confused because both use the terms “must” and “shall” to emphasize their obligatory nature. Confusion can increase when they are interwoven in the text of the solicitation document; for example, where a mandatory requirement is presented followed by a contract obligation and then another mandatory requirement. We therefore recommend that the authoritative listing of contract obligations be kept distinct, by ensuring that they only appear in a Form of Agreement appendix and its schedules.

Similarly, as illustrated further in Appendix 6, evaluation criteria and evidence that would satisfy those criteria were often conflated in the RFPs reviewed.

Further information on these distinctions and sources of confusion as between the above categories is included under items 21 to 25 and Appendices 4 to 7.

## APPENDIX 4 –Distinguishing Categories of Mandatory Requirements

Mandatory requirements typically fall into four categories:

**Procedural requirements:** Procedures or protocols that must be followed as part of the competitive solicitation process, e.g., register with the bidding website, attend a bidder’s meeting or submit by deadline.

**Submission requirements:** Documentation that must be submitted for evaluation or compliance purposes by the submission deadline, e.g., Form of Offer, Rate Bid Form, CVOR abstract.

Submission requirements may include evidence that is rated or used for rating, e.g., references.

**Preconditions to award:** Items that must be provided before the contract can be formally awarded to the selected proponent, e.g., certificate of insurance.

**Conditions or minimum qualifications:** Standards that must be met in order for the response to be evaluated further, e.g., a level of “Satisfactory” on the CVOR abstract, or a minimum score of 70% in the rated technical qualifications.

Sometimes, unnecessary disqualifications result because proponents – and in some cases procurement staff – misunderstand which of the above categories a mandatory requirement falls into and thus when it applies or should apply. It is therefore good practice to keep the categories separate and present them in the above order, which reflects the sequence in which compliance is determined over the timeframe of the competition. In particular, date-dependent requirements should be prominent and presented at the beginning of the solicitation document.

Proper distinction between categories of mandatory requirements also reduces administrative overhead and eliminates unnecessary burdens on proponents. For example, it is common practice to request, at the submission stage, items that are more properly considered pre-conditions of award, such as proof of insurance. Where information will not be rated but is required only to confirm selection and make an award, it is advisable to defer the requirement of that information to the pre-award stage.

## **APPENDIX 5 – Distinguishing Categories of Contract Obligations**

Contract obligations typically occur in three forms:

- Direct statements of obligation specific to the operation, which in this case is student transportation, created by the purchasing agency (e.g., “Operators shall provide emergency evacuation training to all students who are passengers on their vehicles”)
- Compliance statements (“Operators shall comply with all applicable statutes and regulations, in particular...”)
- General terms and conditions common to many contracts and not specific to the operation (e.g., confidentiality, indemnification, invoicing, insurance).

Ideally, for clarity and also ease of amendment, items in the first two categories should be grouped into schedules of the main contract (the Form of Agreement), while the standard terms and conditions reside in the main body. Many of the RFPs examined did not exhibit this separation, so we propose it as a recommendation for future solicitation documents.

For communication and understanding, it is sometime necessary to summarize or present contract obligations in the main document. When this happens, it should be made clear that the authoritative version is in the Form of Agreement and that what is presented is a contract obligation, not a mandatory evaluation requirement. What should be avoided is the following example, where the obligations only appear as imprecise statements, in this case only in the section with evaluation criteria and not in the Form of Agreement or its schedules:

### Example 5.1

<b>Office, Garage and Maintenance Facilities</b>	<p>The Proponent must provide space for administration, such as dispatch and billing. The Proponent must also provide a facility for the routine maintenance of all vehicles used to provide the contracted service. Describe in detail the office, garage and maintenance facility(ies) (planned or actual) in terms of size, location and investment to meet the needs of the Proponent's submission for services identified in this RFP.</p>	<p>10</p>	<p>5 Superior 4 Good 3 Satisfactory 2 Limited 1 Inadequate 0 Zero</p> <p><b>Response should be limited to 3 pages maximum</b></p>
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A related issue arises when an obligation is implied but not clearly articulated, as in the following example:

### Example 5.2

<b>Cold Weather Program</b>	<p>A Cold Weather Program ensures vehicles operate and transport students as scheduled on days with colder than normal temperatures.</p> <p>Describe your Cold Weather Program and include any dedicated staff, resources and/or technology you employ to facilitate the program. Also indicate the temperature threshold which initiates implementation of the Program in your response.</p>	<p>5</p>	<p>5 Superior 4 Good 3 Satisfactory 2 Limited 1 Inadequate 0 Zero</p> <p><b>Response should be limited to 2 pages</b></p>
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In the RFPs from which this example was taken, there is no actual statement of contract obligation anywhere related to a cold weather program, either in the table above or elsewhere in the document. A requirement for such a program could be inferred from

the wording, and any proponent will likely have such a program and understand what it entails, but the enforceability of the requirement would be unclear.

In summary, with respect to contract obligations, we recommend that:

- The authoritative version of all operational obligations be placed in schedules to the main body of the agreement, with the latter reserved for standard terms and conditions
- Contract obligations that appear elsewhere should be clearly presented as (non-conflicting) summaries or statements of the authoritative versions
- In future solicitation documents, any instances where contract obligations can only be inferred should be converted to authoritative statements and located appropriately.

## APPENDIX 6 - Articulating Clear Evaluation Criteria

In some of the RFPs reviewed, rated qualifications and criteria were implied but not clearly articulated.

For example, in the following example from Appendix 5, repeated here for ease of reference, the request for information about staff, resources and technology indicates that these will be rated, but no connection is made between these broad categories and the ability to provide a cold weather program. In fact, what is actually being requested is *evidence* to enable the evaluation of criteria that are suggested but not articulated.

### Example 6.1

<p><b>Cold Weather Program</b></p>	<p>A Cold Weather Program ensures vehicles operate and transport students as scheduled on days with colder than normal temperatures.</p> <p>Describe your Cold Weather Program and include any dedicated staff, resources and/or technology you employ to facilitate the program. Also indicate the temperature threshold which initiates implementation of the Program in your response.</p>	<p>5</p>	<p>5 Superior 4 Good 3 Satisfactory 2 Limited 1 Inadequate 0 Zero</p> <p><b>Response should be limited to 2 pages maximum</b></p>
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To bring clarity to above, one would start with the contract obligations that define a cold weather program. For example purposes only, an operator implementing a cold weather program might be obliged to:

- Take extra steps in vehicle preparation
- Ensure vehicles interiors will be sufficiently warm when students are picked up
- Include extra equipment and provisions on buses in case of remote breakdown

- Perform an early morning check on routes for black ice, drifting or other conditions that may result from intense cold
- Initiate adverse weather communication protocols.

Proponents would then be evaluated on their ability to carry out any or all of these particular obligations. Do drivers need special skills to cope with cold weather extremes? If so, experience might be a criterion and evidence of that experience would be requested. Is special equipment needed to ensure that vehicles can be brought to proper operation in unusually cold conditions? If so, proponents could be required to provide evidence that they have deployed and used such equipment. Perhaps references can be checked to confirm cold weather performance. With these criteria established along with the associated evidence, rating schemes for the evidence can be devised. These could consist of a combination of methods for both qualitative and quantitative data (see items 24 and 25).

We therefore recommend that in any future solicitation documents, clear evaluation criteria along the lines outlined above be developed whenever there is a need to confirm the ability of proponents to meet contract obligations. The information requested from proponents should not substitute for requirements – the requested information should be developed *after* the criteria are determined and should be limited to that evidence which is necessary to establish that the proponent meets the disclosed criteria.

## APPENDIX 7 - Selecting a Qualitative Method of Evaluation

There are two basic approaches to evaluative qualitative criteria in competitive solicitation documents: the “checklist” method, and the “Likert-type” scale.

In the “**checklist**” method, points are assigned for each item confirmed. For example, to evaluate training credentials, one might request:

- Evidence that demonstrates their actual experience training school bus drivers – in course development, in course delivery, in testing (1 point)
- Examples of training and testing material that they have actually used in delivery (1 point)
- External corroboration, for example, results of training and testing previously conducted by the proponent, which could be anonymized for confidentiality purposes (1 points)
- Training credentials of staff will be training the next contingent of consortia drivers (1 point)
- A training schedule and curriculum for the drivers for a particular set of dates, confirmation that a similar schedule was carried out successfully by the proponent in the past (1 point).

By assigning only one point per item (signifying whether the evidence was provided or not), it is possible to be quite objective, but at the expense of being able to assess a degree of quality and provide data for meaningful comparisons. More points can be assigned to each item, at a cost of increasing subjectivity, but if this is done carefully, it can still be useful and defensible. For example, a 0-3 point rating scheme could be defined as follows:

- Zero points for no response
- One point for a response that addresses the request
- Add a point if there is a clear demonstration of actual experience
- Add another point if the response includes external evidence, provided by a party other than the proponent

Note that while there remain elements of subjectivity, this incremental scoring approach is still more transparent and objective than a scale that is based only on a range of

agreement to disagreement. We note that in some RFPs, there has been an effort to break down some of the information requests into more of a checklist approach.

The other evaluation method often employed is the “**Likert-type**” **scale**, indicating a range of agreement from very low to very high. This is the method used in the RFPs, whereby qualitative responses are rated from zero (no response) to superior (typified as “highly comprehensive” or “excellent”).

A Likert-type scale has become the de facto standard for surveys where opinion is requested but does not need to be justified. Its applicability in assigning a quantitative rating to a collection of evidence is more difficult to justify. Consider the following example from one of the RFPs examined:

**Example 7.1**

<p><b>Fleet Maintenance and Management</b></p>	<p>Vehicle maintenance is a critical component to providing safe, reliable and successful Services. Proponents should describe its fleet management approach including:</p> <ul style="list-style-type: none"> <li>• Preventative maintenance program;</li> <li>• Parts inventory management;</li> <li>• How the Proponent monitors and documents compliance with the Ministry of Transportation requirements</li> </ul> <p>The Proponent should provide its approach to ensuring the continuation of Services during a vehicle breakdown or delay.</p> <p>Proponents should provide their average vehicle change off response times for urban and rural Routes relating to Peel Region.</p> <p>The proponents should describe its cold weather program and include any dedicated staff, resources and/or</p>	<p>10 points</p>	<p>5– Superior          4– Good          3– Satisfactory          2– Limited          1 – Inadequate          0 – Zero</p> <p><b>Response must be limited to 3 pages maximum</b></p>
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	<p>technology it employs to facilitate the program. Also indicate the temperature threshold that initiates the program.</p> <p>The Proponent should describe its maintenance team including the roles and responsibilities of each member.</p> <p>For each maintenance team member identified above, the Proponent should substantiate the degree to which the maintenance team member has relevant experience for the proposed maintenance role including number of years, qualifications, education and training.</p>		
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Proponents are required to provide information in eight different categories, including their cold weather program, which in Example 5.2 from Appendix 5, merited 5 points on its own. Here, only 10 points are allocated for all categories and these must be compressed into a 0-5 scale, reducing the discretion available to evaluators. Moreover, while some of the information requested is quantitative, three pages would not appear to be sufficient given the range of depth of some of the content required.

In view of the above, we recommend that for future competitive solicitation documents, where it is necessary to evaluate qualitative information, a checklist method and incremental scoring approach as described above be applied. Any alternative that provides comparable transparency is also reasonable. A pure Likert-type scale should be the alternative of last resort.