

**Report of the Student Transportation
Competitive Procurement Task Force
to the Ontario Minister of Education**

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Letter of Transmittal to the Minister

January 25, 2012

Dear Minister,

I am pleased to transmit the report of the Student Transportation Competitive Procurement Task Force, established in June, 2011, by your predecessor.

In six meetings (including one teleconference) over the past few months, Task Force members have brought their considerable expertise to bear on reviewing the existing processes for openness, fairness, accountability, and value for money. With the able support of your Ministry's staff, they have dedicated considerable time and effort to this process, and I thank them for their efforts.

The Task Force sought, but in many cases did not achieve, consensus as it studied competitive procurement for student transportation services. This report reflects, in summary form, the views of the Task Force as a whole, providing information on competing views, as well as those upon which consensus was achieved.

Yours very truly,

The Honourable Coulter Osborne Q.C. (Chair)

Task Force Members

Chair

The Honourable Coulter Osborne Q.C.

Ministry of Education Representative

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¹ Mr. Gottlieb is also a member of the Task Force

Introduction and Background

Every school day in Ontario, more than 800,000 students rely on student transportation services to transport them to and from school safely, punctually, and efficiently. Every Ontario school board provides transportation services to eligible students, through funding from the Ministry of Education's Transportation Grant. Virtually all (99 per cent) of this student transportation service is provided through contracts with private transportation companies. Ontario's Transportation Grant for 2011-12 is projected to be \$845 million, comprising four per cent of all education funding in the province.

In aggregate, this is a large enterprise by any standard. With 18,000 vehicles traveling 1.8 million kilometres each day, consuming 100 million litres of fuel each year, student transportation by its very size and nature offers many opportunities for enhanced efficiency and effectiveness. Historically, school transportation contracting processes in Ontario have typically used contract negotiation, with contracts awarded to a relatively constant local operator group. Contract rates were largely dependent on annual transportation allocations. There was limited use of competitive contracting processes.

In July, 2006, the government announced its Student Transportation Reforms. A key part of these reforms was the resort to board consortia to achieve better efficiencies and economies of scale in student transportation. At this time some school boards were already reaping the benefits of consortia. As part of the development of a new transportation funding model (centred on a mechanism to deal with funding deficits), consortia activities were reviewed for efficiency and effectiveness.

The Ministry's Efficiency and Effectiveness Reviews (conducted by a third party) revealed some deficiencies in contract management and procurement practices, especially in the area of competitive procurement. At the request of the sector, the Council of Senior Business Officials (COSBO), with the support of the Ministry, initiated the Contracting Practices Advisory Committee (CPAC) to establish templates for contracts between school boards and bus operators.

The CPAC was composed of transportation managers, school bus operators, and school board procurement staff, and facilitated by a third party procurement advisor. A resource package, which included a contract template, a Request for Proposals (RFP) template, and procurement guidelines, was developed. The package reflected the CPAC's input for appropriate procurement practices, recognizing the need for sector stability during the transition to competitive procurement.

As part of a transitional strategy to move the sector to competitive procurement, a pilot project using an RFP was conducted at three consortia sites. Halton Student

Transportation Services, Student Transportation Services of York Region and Wellington-Dufferin Student Transportation Services used the RFP tools and templates developed by CPAC to procure services for a maximum of 25% of their routes, where no more than 25% of an operator's existing routes would be part of the pilot.

The pilot RFPs were intended as an opportunity to refine the tools and templates, and incorporate lessons learned for future reference. The Ministry offered the assistance of a procurement consultant for the three consortia sites over the course of the pilots, as well as funding assistance to the Ontario School Bus Association (OSBA) to provide training for its members. The RFP pilot projects were completed in June, 2010.

While the RFP pilot projects were deemed a success by the Ministry, this view was not shared by most operators. The Ministry received complaints from a number of operator proponents regarding the fairness, openness and transparency of the procurement process, specifically in regard to the pilot RFPs.

The industry reacted very strongly to the results of the pilot RFPs, especially in cases where smaller operators lost long-held routes to larger companies. Responding to industry concerns about the procurement process, the then Minister of Education, Kathleen Wynne, announced that there would no new RFPs issued until January, 2010.

Shortly after, the Ontario government mandated that all public sector bodies comply with the Broader Public Sector Supply Chain Guidelines (which include a component on competitive procurement) by March 31, 2010. Ministry staff and representatives of the operator associations met several times during this period to consider other procurement models that would comply with the Supply Chain Guidelines. A two-stage procurement model was proposed by industry representatives, and piloted at five consortia sites in northern Ontario. North-East Triboard Student Transportation, Rainy River Transportation Services, Northwestern Ontario Student Services Consortium, Student Transportation Services of Thunder Bay, and East of Thunder Bay Transportation Consortium were selected to participate in the two-stage pilot project.

The Ministry engaged third party consultants to develop a Two-Stage Competitive Procurement Resource Package to support contracting practices, and to lead the two-stage pilot project. A separate consulting firm was hired to act as fairness commissioner. The Ministry provided funding to OSBA for proponent training sessions on the first stage of the process (Request for Statements of Qualifications, or RFSQ), and the second RFP stage was completed in February 2010. In the meantime, the first RFP pilot sites proceeded with competitive procurement for their remaining routes.

In April 2011, the Ontario government introduced the BPS Procurement Directive; it replaced the BPS Supply Chain Guidelines. School bus service providers remained unconvinced that the two-stage contracting models stemming from the pilot projects best served their members and the public. They expressed their displeasure with the procurement process frequently and vociferously.

Responding to concerns of operators, rural communities, and operator associations, in June 2011, Cabinet granted school boards a six-month exemption from compliance with the BPS Procurement Directive for student transportation. In June of 2011, the then Minister of Education, Leona Dombrowsky, announced the creation of this task force.

Task Force Mandate and Meetings

The former Minister created the Task Force to respond to operator and community concerns regarding the move to competitive procurement, while ensuring that the process complies with the law and remains fair, open, transparent, and accountable.

The Task Force comprised 13 members:

- A neutral, third-party Chair, appointed by the Minister;
- Four representatives of Ontario school boards, appointed by the Minister;
- Four owners/operators in the school bus industry, appointed by the Minister;
- Two representatives of transportation consortia, appointed by the Minister
- One Procurement Advisor, procured competitively by the Ministry;
- One representative from the Ministry of Education, appointed by the Minister.

The Task Force's mandate, which was approved by Cabinet, is "to review competitive processes used to procure student home to school transportation, paying specific attention to their openness, fairness, accountability, and value for money". The Task Force was also requested to review the two RFP pilot processes referred to above in relation to their openness, fairness, accountability and value for money.

Apart from the Chair and the Procurement Advisor, all members of the Task Force are, in one way or another, involved in the broader student transportation industry. They represent interests that in many ways do not coincide. It is, therefore, not at all surprising that consensus was not achieved on many issues.

The Task Force received and discussed information concerning numerous aspects of student transportation that was for the most part unverified as to its factual accuracy. Thus, the various presentations and submissions received by the Task Force represented the views of the presenting party, not the Task Force as a whole.

Over the course of the Task Force's meetings the Task Force agreed on two broad areas for study and recommendations. To reflect this agreement, we have divided the report's findings into two main sections:

1. Improvements to the current RFP procurement process; and
2. Alternatives to the current RFP procurement process.

Improvements to the Current RFP Procurement Process

As outlined in the introduction to this report, the development of the current school transportation procurement process began with student transportation reforms introduced in 2006. As noted, some school boards and consortia were already conducting competitive procurement. In November 2007, the Ministry convened the CPAC to develop a resource package containing guidelines, tools and templates to support fair and transparent contracting practices. CPAC, which included members from school board transportation managers, school board procurement staff, senior business officials, and OSBA, held 13 meetings in 2007-08. The resource package was released in December 2008, and included Procurement Guidelines and RFP and contract templates. The Ministry subsequently ran two separate sets of pilot projects: the RFP pilot projects, and the Two-Stage pilot projects.

RFP Pilot Project

Using the draft resource package developed by the CPAC, the Ministry initiated pilots in three consortia sites to test the tools developed to support competitive procurement. Halton Student Transportation Services, Student Transportation Services of York Region, and Wellington- Dufferin Student Transportation Services agreed to participate as pilot sites. The Ministry hired Management Partnership Services Inc. (MPS) for procurement document advice, and to support the consortia in the procurement process.

Ministry Evaluation of the RFP Pilot Projects Process²

Overall, the Ministry reported positive results from the RFP pilots. Key points include school boards achieving value for money through:

- Updated fuel terms in contracts to reflect current costs of fuel;
- Cost savings in contract rates;
- Standardized service and safety levels for their jurisdiction.

Other comments from the RFP pilots that were identified by the Ministry include:

- The pilots revealed new interest in the marketplace, for both new entrants and existing area operators wanting to expand their business;
- Training provided by the Ministry and OSBA was helpful for small and medium-

² Info from EDU document: "Overview of pilot results"

sized operators in understanding the process and to submit a competitive bid;

- Pilot results demonstrated that there were small, medium and large size operators who were both successful, and unsuccessful, in this process;
- The technical part of the RFP had a very narrow spread in evaluation points between small and large operators in all three pilot sites.

The Ministry also identified some areas of the pilots that demonstrated a need for further refinement and review:

- The ability to successfully articulate and explain safety and driver training elements in the RFP process was more difficult for smaller operators;
- Some smaller operators had difficulty costing out their business to submit an accurate financial proposal; more specifically, some operators did not take cues from consortium managers to examine their actual, as opposed to historical, costs.

Ministry Feedback Received from Participating Operators

- OSBA's training (funded by the Ministry) was viewed as helpful;
- Smaller operators found it to be difficult to produce a realistic competitive proposal.

Two-Stage Pilot Projects

At the conclusion of the RFP pilots referred to above, OSBA expressed interest in examining other methods of procuring student transportation services. To assist the industry transition to competitive procurement and to give school boards flexibility in selecting the best procurement option, OSBA suggested that a two-stage procurement process be developed as an alternative. North-East Triboard Student Transportation, Rainy River Transportation Services, Northwestern Ontario Student Services Consortium, Student Transportation Services of Thunder Bay, and East of Thunder Bay Transportation Consortium were selected to participate in a two-stage pilot project. The Ministry hired PPI Consulting Limited in March, 2010 to develop a resource package to support a two-staged procurement process for student transportation services³.

³ Info from PPI Consultants report: "Assessment of the Effectiveness of the Two-Stage Pilot Process"

Consultant's Evaluation of Two-Stage Pilots

PPI Consultants Limited, the firm hired by the Ministry to administer the two-stage pilot project in northern Ontario, concluded that the results of the project indicate that “competitive procurement can be successfully implemented in northern consortia in a manner that improves overall value for money.”⁴ PPI's report stated that the pilot processes demonstrated that:

- Where there is competition, value-for-money is achievable;
- The pilot process documents have proven useful in achieving improved value-for-money;
- Successful proponent operators in the pilot processes were not disproportionately represented by any one segment of the operators.

PPI's report on the two-stage pilots also recommended that:

- Consortia should do substantial planning to ensure that the procurement process will achieve its desired business objectives;
- Consortia should develop a clear communication strategy to address all key stakeholders;

There was a wide variation in resources availability and experience with public procurement,

- Procurement training and support for existing staff should be a focal point;
- The two-stage process was a “serendipitous” way of addressing the RFP skills gap for both consortia and operators;
- To assist with the transition to competitive procurement, the Ministry should consider continuing its work in terms of developing tools and templates, providing access to expertise, and arranging for skills development among consortia.

Fairness Commissioner's Evaluation of Two-Stage Pilots

Knowles Canada Consultancy Services Inc. was retained by the Ministry in December, 2009 to serve as Fairness Commissioner for each of the Two-Stage Pilots. Knowles concluded that it was satisfied that the RFP process was conducted in a procedurally

⁴ Info from PPI Consultants report: “Assessment of the Effectiveness of the Two-Stage Pilot Process”

fair, open, and transparent manner. All submissions received were evaluated against the Quality Criteria published in the RFP. Knowles found no bias either for or against any particular Qualified Supplier in the application of the Quality Criteria. The Quality Criteria were applied objectively based on the criteria published in the RFP⁵.

OSBA Experiences and Evaluation of the Pilot Projects Process

OSBA outlined a number of problem areas identified from its members' experience with the pilot RFPs, noting that various aspects of the RFP process have affected school bus operators of all sizes in Ontario. OSBA submitted that some of its members had difficulty during the past three years.⁶ Problem areas OSBA identified include:

- RFPs were not uniformly straightforward and easily comprehensible;
- Parcels of work were sometimes too small (e.g. one RFP had five-bus bundles, and operators were not allowed to qualify their bids);
- There was difficulty in obtaining contract information in some cases;
- Sometimes, when an operator was selected, there were no geographic references in the RFP. Thus, the operator could be offered work in remote areas, where there could be hours of travel time between allocated routes. This is a fairness/transparency issue;
- Safety programs were not always specified in the RFP in a comprehensive, understandable way;
- Some OSBA operators contended that they were discriminated against in the evaluation process because of the size of their company;
- Many of the early pilot RFPs using the original 2008 contract templates were so financially focused as to constitute tender calls, not RFPs;
- Financial formulas were not provided or in some cases were unfair or illogical;
- There was little control of the processes, practice, accountability and transparency in the RFPs issued to date. This is less so with RFPs that were proctored by fairness commissioners;
- There was little top down control of the RFP change management process

⁵ Info from Fairness Commissioner's Reports, June, 2011

⁶ Task Force Meeting 3 notes

OSBA identified as mandatory early on in the transition process;

- Evaluation of RFPs has been inconsistent and uses odd and unfair ways of evaluating both quality and financial criteria;
- The processes did not (and still do not) fully comply with the Supply Chain Guidelines or Agreement on Internal Trade;
- Operators of every size have been and continue to be hampered by the process and the transition process;
- There is an insufficient history to determine whether or not a viable multi-vendor operator community will continue. At the very least, the Ministry's declaration of success for the RFP process will not be sustainable until the second generation of competitive procurement in five or so years. At that point, it will be too late if a premature assessment of success proves to be wrong;
- There is no real evidence of cost savings – only incomplete estimates. Cost estimates do not include changes to total cost of contract management including, loss of collaboration benefits and coordination among operators, loss of contractual flexibility between operators and consortia, and the cost of new performance management, audit and other contractual additions to both operators and consortia;
- A larger more engaged role for the Ministry than anticipated is critical; Providing training to each consortium as they move to competitive procurement and providing training to operators in each consortium as they also make the transition is important but lacking;
- Support a consistent province wide set of standards for school transportation procurement;
- Processes and measurement criteria to maximize transparency, accountability and stability are desirable;
- Driver wages are low—(lower than crossing guards on a per hour basis). Although in the current economy, finding drivers is less difficult, pushing wages down, that may not always be the case.

Based on its members' experiences with RFPs, OSBA's position in summary form is

that, where competitive procurement is in place, the following is required:⁷

- RFPs must be straightforward and understandable;
- Parcels of work must be of sufficient size and specified clearly;
- RFP evaluation must be straightforward and transparent;
- Contract pricing should be public;
- Routes should be geographically grouped in a coherent way;
- Safety programs required should be clearly set out in the RFP and proponents' proposals;
- There must be no discrimination based on service provider size;
- Remote areas/ dispersed routes should be exempt from the RFP process, and negotiated. Consideration should be given to exempting dispersed routes and routes in manifestly remote areas from competitive (RFP) procurement;
- Lastly, reasonable and consistent funding is essential.

ISBOA Experiences and Evaluation of the Pilot Projects Process

In many instances ISBOA shared OSBA's dissatisfaction with the RFP process. This dissatisfaction was made clear in an online survey which ISBOA conducted of its membership to get feedback on the pilot RFP experience.⁸ Since respondents were advised that their responses would be confidential, their names and contact information were provided to the Chair in confidence for verification, if necessary⁹. ISBOA provided a summary of the survey to the Task Force, but did not include comments from responders for reasons of confidentiality. The ISBOA survey had 85 responses, with 49 respondents supplying their names. Respondent companies ranged in size from multi-nationals to operations with one or two buses. Respondents were allowed to answer the survey if they had not taken part in an RFP. The majority of the respondents to the survey have not participated in any of the competitive student transportation procurements.

On behalf of its members, ISBOA outlined a number of problem areas identified from its

⁷ OSBA submission "Principles for Competitive Procurement"

⁸ ISBOA submission: "Task Force Survey Summary Only"

⁹ In the circumstances, no verification was thought to be necessary

members' experience with the pilot RFPs, including:¹⁰

- Systemic flaws in the RFP process;
- Some RFP documents contained manifest errors, that is they were not sufficiently edited for substance and form;
- General lack of information on RFPs, making it difficult for proponents, or potential proponents to prepare proposals;
- RFP response timelines have often been too short;
- There has been a lack of transparency;
- Lack of procurement expertise in both the consortia and operators;
- Proponents' proposals were held to be non-compliant for attempting to obtain information needed for the proponents' proposal outside of the prescribed RFP process; the concern, more specifically, was not compliance as such, but rather the heavy handed nature of the response;
- Value for money was inadequately assessed;
- Evaluation scoring was frequently overly subjective;
- RFP addenda issued were often confusing and answers to questions were often unhelpful;
- Inefficiencies in routing was a frequent RFP related problem;
- Service level guarantees were no longer available;
- Lack of transparency has arisen from the failure to disclose essential terms of the successful proponent proposal;
- Debriefing sessions were often of little value to unsuccessful proponents.

Consortia Experiences and Evaluation of the RFP Pilot Projects Process¹¹

Consortia representatives on the Task Force did not make formal submissions regarding experience with the RFP pilot projects. They did however share observations

¹⁰ Task Force Meetings 1,2, and 3 and ISBOA submissions to the Task Force December 8/11

¹¹ As was the case with virtually all stakeholder positions and submissions, there was limited verification of assertions advanced. It was beyond the scope of the Task Force's mandate to convert information (including submissions received) into evidence.

regarding the process in Task Force meetings. These include:

- The level of safety has increased with the advent of competitive procurement;
- RFPs are a tool to be used to obtain improved safety;
- There has been no data presented to support the contention that RFPs compromise safety;
- Some operators did not follow RFP requirements (e.g. soliciting information from outside sources)¹²;
- With RFPs, consortia better know what they are paying for;
- There were some new entrants in local markets and many current operators valued the opportunity to expand their businesses. The elimination of barriers to entry allowed for this to happen;
- Having third party experts to assist in issuing procurement documents as part of the transition to competitive procurement is desirable.

The Ministry hired consultants to conduct focus groups with stakeholders after the RFP pilots were complete. In the case of feedback from consortia/boards, the consensus was:

- There was a high level of support for the RFP approach and process;
- Competitive procurement achieves real cost savings and establishes clear service levels;
- Tools and templates provided were helpful.

The Task Force received a letter from the *Association franco-ontarienne des conseils scolaires catholiques* (AFOCSC) that expressed satisfaction with the RFP processes. To summarize, the AFOCSC letter stated that:

- RFP documents and processes meet the provincial procurement requirements;
- Directives assist in ensuring an open, fair and accountable process;
- RFP documents set performance standards and benchmarks for safe, reliable

¹² The flip side of this concern is the service provider complaint that in some circumstances consortia over-reacted in declaring proponents non-compliant due to reasonably trivial breaches of RFP terms

transportation, and also promote consistency in service levels;

- Smaller operators should seek assistance from the Ministry in how to respond to RFPs.

The Task Force also received a letter ¹³ from Student Transportation Services of Waterloo Region Inc. which independently (not as part of the Ministry's pilot projects) issued an RFP for all of its student transportation services (excluding taxis) in January, 2010. The letter offers a detailed account of that consortium's experience with the move to competitive procurement using an RFP. Highlights relating specifically to the RFP process include:

- The Waterloo RFP was independently run by the transportation consortium, with support from purchasing departments at partner boards during the RFP development and release stage;
- Key evaluation criteria were safety, driver education, training and retention, communication, vehicle maintenance and technology;
- Pricing was only evaluated after proponents had met a minimum threshold in the above core competencies;
- The Region of Waterloo was divided into six distinct areas; operators could bid on a maximum of 50% of the routes in any one area, and could not obtain more than 35% of the business overall;
- These market share caps were designed to prevent dependence on any single operator, while allowing sufficient volume for economies of scale;
- The General Manager of the Waterloo consortium met with interested parties to answer RFP-related questions and addenda followed;
- The consortium evaluated eight proposals, six from all current operators and two proposals from new proponents;
- There was no correlation between the size of the operator and the quality of the proposal;
- In the end some regional operators gained substantial business, one larger operator did not obtain any business, the largest operator received two thirds of

¹³ Student Transportation Services of Waterloo Region, "Letter to Task Force from STSWR", Oct. 11, 2011. There was some discussion within the Task Force as to the weight to be given to and the admissibility of this letter since the Task Force did not solicit outside submissions. The Task Force did, however, encourage its members to solicit feedback from their constituents.

prior business, and a new operator secured some of the available routes;

- Long-term contracts allowed successful proponents to invest in fleet and personnel;
- A large proportion of the drivers affected by the change in business transferred to the successful proponents;
- The RFP delivered significant cost savings to the consortium and the partner boards.

The above represents the Waterloo experience, from the buyer's perspective. It may not represent a typical buyer/seller RFP experience, and as earlier footnoted there was some discussion within the Task Force as to the admissibility of the Waterloo letter.

RFP Issues and Practices

The Task Force's discussions of experience with the RFP process produced a list of several distinct areas of concern and opportunities for improvement. Members expressed divergent views on some of the RFP issues and practices, but there was general agreement that the RFP process can and should be improved.

We begin by referring to the helpful memorandum of the Task Force's Procurement Advisor, Leo Gottlieb¹⁴. It provides useful background facts which must be taken into account whether or not one supports the RFP process or some other procurement model.¹⁵

In his memorandum of December 11, 2011, the Task Force's Procurement Advisor emphasized the need that RFPs be clearly written documents. That is to say it should be clear from the text of the RFP what a potential proponent is obliged to do if it is the successful proponent¹⁶. This is also important in relation to potential proponents who must determine whether to submit a proposal in response to the RFP. The need for scope of work clarity is distinct from the need for clarity in what a proponent is required to provide in response to the RFP if the proponent chooses to submit a proposal. It is also important that the RFP provide clear, understandable information or advice on what a proponent is required to be or have to be compliant with the RFP and to be selected¹⁷ and how proponents' proposals will be evaluated. All of this supports the need for the entire procurement process to be easy to identify and understand¹⁸.

On the sensitive issue of bundling and parcels of work, the Task Force discussed the need for:

- Flexibility and consultation on route bundling;
- Level of detail concerning bundling in RFPs;
- Pre-RFP consultations for sensible route bundling;
- The need for a clearly stated link between bundles and awards;

¹⁴ In addition to being the Task Force's Procurement Advisor, Mr. Gottlieb was also a member of the Task Force. The Task Force's Legal Advisor, Paul Emanuelli, was not a member of the Task Force.

¹⁵ The Task Force worked to a compressed schedule. In result, some written material was received by all members of the Task Force after the Task Force's last scheduled meeting. This material was discussed in the course of preparing this report.

¹⁶This is frequently referred to as the Statement of Work.

¹⁷ In the world of student transportation this information might include qualifications such as operator experience, and the number of buses.

¹⁸ Readability is enhanced by clear cross references, and even more so by html links.

- Clear identification of routes in bundles.

Bundling deserves further comment. As the Task Force's Procurement Advisor noted, consortia frequently have too many routes to permit routes to be awarded separately and there is therefore an obvious need that all routes be covered. All agreed that bundling should not stifle competition. It should provide operators with a clearly articulated opportunity to submit proposals on viable packages of business.

The Task Force was advised that bundling related problems in the procurement process can arise when operators who want to submit a proposal feel they have to bid on a number of bundles to ensure they obtain some routes, bundled or otherwise. In some such cases the end result was that operators were awarded routes or combinations of routes that were not feasible for them. The Procurement Advisor suggested, and the Task Force accepted, that pre-consultation might assist in the creation of more logical bundles. This will not achieve perfection, but it will help. "Bundle swapping" may be necessary. It should, however, be established in advance and transparent.

The Task Force recognized that some of the issues referred to above fell outside the Task Force's mandate and that particular Boards (and operators) may have business related and other issues that vary from one board/consortium to another. A small working group including board/consortia Ministry and operator representatives might in some of the Task Force's view be helpful.

In his memorandum to the Task Force, the Procurement Advisor also reinforced earlier stated concerns about the general issue of the time provided to proponents to respond to RFPs.

A related issue discussed by the Task Force with some frequency was the time to respond after questions arising from an RFP have been answered. On this subject the Procurement Advisor stated that:

- The procurement schedule should provide enough time for at least two rounds of questions. In that way questions can be raised in response to answers provided, and then answered;
- The schedule should provide for at least a week between the last answer and the submission deadline;
- If an addendum is truly complicated, changes the RFP in a material way, or if the nature and volume of questions makes it obvious that proponents are having difficulty understanding the RFP, the schedule should be extended;

- Questions should not be answered simply by directing questioners back to the RFP. If a question is raised, it should be assumed that a proponent is having difficulty understanding the RFP and needs additional explanation.

The Task Force Procurement Advisor also recommended that, if the Task Force accepted, that questions be subdivided into categories:

- a) Urgent (where delay will materially limit or prevent a proponent's capacity to prepare and complete a proposal)-- such questions should be answered within 1 day;
- b) Urgent but complex (where reality requires more response time but urgency exists). This category of questions should be answered on an as soon as possible, but no more than 2 days, basis; and
- c) Non-urgent questions which should be answered within 1 week

The Task Force generally agreed with the Procurement Advisor's concerns and recommendations as to questions and response time.

The Task Force recognized that the procurement process generally, and RFP related questions in particular, may strain boards' or consortia's resources, but the Task Force viewed timely and clear disclosure as critical elements of an open and fair procurement process where hundreds of thousands or even millions of dollars may be at stake. Thus, if temporary resources are required, they should be secured. All of this is, of course, subject to the ever-arching principle that resourcing should be commensurate with the scale (and in some cases the complexity) of the procurement.

In its review of RFP related issues, the Task Force was reminded that local preference is not permitted by relevant trade treaties; however, experience in conditions that compare with those found locally is acceptable.

The Task Force discussed proposal evaluation related issues at some length. Some members of the Task Force expressed the view that in the evaluation process price was determinative notwithstanding the provisions of the RFP that allocate evaluation points for specific non-financial considerations. This resulted in the Task Force considering three related questions— first, the split for evaluation purposes between financial and non-financial components of proponents' proposals; second, what is measured in the non-financial component and third, how it is evaluated.

It was accepted that the evaluation splits is a decision for the issuer of the RFP, i.e. consortia or boards, as is the content of the RFP as a whole. The pilot RFPs included 75-25 (non price: price) and 65-35 evaluation splits. These splits would suggest that

student transportation has been treated as a service more than as a commodity¹⁹. The evaluations in the Pilot RFPs revealed close scoring among proponents in non-financial areas with the result that price evaluation was determinative. The probative value of this is suspect in the sense that it cannot reasonably be taken to mean that the evaluation criteria were flawed, or for that matter, not flawed.

The Task Force accepted that non-financial RFP criteria should be as objective as possible. This is more difficult to accomplish in practice than it is to discuss in abstract terms. Adding criteria, making rating scales finer and requesting more detailed information from proponents will help. However, as the Procurement Advisor noted there is no standard practice that can be looked to in order to establish the level of detail or degree of differentiation for evaluation criteria.

Templates are useful for collecting objective data, or when the RFP requires short answers, where a narrative answer is not needed. They are less useful when more abstract information is sought, as is the case when proponents are asked to describe approaches and work plans or answer complex questions.

The Task Force generally accepted that proposals should be evaluated in accordance with the evaluation criteria in the applicable RFP, not against each other²⁰. It was also accepted that, when price is scored, scoring is typically assigned in relation to the lowest scoring proponent.

The Procurement Advisor suggested, and the Task Force agreed, that templates could be useful for parts of the procurement where criteria in question are more subjective, with the result that responses in proposals can be more objective.

Methodology for Determining Value for Money

In its meetings the Task Force considered the issue of “value for money”, an issue specifically referred to in the Task Force’s mandate.

The term likely has its roots in commodity procurement, where it can reasonably be said that given identical specifications, the lowest price can be said to provide value for money.

Public sector procurement in part rests on the assumption that competition will provide value for money, but once qualitative criteria are introduced into the procurement process the value for money assessment can become subjective and harder to demonstrate. In the end, the Task Force accepted that there is no proven, single

¹⁹Memorandum to Task Force from Procurement Advisor December 11, 2011

²⁰Procurement Advisor memorandum December 11, 2011.

methodology for assuring beyond doubt that value for money in procurements where non-price factors are present.

Extension of the Transition Period Beyond 2013

The Task Force was in general agreement that the student transportation sector in Ontario could find it challenging to deal with a “full court press” on competitive procurement starting January 1, 2012.

The Task Force accepted that student transportation could but likely will not be exempted from the procurement requirements of the BPS Directive. There may, however, be a case to be made for a limited phase-in period for boards/consortia that are not ready for the full RFP procurement process. The Task Force’s Procurement Advisor suggested that the Ministry consider a transition schedule over 18 months, perhaps with a requirement that boards/consortia achieve a stipulated percentage of completed routes by specified dates. This would have the added benefit of reducing pressure on operators that would inevitably result if a number of RFPs were released in the same general time frame. In addition the phase out of the “moratorium” should be accompanied by continuing procurement education and support (e.g. in the form of a transition support group) for both boards and operators that need it²¹.

Sustaining Competition

The spectre of a procurement process that in the end would lead to monopoly delivery was of concern to all. In discussion centred on the objective of sustaining competition the Task Force considered:

- Setting market share limits in conjunction with local market conditions;
- Providing market share limits in RFPs;
- Geographical considerations regarding market share limits;
- Legislative considerations regarding the principle of set-asides requires further research;
- Collaborative programs for operators for training and safety—these programs already exist in some areas. The Task Force agreed they should be maintained. Moreover, in the Task Force’s view conditions for such programs

²¹ Majority of the Task Force assured that the moratorium will not be extended, in part based on the Procurement Advisor’s opinion that extending or renewing the moratorium could have trade agreement implications.

should be clearly spelled out in all RFPs.

Operator and Consortia Knowledge of the RFP Process

In the Task Force's meetings it became clear that in some, but not all, cases there was a pervasive uncertainty about aspects of RFP based procurement. This was not a one-way street. Rather it applied to some operators and some consortia. The existence of this knowledge gap militates in favour of ongoing competitive procurement education.

As noted, Cabinet granted school boards a six-month exemption from compliance with the BPS Procurement Directive (for student transportation) in June, 2011, while the work of the Task Force was underway²². This exemption expired on December 31, 2011.

The Task Force recognizes that, notwithstanding what has come to be known as the "moratorium" on competitive procurement, Ontario's school boards continue to retain the authority in purchasing. However, since the moratorium expired on December 31, 2011, some members suggested that consideration be given to extending it. If the moratorium is extended, the E&E Reviews would be impacted. The extension of the moratorium was an issue on which the Task Force's members did not agree.

Alternatives to the Current RFP Procurement Process

As part of its mandate to review the competitive procurement policies and practices required by the BPS Procurement Directive for student transportation services, the Task Force sought input from all of its members on alternatives to the RFP procurement model. The following section of this report addresses alternative policies and practices which may usefully be considered in any effort to supplement or modify current procurement practices for student transportation in Ontario.

Within the Task Force opposition to the use of RFPs in student transportation came from representatives of ISBOA and OSBA, organizations that, as stated, represent operators. ISBOA and OSBA, supported by their members are opposed to the universal application of RFP processes. They maintain that, although the BPS Procurement Directive does require competitive procurement, the specifics of how that procurement is achieved are left to the discretion of the consortia. Operators and operator groups contend that the exclusive use of RFP processes is neither effective nor fair in student transportation procurement.

The opposition to the universal application of the RFP models of competitive

²² Although this Task Force was established in June 2011, its first meeting did not take place until October 2011.

procurement is primarily based on the belief of some Task Force members that school transportation is, in many cases, procured in an “artificial market”, a market with a single buyer.²³ As a loose definition for discussion purposes here, we will define artificial markets (in student transportation services) as markets where a number of unique conditions and circumstances might work to dilute, or even rebut, the assumption that the RFP process now in place is the only way to ensure that student transportation procurement achieves value for money and is open, fair, and accountable.

Several submissions from the operators to the Task Force echoed this theme and concern. Their proposals and views are summarized here, and footnoted for further reference. The Task Force’s discussions of alternatives to the RFP process yielded numerous suggestions, and identified several procurement methods that could be investigated further. Again, members expressed manifestly divergent views on these issues. In particular, there was no agreement on whether student transportation is truly an “artificial market” as defined by submitted material. Nor was there agreement on any specific recommendations regarding submitted procurement alternatives as viable alternatives for consideration under the BPS Procurement Directive.

The two leading associations (OSBA and ISBOA) representing the operators (sellers) in the procurement process took issue with the general fairness of the RFP process in student transportation. Both share the view that the use of RFPs may too frequently lead to monopoly circumstances. As noted the two associations share common members, and in aggregate they represent the majority of school transportation providers in Ontario.

OSBA obtained a legal opinion regarding the legality and practicality of school boards or consortia negotiating with a group of operators, and related *Competition Act* implications, if any.²⁴

The opinion noted several advantages to collective negotiation, including:

- Rate consistency and stability;
- Consistency in the nature of services;
- Standardization of service, safety, training etc;
- Savings to school boards in time and costs.

²³ISBOA submission: “The Problem with Artificial Markets”, Nov. 2, 2011

²⁴ ISBOA submission: “The Problem with Artificial Markets”, Nov. 2, 2011

On the matter of *Competition Act* concerns, the opinion noted the possibility of using a knowledgeable third party at arm's length from both buyer and seller. The third party would be familiar with benchmark values and costing components, and would prepare data independently for recommendations on rates. This was said to present no *Competition Act* problem.

Service Providers' Proposed Alternatives to RFP Process

OSBA Position

Retained by the OSBA, Denis Chamberland is a commercial lawyer with extensive experience in IT outsourcing, supply chain, and government contracts, and is a recognized expert in the field of public procurement. He was retained by the Ontario Ministry of Finance in 2009, after the BPS Supply Chain Guideline was released. In a presentation to the Task Force on November 29, 2011²⁵, he expanded on the points noted in his written opinion to OSBA. His opinion is summarized below.

In dealing with procurement principles generally, Mr. Chamberland opined that the RFP process is intended to capture the creativity of the marketplace. He stated that there is no requirement that school board consortia conduct traditional single-award RFP processes. That is boards/consortia can structure their competitive procurement processes as they wish. He reviewed the following four variations on the single RFP theme, which in his view could help achieve value for money, while ensuring a competitive market in the long term.

(i) RFP with Multiple Awards²⁶

Rather than issue single-award contracts, according to Mr. Chamberland it is possible to draft a robust RFP that identifies several successful proponents, provided that threshold requirements have been met. Multiple award contracts allow buyers to procure services and supplies more quickly, using a streamlined acquisition procedure, with the advantage of competition for optimum prices. Used extensively in the United States, this procurement approach also enhances the development of a vibrant market over the long term.

(ii) Supply Arrangements

Mr. Chamberland expressed the view that Supply Arrangements (SA) could be used to pre-qualify capable operators, in accordance with pre-defined criteria. Terms would include the duration of the SA, the service requirements (specifications and performance standards) and the maximum price to be paid by the consortium. In the second round, the consortium could set a mini-price competition for select routes, but within a pre-defined pricing band to avoid unbalanced bids.

(iii) Benchmarking to Market

Well-prepared contracts often include benchmarking provisions to manage the financial

²⁵ OSBA submission: "Chamberland Submission, Nov. 29, 2011

²⁶ RFPs with Multiple Awards and Supply Arrangements were both components of the Ministry's pilot projects.

risks over the duration of the contract. Mr. Chamberland stated that a benchmarking process could be used in at least two ways. A consortium (either alone or working with operators or a group of operators) would hire a third party specialist to peg the market prices for a particular location at a particular time. This would help to ensure that services are provided competitively. Operators would be required to meet the established benchmark at the outset or over a fixed period of time. Rather than forcing operators to leave the market, this approach could facilitate a transition for operators to become more efficient, without putting the core mandate at risk. This would also represent a local solution. Another bench-marking process could involve the Ministry retaining a third- party specialist to benchmark the prices for the services province-wide, for a fixed period of time. The benchmark findings could be made public, and would help consortia complete commercial arrangements with operators. Both of these benchmarking approaches would be market-based, and would put downward pressure on prices according to Mr. Chamberland.

(M) Subcontractor Model

Where smaller operators are unable to compete directly with larger participants, the successful operator on the larger contracts could be required to subcontract some part of the contract to smaller local operators, on terms negotiated by the parties. This would have the effect of preserving a competitive market over the longer term, and avoid the rising costs that are sure to follow when the number of operators has been reduced to a few. This would preserve the collaborative approach that has long existed in the student transportation sector.

ISBOA Position

ISBOA also provided expert opinions to support its contention that the BPS Procurement Directive be amended to include provisions intended to promote and preserve the role of small and medium size operators in the procurement process, to enhance the safety of children, and to avoid monopoly situations. ISBOA supports an amendment to the BPS Procurement Directive that would clarify that competition does not inevitably mean issuing an RFP.

Dr. James M. Cooper was retained by ISBOA. He is a Senior Research Fellow at the Transport Research Institute at Napier University in Edinburgh, Scotland. He prepared a peer reviewed paper “Ontario Schools Transport 2011” that was submitted to the Task Force²⁷ for consideration.

As a point of commencement, Dr. Cooper noted that while competition is highly

²⁷ISBOA; “Submission to Task Force”

desirable, the processes by which school transport services are being allocated appear to be reducing the level of effective competition, reducing the extent of local supply, and creating barriers to entry. In summary form Dr. Cooper stated that:

- (i) Negative impacts arise in three areas; the inability of the market to respond competitively, the inability of the market to sustain local operation, and the lack of consideration of wider impacts.
- (ii) As the RFP process moves from a new to a mature process he suggested that behaviour on the part of some operators may result in unfair competition, the potential for collusion, and anti-competitive practices.
- (iii) Potential solutions include the adoption of broader competitive processes, better route definitions, and the acknowledgement of secondary and community benefits, as well as narrow financial cost benefits.
- (iv) Large area contracts have tended to lead to a loss of competition over time and may result in monopolistic circumstances and behaviour. These large area contracts should be replaced by a series of smaller contracts, even on a route-by-route basis.
- (v) Purchasing authorities need to be better aware of the cost of production and measurement of benefit specific to their location and reject bids that are either significantly above or below true cost of production.
- (vi) The process itself should be simplified to reduce administrative burden, with the “drag” associated with an RFP cut to the minimum. This includes simplification of bids.
- (vii) Measures to encourage market competition, including the presence of multiple operators, drawn from local and national suppliers, permits for rapid response to route hand backs, and the avoidance of monopolistic pricing.
- (viii) The inclusion of community and regional benefits will further ensure the avoidance of a silo measurement. This combination of measures is likely to result in greater response rates to competitions and the assurance of more optimal outcomes.
- (ix) Optimal structures, or at least those identifying the greatest range of benefits, should be considered alongside (or instead of) those that satisfy a narrow range of metrics. These might include:

- Better knowledge of cost structures and service expectations on the part

- of the commissioning authority;
- Encouraging market competition from a wide range of suppliers;
- Measuring and accounting for the wider range of economic benefits attributable to service provision;
- Ensuring that the process does not create a barrier to entry;
- Ensuring market contestability, even where limited numbers of suppliers enter the competition;
- Ensuring minimum service standards, including quality and reliability;
- Valuing local knowledge.

Concurrently with the filing of Dr. Cooper's opinion, ISBOA submitted an opinion on Dr. Cooper's paper from Michael Trebilcock, Professor of Law and Economics, at the University of Toronto Faculty of Law. In an email to ISBOA²⁸, Dr. Trebilcock wrote that he was "persuaded by his [Dr. Cooper's] critiques of conventional RFP processes for transport services, including school busing, and by his case for a more nuanced contracting process that considers a broader range of criteria beyond price per service."

ISBOA also submitted a paper entitled "Public Bus Transport in Germany - a proposal to improve the current awarding system" (*Working Paper Series in Economics, University of the State of Baden-Wuerttemberg*) by Arne Beck.²⁹ In the paper, Mr. Beck writes that "introducing competition in the German market for short-distance public bus transport services has brought successes, but also some notable failures." He proposes six objectives for a new procurement model, which should:

- Be flexible in the range of options to ensure efficient market organizations;
- Provide a variety of options for action to operators and public transport authorities;
- Offer possibilities for a high level of freedom to operators to design services;
- Provide a framework conducive to innovation;
- Contain well-defined regulations for awarding procedures and delegate defined

²⁸Email of Dec. 8, 2011, forwarded to Task Force

²⁹ ISBOA submission: Proposal to improve awarding system in Germany, Nov. 2, 2011

roles and tasks to market participants;

- Avoid legal uncertainties.

ISBOA's recommendations for alternative approaches echo the four approaches suggested by Denis Chamberland and OSBA above³⁰. That is, ISBOA supports the consideration of the models using RFPs with multiple awards, supply arrangement, benchmarking to market, and the subcontractor model. (*See Chamberland submission summary above for details*)

ISBOA consistently emphasized its concern about a straight line RFP process driving smaller operators out of business as a consequence of a process where price (as measured on a short-term basis) is the determinative factor. This, ISBOA asserts, will result in an eventually less competitive student transportation market and in some cases to the existence of monopoly delivery. The notion of an artificial market is in some way a proxy for these concerns.

The board and consortia representatives on the Task Force do not reject consideration of other procurement approaches provided that they permit their business requirements to be met and comply with applicable legislation and directives. Nonetheless, the board/consortia and ministry Task Force representatives' core position is that the current RFP model can be made to work and given legislative and Directive provisions, has to be made to work. Put another way, and more bluntly, board and consortia and ministry representatives on the Task Force were not persuaded that substantial, in the sense of structural, change in the procurement status quo is required.

³⁰ OSBA submission: "Chamberland Submission", Nov. 29, 2011; ISBOA: "Submission to Task Force", Dec. 8 v.2

Chair's Commentary

I am honoured to have been asked to chair this Task Force. In that capacity I propose in what briefly follows to make some random comments about student transportation competitive procurement, a subject on which all Task Force members, but me, can claim a palpable degree of expertise.

At the outset I should note that I accept that in student transportation (an essential industry) competitive procurement is required by law, and even if it was not, it is desirable because almost \$1 billion of taxpayers' money is on the line. Thus, value for money is an important, but certainly not the only, consideration.

As is made clear in this report, given the composition of the Task Force, it is not at all surprising that there were many issues discussed by the Task Force where there was no consensus. My principal concern as Chair was to ensure that all interests at the table were heard, whether or not information provided was accepted and opinions expressed were agreed to.

With regard to the issues surrounding improvement of the existing RFP process, there was no unanimous support for any proposed recommendations. There was, however, broad (but short of unanimous) support for further review of the RFP process. In my view, there are at least three areas which merit further consideration to help achieve the goals of openness, fairness, accountability, and value for money.

First, the Ministry could extend the transition period for competitive procurement beyond the current deadline of September 2013, in a manner consistent with the Procurement Advisor's comments. Second, the Ministry could retain an independent third party expert to examine the specific issues raised here, and provide specific advice to the Ministry to ensure that the RFP process meets the goals identified in the Task Force mandate. It is important that this review be independent and comprehensive. Third, the Ministry could mandate the use of independent fairness commissioners for all student transportation RFPs, as was done in all of the two-stage pilot RFPs. The report of the Fairness Commissioner should be made available to all RFP stakeholders and the Fairness Commissioner should be retained at as early a stage in the procurement process as is practicable.

In the end, it seems to me that a rough dividing line developed between those generally preferring and respecting the RFP contract "A" status quo and those advocating a different procurement path. School boards (and consortia) were on one side of that line, with operators (OSBA and ISBOA) on the other.

On the basis of the information made available to the Task Force the Ministry has attempted to provide assistance to the major student transportation stakeholders—operators and boards/consortia. That assistance should continue to be provided on a tailored to need basis. The Ministry’s assistance was understandably geared to the RFP contract procurement model because that was the applicable procurement paradigm.

Although the Task Force did not receive “evidence” in the legal sense, it did receive information on specific elements of the student transportation system that brings into question whether a one size fits all procurement model is the only way, thus invoking the question—is there another, or better, way from which the benefits of competition would accrue, but with fewer casualties and downstream risks.

As I see it, the principal downstream risk is the potential gravitation to monopoly service providers. One does not have to be an economist or possessed of particular procurement expertise to recognize that if any procurement model works to limit, or eliminate competition, the result is not in the public interest, for the obvious reason that in a monopoly seller environment, costs will almost inevitably rise, at least in the longer term. This is not new news. Indeed, the Provincial Auditor General in his 1991 report, while advocating a competitive process for student transportation procurement and a sufficient analysis of real costs, was alert to the monopoly seller risk. In that report he stated:

To avoid monopoly situations and maintain flexibility, options to consider would include:

- Grouping routes in packages and seeking invitational tenders for each package;
- Inviting operators to submit proposals complete with the routes they wish to service, the number of vehicles available, and associated costs; and
- Seeking open tenders on all routes but limiting the proportion or routes awarded to any one operator.

I find it difficult to discern whether the procurement casualties (my term of reference) were wounded because of the RFP process model as applied on an across the board basis, or by aspects of the RFP process that can be improved with the benefit of current experience, some of which is referred to in this report. In any case, no one can reasonably assert that in 2012 an operator providing student transportation is directly or indirectly entitled to a lifetime commitment, even without consideration of trade agreements and BPS Directives. But if the procurement system can be modified to limit, or eliminate, unfairness particularly as related to mainly smaller, rural service providers, then changes should be made. For that reason I support the view that a further review of lawful procurement options should be undertaken. In my opinion, that

review should be independent, with the reviewer having access to economic and stakeholder input. The relevant question, in my view, is not whether there is another way, but rather whether there is a better way, taking into account all relevant circumstances including legal and quasi-legal requirements and the nature of the student transportation market. Part of that review should obviously include funding, a critical core issue. That would necessarily involve the Ministry of Finance, given the money involved and the policy implications of this report.

Lastly, I want to express my thanks to ministry staff involved in the Task Force's work, particularly Nathania Ho of the School Business Support Branch and consultant Paul LeBel. Their assistance throughout has been exemplary and invaluable.