



A Failed Procurement Process

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ISSUE: The school bus industry has become unsustainable and there are service disruptions because of the procurement process implemented by the Ministry of Education. Student transportation is a \$1 billion expenditure to the government of Ontario. There are approximately 18,000 school buses operated under contract to school boards (through consortia) by private companies.

1. What is the evidence of a bad procurement process in student transportation?

- a. Court decisions:
 - i. Three separate injunctions granted by the courts against the government procurement system
 - ii. Five damage claims by student transportation companies processing through the courts (one settled). Another case continues into its 7th year.
 - iii. Twelve out of twelve court decisions/motions granted in favour of the industry
- b. Independent reviews:
 - i. Criticized by Task Force Chaired by retired Justice Coulter Osborne
 - ii. Criticized by Student Transportation Competitive Procurement Review Chaired by retired Justice Colin Campbell
 - iii. Investigation by the Ontario Ombudsman with recommendations for change
 - iv. Thirteen contracts established from the procurement process were reviewed by Colin Campbell. All thirteen were found faulty
- c. Unsustainable industry
 - i. Service disruptions and driver shortages
 - ii. Over 40 family operated school bus companies have been forced out of business
 - iii. A division of a large multinational company withdrew its investment from the student transportation market in Ontario
 - iv. The Ministry of Education is supplementing industry by \$70 million
- d. Monopolies:
 - i. Moving towards a monopoly/oligopoly. There are over 50 fewer companies supplying student transportation than there were when the current procurement process was implemented
 - ii. There are 'buyer monopolies'

2. What do independent experts say about the procurement process in student transportation?

- a. **Retired Justice Colin Campbell (Chair), procurement experts Leo Gotlieb and Paul Emanuelli in their Student Transportation Competitive Procurement Review Report:**

- i. *"Without exception, all 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.” (Page 20-21)

- ii. *“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.”*
- iii. *“...establish consistent and balanced legal agreement terms and conditions and fair, open and transparent competition, we also **recommend** that the purchasing consortia rebalance their legal agreement terms ... through a coordinated process that establishes province-wide common standards **based on input from both school boards and operators.**” (pages 21-22, emphasis added)*
- iv. *“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.” (page 4)*
- v. *“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” (page 6)*
- vi. *“Due to the uniqueness of our industry, losing a contract can put a small or medium sized bus company out of business, with owners not just losing their jobs, losing their investment and losing their ‘pension’.”*

b. Paul Dube, Ontario Ombudsman “The Root of the Problem” (2017):

- i. *“While there were multiple contributing causes for the busing disruptions in September, many of the underlying issues originated from the structure of the 2016 RFP.*
- ii. *“...the (consortia) noted that the new broader public sector procurement requirements had impacted how it procured student transportation, and that it had “very little control over who is awarded services.” “ (paragraph 79)*
- iii. *“The busing crisis of fall 2016 was not a discrete event, but a symptom of underlying systemic problems.” (Paragraph 162)*

c. Patrick Daley, Chair Catholic Trustees Association and Chair Hamilton District Catholic School Board:

- i. *“The education ministry has recently announced it is re-examining its school transportation funding model and the process it compels the boards to use in hiring*

school bus companies, he added.... The process for hiring the companies "has created a great deal of instability for the boards and the (bus) operators," said Daly." (Hamilton Spectator)

d. Justice ‘Tranmer in Case Management Order dated May 14, 2014, (paras. 5-7):

In its Statement of Intervener, the Crown stated that “it has no vested interest in the procurement process adopted by any school board or consortium in regard to the contracting of student transportation services. Each board and/or consortium is free to choose whatever forms of procurement best suits its business goals and local market conditions, provided that such method of procurement complies with the BPSAA and the BPSPD” (para.19). ... it is the position of the crown that it did not direct or influence, school boards or consortia, as alleged by the plaintiffs... The representative of the defendant swears in his affidavit that there was no such direction or influence by the Crown.

Documentation that has recently been produced to the Plaintiffs by the defendant and Crown indicates that, to the contrary of the position of the Crown and defendant, the Crown did direct or influence STEO to use only the RFP procurement method solely.” *(emphasis added)*

e. Justice Nolan in enjoining STS’s RFP, dated April 2, 2013:

“...The disastrous results are more than speculative.”

f. From the decision of Justice Hackland dismissing the Crown’s motion for leave to appeal Justice Belch’s decision to allow the Plaintiffs’ claims against the Crown to proceed, dated September 5, 2014:

“Evidence in the motion record suggests an air of reality to the Plaintiffs’ claim that this is not being permitted by the Ministry, in apparent contravention of the Act and the Directive.”

3. Actions of the Ministry of Education:

If the current procurement system was the correct one for our industry the staff at the Ministry would not have done what they have and continue to do.

It is our belief that the staff of the Ministry of Education refuse to admit that the development and implementation of their procurement process is a failure and wrong for an industry with unique characteristics: one size does not fit all.

a. Actions of the Ministry of Education:

- i. One court approved mediation the Ministry of Education refused to cooperate**



- ii. Suggested to the Minister that the Auditor General ordered student transportation be covered under the Broader Public Sector Accountability Act, which there is no record that the Auditor General ever did so
- iii. Ignored the courts, Justice Osborne Task Force, Justice Campbell Review Report and industry warnings. Just 'lip service' with failed committees.
- iv. It is inconsistent in its application of their procurement process; they did not apply it to the contracting of transit vehicles for student transportation
- v. The Ministry staff acted in "apparent contravention of the Act and the Directive"
- vi. While denying it was paying consortia's legal fees, the Ministry was paying them with money from the Ministry's "Education Funds-Other" allocation. This Fund was for programs including those for "aboriginal education, autism supports and training, school mental health strategies", etc. It does not include litigation funding. The Ministry's response:

"The Deputy Minister has delegation of authority to approve the funding in question. All documentation in support of the request and his approval have been provided. The expenditures were paid to STEO and STS through the Education Programs-Other transfer payment line of the Ministry of Education..." *(Email from counsel to the Ministry to Plaintiff's counsel.)*

4.0 Uniqueness of the Industry:

- a. School buses are single use vehicles and generally can not be used for other purposes
- b. With a consortium representing all school boards in a region there is only one buyer: buyer monopoly

5.0 ISBOA Position

While we are still opposed to a Request For Proposal (RFP) procurement process, ISBOA requests a system that also permits a Consortium or School Board to enter into a negotiated/mediated/arbitrated contract with the members of the local carrier associations for student transportation. This process has been used in the this past, including this past September. This process can be supported with the use of a costing model and/or benchmarking.

"Unlike the supply of other goods or services to a consortium for school transportation, many sellers (school bus companies) 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." (Justice Campbell in his report, page 4)