

MEMORANDUM

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Association
Karen Cameron, Executive Director,
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Association ("ISBOA")

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SUBJECT: **Alternatives to RFPs**

In the past year we argued that approaches other than the use of request for proposals ("RFPs") could be used to procure student transportation services, in a way that complies with the requirements of the Broader Public Sector Procurement Directive ("Directive"). We argued that the Directive does not prescribe how school boards should procure, provided they apply the important principles set out in the Directive.

We hoped that our arguments would lead the consortia to take a fresh look at the legal and policy framework and recognize the flexibility that is available to them to be creative in the way they can best achieve value for money in procuring student transportation services. Importantly, we also hoped they would address the concerns about the possibility of monopolies being created through the use of RFPs first raised in 1991 by the then provincial Auditor General, and more recently by The Honourable Coulter Osborne in his Task Force report submitted to the Minister of Education in January 2012.

It is disappointing that to date this has yet to happen, at least not publicly, if it has happened at all. Given the havoc that monopolies could wreak on the market – on the operators by decimating their businesses unnecessarily, and on the school boards by causing them to pay higher prices for the services and achieving less value – it is reasonable to assume that a conscientious buyer would want to thoroughly assess the concerns articulated by highly credible authorities and come to a clear understanding of the long-term impact of RFPs on its own business.

Although we challenged the position that only RFPs meet the requirements of the Directive, for the most part we have not seen a commitment by the consortia themselves to tackle the important issues raised by ISBOA. There may be a wide range of reasons for this lack of commitment. Many objections have been raised by consortia, including some that relate to trade law considerations and others to the commercial realities of applying leading practices to achieve value for money. While

public procurement is complicated at the best of times, it is disappointing that those affected, and who directly represent the public interest, have not seen fit to engage ISBOA and its members in trying to explore and clarify the important issues. Not only is it disappointing from the perspective of ISBOA and its members, but there is an obligation on the consortia under the Directive to assess the concerns and to articulate a response.

This memorandum provides a perspective broader than anything offered so far, with the idea that a more complete picture will emerge about how competitive procurement can be made to work that complies with the requirements of the Directive, but without the use of RFPs. This memorandum is divided into three parts. The first addresses some important Directive and trade law-related issues that have been raised as obstacles to procuring without an RFP. The second sets out examples of ways to procure without using an RFP, which are not presented as one-size fits all approaches, but as illustrations of how the principles that underpin the Directive can be applied. It is emphasized that these are not concrete recommendations, but only examples of the flexibility inherent in the way the principles can be applied. The third part explains the general approach to managing long-term contracts, particularly public-private partnerships, that can significantly enhance value, and that consortia should apply in their own way.

Part 1 – Directive and Trade Law Issues

The Directive and trade law objections have taken many forms. Below are the main objections and a brief clarification.

a) Does ‘Competitive Procurement’ Mean Using an RFP Only?

There is no definition of competitive procurement in the Directive, which is based on five key principles that are intended to help organizations to achieve value for money, as follows:

- **Accountability**
Organizations must be accountable for the results of their procurement decisions and the appropriateness of the processes.
- **Transparency**
Organizations must be transparent to all stakeholders. Wherever possible, stakeholders must have equal access to information on procurement opportunities, processes and results.
- **Value for Money**
Organizations must maximize the value they receive from the use of public funds. A value-for-money approach aims to deliver goods and services at the optimum total lifecycle cost.
- **Quality Service Delivery**
Front-line services provided by Organizations, such as teaching and patient care, must receive the right product, at the right time, in the right place.
- **Process Standardization**
Standardized processes remove inefficiencies and create a level playing field.

There is also no specific requirement or guidance in the Directive on the form that competitive procurement should take, although it is assumed that there will be submissions and evaluations. Provided that the approach taken allows the buyer to optimize value for money in a competitive setting in the specific circumstances, and is otherwise consistent with the other principles, then such an approach complies with the Directive.

Acknowledging the specific circumstances is critical because every situation is different (ie, different number and mix of operators, sizes, etc). It is a given that the unique or distinctive aspects of the specific market need to be taken into account to achieve the most value, and it is something that conscientious buyers focus on. In fact, under the Accountability principle – which states that "Organizations must be accountable for the results of their procurement decisions and the appropriateness of the processes" (underline added) – consortia must assess the unique and distinctive features of their respective market.

b) Are RFPs the Only Way to Procure Competitively Under the Trade Agreements?

An RFP is often an effective way to tap the value of the market, but not always. RFPs are not always effective or even appropriate. In a traditional market environment, an RFP is designed to canvass the market but only in a limited way. An RFP captures the value that is offered by a few bidders, not necessarily all of those that could have bid, but only those who could submit a proposal at that particular time.

The value offered through an RFP is further limited by the fact that the results of an RFP do not assess the entire market, but only a small part of it, at a particular point in time. In that sense, the market created by an RFP is a snapshot in time, and not representative of the entire market. Accordingly, with an RFP, the buyer is at the mercy of what the market will offer, good or bad. Circumstances when an RFP should be used include the following:

- 1) The pool of potential bidders for each RFP usually varies significantly;
- 2) When what is being procured is new and the buyer does not know what the market will offer; and
- 3) When the buyer has no extensive knowledge of the potential bidders and the particular products and/or services they provide.

In short, when the market is not transparent to the buyer, issuing an RFP is the best way to sound the market. But when the buyer has a complete or near complete understanding of its own market and its participants for the services it is procuring, and particularly where the pool of service providers is largely or entirely pre-determined, the use of an RFP can lead to less value being achieved, in the short or longer term, or both.

In our experience in advising on RFP processes in many industry sectors, such an environment is highly unusual, and should have caused the consortia to focus on the concerns about the possibility of monopolies, expressed first in 1991 by the provincial Auditor General, and more recently by The Honourable Coulter Osborne in his Task Force report submitted to the Minister of Education in January 2012. In this type of environment where the alarm has been sounded, a conscientious buyer would especially want to assess the impact of the use of RFPs on its own market. While the trade agreements requirements are not to be ignored, the first order of business for a consortium should be to ensure that its procurement practices are not going to cannibalize its own market in the long term.

c) Is An Approach that Avoids RFPs Protectionist under the Trade Agreements?

As noted earlier, the Directive promotes approaches that support the principles set out in 1, above, including achieving value for money. It does not prescribe how this should be achieved. Whichever

approach is adopted needs to produce competitive results and it needs to take into account the unique or distinctive features of the specific market in question to ensure that not only best value is achieved today, but that a vibrant market for services exists in the future.

The Directive makes it clear that the best way to achieve value for money is generally through a direct competitive process, but the Directive does not preclude approaches that can produce competitive results in other ways. The Directive also recognizes those exemptions, exceptions and certain non-application provisions that are grounded in the applicable trade agreements, including the Agreement on Internal Trade ("AIT"). Some of these, which are discussed below, may be relied on without triggering a protectionist practice.

d) Is "Local Preference" Synonymous with "Local Market Conditions"?

Local preference is a very different matter from local market conditions when procuring. Not only is it different, but even if it were the same, in a market as distinctive and important as student transportation, it is entirely justifiable to take local market conditions into consideration because doing so promotes competition and enhances value for money in the long term.

Local Preference

Local preference may be defined as the practice of favouring local suppliers in procurement competitions simply because they have a local presence. It has been a controversial topic in Canada since the 1990s, when Canada's free trade obligations were firmed up through the international North American Free Trade Agreement ("NAFTA") and the AIT, among other trade treaties. Since then the movement towards greater trade liberalization in the last 15 to 20 years has been consistent, and in fact has been accelerating since 2005, when Stephen Harper became Prime Minister. The specific purpose of introducing the AIT was to try to bring provincial and local governments (and their agencies) in line with international trade regimes that promote trade liberalization and limit public policy options.

Despite the trade agreements' commitment to trade liberalization, the current agreements do not restrict provincial and local governments, including school boards and their consortia, from adopting policies that maximize local benefits and advance public priorities. The AIT, among other agreements, permits the inclusion of Canadian content and regional economic development in public procurement. As such, public procurement remains one of the few economic levers available to the public sector under free trade to promote economic development. As Scott Sinclair of the Canadian Centre for Policy Alternatives commented in 2011, while defending the use of well considered local benefit policies: "Deciding what type of goods and services to purchase, under what conditions and from whom, are all important aspects of what many citizens understand as democratic governance."

In addition to the more conventional economic goals associated with public procurement are those related to innovation and the environment. For example, under Ontario's *Green Energy Act, 2009*, a preferential feed-in tariff programme was set up to encourage the use of renewable energy. The legislation includes significant domestic content requirements for the procurement of renewable energy projects, initially starting with at least 25% of wind projects and 50% of large solar projects being required to contain Ontario goods and labour. Despite some resistance, the provincial Government continues to stand by its programme for the greater economic good of Ontarians.

Along the same lines, in 2008 the City of Toronto's Council adopted a Local Food Procurement Policy that was "aimed at reducing greenhouse gas and smog causing emissions generated by the

import of food from outside Ontario as part of the implementation of the Climate Change, Clean Air and Sustainable Energy Action Plan.” In December 2010, the City was awarded a \$225,000 grant from the Broader Public Sector Investment Fund, which was funded in part by the Ontario Ministry of Agriculture.

Ontario’s funding of local development policies does not operate in isolation. In the United States, the Federal government has long used its purchasing power as a tool to achieve certain social and political purposes. For example, preference for small businesses goes back to at least 1941, and the importance of socioeconomic programs for state and local governments was recognized in the American Bar Association’s Model Procurement Code issued in 1979. Part D of article 11 of the Code is expressly reserved for "Other Socioeconomic Procurement Programs". The Code has been implemented in whole or in part by most States, and by many local government organizations.

Public procurement is also used to foster innovation in the United Kingdom. In a 2010 Parliamentary report relating to the Department of Transport, the comment is made that "Ministers and senior officials recognise the significance of government procurement as a tool with which to exercise influence and also the beneficial link between procurement and innovation in achieving solutions to procurement problems and impacting on economic growth." The United Kingdom does not stand alone in Europe. Many European countries have been early adapters of strategic procurement to foster economic objectives, notably in the area of renewable energy technologies, such as Germany, for example.

In an opinion written for the Columbia Institute Centre for Civic Governance in 2010, lawyer Steven Shrybman even questions whether local preferences could be considered protectionist. He points out that until the advent of the World Trade Organization in 1995, procurement was not even a subject for inclusion in an international trade agreement because until then the trade agreements were entirely focused on the avoidance of interference with trade in goods and services across international borders. Public buyers were not required to spend public funds on foreign goods or services when they chose not to.

If one of the goals in public procurement is to avoid knee-jerk favouritism based on arbitrary preferences determined by locally-elected officials, then it’s easy to see how local policies can be seen as the enemy of the public good. If all organizations prefer local suppliers for spurious reasons, then even the suppliers will suffer when they routinely fail to win contracts outside their own region and prices go up everywhere. But if local policies are used for what they can be, namely a potentially powerful tool of economic development and preservation, it is hard to see why they should not be used in the public sector in Ontario, particularly when Canada’s major trading partners are determined to maintain their use of them. As is argued below, given the distinctive features of the student transportation market in Ontario, focus on local benefits is desirable, and entirely justifiable.

Ontario's *Discriminatory Business Practices Act*

Any discussion in Ontario of local preference quickly stumbles across the *Discriminatory Business Practices Act (Ontario)*, which is unrelated to procurement, but is broadly believed in Ontario to bar certain procurement practices.

The statute was passed in the 1970s by Premier Davis in response to the prohibition from conducting business with Israel imposed by the Arab League against Canadian companies. Arab League countries were boycotting Israel at the time. The background to the legislation shows that the Act was intended as a tool to prevent racial discrimination, wholly unrelated to purely domestic

business practices, including procurement, which did not surface as a distinctive business practice until the 1990s.

The relevant provisions of the legislation are the following:

Purpose and intent of Act

2. The purpose and intent of this Act is to prevent discrimination in Ontario on the ground of race, creed, colour, nationality, ancestry, place of origin, sex or geographical location of persons employed in or engaging in business. R.S.O.

1990, c. D.12, s. 2.

Discriminatory business practices

4. (1) For the purposes of this Act, the following shall be deemed to be discriminatory business practices:

1. A refusal to engage in business with a second person, where the refusal,

(i) is on account of an attribute,

(A) of the second person, or

(B) of a third person with whom the second person conducts, has conducted or may conduct business; and

(ii) is a condition of the engaging in business of the person making the refusal and another person.

The application of the Act to local preference appears to focus on the interpretation of the expressions “place of origin” and “geographic location”. Although many have interpreted the wording of par. 4.(1) 1.(i) to mean that granting a local preference would discriminate against a non-local supplier in a procurement competition, the wording in par. 4.(1) 1.(ii) – which also applies by virtue of the conjunctive word “and” in par. 4.(1) 1.(i)(B) – makes it highly doubtful that the provision applies at all to the granting of a local preference. This wording clarifies that the refusal to engage in business with a second person (ie, a non-local supplier) must be a condition that is imposed on the first person (ie, the transportation consortium) in an arrangement with another person. In other words, the first person must be coerced or pressured in some way into refusing to do business with the second person. If the transportation consortium, or any other public body for that matter, itself determines that it will grant a local preference, then the “condition” required to trigger the application of the provision is absent, and the Act does not come into play on this basis.

There is also the fact that granting a preference does not necessarily amount to a refusal to engage in business. While a local food procurement policy may shut out certain business – those that operate outside the prescribed geographical area – a procurement process that simply recognizes the importance of certain local factors to the manner in which the services are provided would not constitute a “refusal to engage in business.” In fact, as we argue below, taking local factors into consideration in some cases is not only not discriminatory, but it is an absolute requirement, from both a legal and business perspective.

There are no reported decisions that consider how the statute applies to the adoption of local preferences in public procurement. The closest thing we have to guidance appears to be a 2004 decision involving young hockey players from outside the City of Toronto wanting to play for a Toronto-based hockey team. In *Beauchamp (Litigation Guardian of) v. North Central Predators AAA Hockey Assn.*, the Court there considered the application of the statute to the mobility restrictions applied to minor hockey league players living outside the City of Toronto. The Court went on to dismiss the application of the statute on the grounds that the minor hockey league was not “engaging in business”, and clarified that the statute was put in place to combat the Arab boycott of Israel in the mid-1970s and the effects this could have on the Ontario marketplace. As such, the statute appears to be a very unique piece of human rights legislation -- one that says that a province can coerce its residents to avoid participating in a foreign State-sponsored campaign of international discrimination.

A court may someday be called upon to opine on the application of the *Discriminatory Business Practices Act* to the granting of local preferences and provide much needed clarity as to the scope of the legislation. But it is difficult to understand how the drafters of the legislation could have had local procurement in mind at the time of drafting when, as noted above, procurement had not surfaced as a distinctive business practice. To the extent that the legislation could now be interpreted to affect procurement, the court would be called upon to adjudicate on provincial and federal interests, insofar as public procurement is governed by the domestic and international trade agreements.

In the meantime, local benefit policies are applied in many jurisdictions, including Ontario, as a powerful policy tool to promote a wide range of different objectives relating to a variety of different industry sectors. Given the significant benefits that can be produced by such policies, that consortia mechanically refuse to consider local preference is troubling, and demonstrates that consortia fail to understand the deeper policy environment in which they operate.

e) Local Market Conditions

One of the important principles of the Directive is to maximize value for money when procuring. For this purpose, and as one step in preparing to procure, is Mandatory Requirement # 4 of the Directive: Information Gathering. The goal of gathering information, according to the Directive, is that it allows consortia to plan a cost-effective and fair procurement process, and it also helps to identify qualified and interested suppliers.

Implicit in Mandatory Requirement # 4 is the need to ensure that whichever approach is adopted does not weaken the competitiveness of the market in the long term. In other words, robust competition in the market is important to achieve value for money on a sustainable basis. Especially where concerns have been expressed about the long-term competitiveness of the market, buyers should be on the alert that a proper analysis of the market is conducted.

This is the case in the student transportation sector where concerns about the creation of operator monopolies were expressed by the provincial Auditor General as far back as 1991, and again more recently by the Honourable Coulter Osborne in his Student Transportation Task Force report, submitted to the Minister of Education in January 2012. In the circumstances, a thorough analysis by each transportation consortium of its own market conditions is critical given the impact that the use of RFPs may have on the long-term viability of the services being procured.

There is no definition of ‘local market conditions’ in the Directive, nor is it a generally defined term in the procurement environment, this despite the fact that local market conditions must be considered

in every procurement. As is noted in a), above, under the Accountability principle – which stipulates that purchasers “must be accountable for the results of their procurement decisions and the appropriateness of the processes”, purchasers should develop a thorough understanding of their environment so they can maximize value for money. Assessing local market conditions is an important part of being accountable when procuring under the Directive, as it helps a consortium determine how those distinctive features in its own market should shape the design of a meaningful procurement process. The range of considerations that may be taken into account when assessing local market conditions is open-ended and includes the following:

1. Value for money currently being achieved in the market, with reference to efficiencies that should be maintained and inefficiencies that need to be addressed.
 - Examples of efficiencies include collaboration among operators on safety programs, driver training, and assistance in the event of breakdowns or accidents, flexible relationships with the consortium, and operators’ identification of route efficiencies.
 - Examples of market inefficiencies included inconsistent service standards and inconsistent driver and safety training programs.
 - Such factors necessarily differ from one market to the next.
2. The broader impact of the student transportation market, including employees and service providers, and community involvement.
 - The local economic impact of an industry depends on the size and physical location of its members (in this case school bus operators), as well as on the nature of the economies in which they operate (e.g. dense urban areas with diverse economies, or rural areas that tend to have less diversification).
 - An industry can also have an indirect impact on its local market through members’ participation in and contribution to the communities in which they operate, through a variety of voluntary or charitable activities.
3. Relative economic power in the industry, as between the consortium and operators. At a minimum, this requires an assessment of the cost structures and margins of typical operators (which may well differ depending on areas serviced), and the ability of the consortium to lower prices, increase service requirements, or otherwise achieve efficiencies.
 - The relative economic power of the consortium within its market is important to understanding the likely impact of the different competitive procurement options available to it, and how to avoid market failures.
 - It is also important to consider how different procurement methods, and their likely results, may affect the economic power of market participants.
4. The effect of changing demographics and geographic distribution of populations on the future needs of the consortium and the distribution of routes.

- If this analysis demonstrates that significant changes are expected in the near term, it will be important to take this into account in deciding whether and how to bundle routes.
5. How different procurement methods will impact the market, in terms of the risks of monopolies or oligopolies on the one hand, and the potential for a highly fractured marketplace on the other.
- The optimum number of market participants and their economic power will be different from one market to the next. Too few participants will almost certainly lead to monopolistic or oligopolistic market distortions, and this risk has been consistently highlighted in the student transportation industry by, among others, the Auditor General and the Honourable Coulter Osborne.
 - Determining the optimum conditions for a given market will require an economic analysis based on empirical research and past experience. The results may well differ even within the region for which STS is responsible, given the contrast between its urban and rural areas.
6. How different competitive procurement options are likely to affect market competition and viability, both in the short-term and the long-term. Assuming a consortium wants to ensure the local market for student transportation is both competitive and viable in the long-term, it must consider factors such as:
- Operators' business and whether revenue is derived from sources other than student transportation. If an operator has other sources of revenue it may be able to lose part of its business and still participate in subsequent procurement. If, on the other hand, an operator is entirely dependent on student transportation then it will not be able to survive the loss of a significant portion, or all, of its routes.
 - What bids or behaviour by operators amount to aggressive anti-competitive actions. A consortium should consider the cost and pricing structures of an average operator, which may differ from one area to another, and determine a range of appropriate bids. Depending on the market power of operators, bids that fall above and below the range may both represent attempts at monopolistic or similarly anti-competitive responses.
7. A full consideration of the benefits and costs of different competitive procurement options, including the potential for 'hidden' costs.
- The immediate costs and benefits of a given procurement option can usually be readily identified and focus on the service provided and the price paid. More difficult to assess, but equally important, are secondary costs and benefits, including: (i) efficiencies achieved through operator collaboration; (ii) benefits of a flexible relationship between the consortium and operators; (iii) operator input on route

- design and efficiencies; and (iv) initial and ongoing administrative and audit costs associated with different types of competitive procurement.
- Assessing and understanding these factors will allow the consortium to determine the true costs and benefits of different procurement options and whether some will produce better value for money overall.
8. The varying experience of local operators with competitive procurement generally, and with competitive public procurement in particular.
- A high degree of sophistication and experience with competitive procurement among operators may indicate that fewer steps need to be taken to ensure the process is fair and competitive, and may make certain competitive processes more feasible.
 - By contrast, limited sophistication and experience with competitive procurement suggest the need for comprehensive training to ensure all operators can compete fairly.
 - These considerations are also relevant to which competitive procurement process to use, as some, such as RFSQ, Benchmarking to market, and the Subcontractor Model, are more readily understood and adapted to by unsophisticated and inexperienced proponents.
9. The appropriate bundling of routes, if any, in the RFP. Bundling of routes requires proponents to bid on an 'all or nothing' basis for a particular bundle, and is therefore a highly sensitive decision that can have significant ramifications for the ability of operators to fairly compete.
- This will vary enormously depending on the geographic makeup of a consortium's region. The options range from a single bundle encompassing the entire area, to allowing each route to be bid on independently.
 - The approach that is most appropriate will depend on the consortium's assessment of long-term market viability and participation rates, and the relative advantages and disadvantages of bundles to operators of different sizes and in different locations within the region.
10. The appropriate weighting between technical factors and price, given all of the local market conditions that have been identified through the preceding considerations. It is also important to consider whether this should differ based on the area and routes that are subject to the particular procurement.
11. Whether award caps should be used, what those caps should be, and whether the appropriate cap is different depending on the area subject to the procurement.

- An important consideration in student transportation, which is a vital daily service, is whether to have redundancies such that if one operator fails or backs out of a contract, the routes can be serviced by other operators.
- The number of operators in the marketplace will have a significant impact on whether such backup service provision is feasible, especially where distances are comparatively large.
- These considerations should inform any award cap used, and may also suggest different award caps for urban versus rural routes. In a tight geographic area a smaller number of operators can provide backup because they will be servicing routes that are still comparatively close to their facility. In a wider geographic area it may be necessary to have a greater number of operators before this is possible.

There is common belief among consortia that to assess local market conditions inevitably means awarding in a non-competitive environment. This is not the case. In the paper entitled "School Transportation Services Procurement Guideline", dated October 2008 and prepared by PPI Consulting Limited, on page 5 the paper notes that "In a non-competitive approach, a contract is awarded without competition based on an analysis of local market conditions". An assessment of the local market conditions may indeed lead to a sole source award, but it can also lead to the conclusion that the most effective means of creating a sustainable competitive environment is to avoid the use of an RFP. While "local market conditions" and "sole source award" are not synonymous, assessing local market conditions remains a best procurement practice to ensure that consortia are well positioned to make the best decision on the right approach to procuring.

Importantly, the PPI paper acknowledges the possible differences that can exist from consortium to consortium. It states: "For example, the situation in one geographic area may not warrant a competitive process based on an analysis of the factors identified above where as the requirements and situation in another geographic area may confirm that the most value will best be achieved through a competitive process." Of course different situations may also lead to approaches that are equally competitive – one that calls for an RFP, and the other not. The broader point is that blind competition for the sake of competition is not always a good thing. As the federal Competition Bureau noted in its 2007 Report entitled "Self-regulated professions – Balancing competition and regulation":

[The Bureau] does not argue blindly for competition at the expense of all other policy objectives, since there may be legitimate public interests at issue other than the efficient functioning of markets. The Bureau does, however, advocate that to be effective, regulatory decisions must be fully informed, keeping in mind the many direct and indirect effects they may have on consumers through reduced competition. Regulation that is excessive or restricts competition more than an equally effective alternative can come at great cost and should be removed or modified."

What is generally needed then, according to the Bureau, is not blind competition, but smart competition. The practice of consortia to blindly issue RFPs ignores the "many direct and indirect

effects they may have" on their own market "through reduced competition", in contravention of the Directive.

Southwestern Ontario Student Transportation Services ("STS") offers a telling case study in this respect. In their first Effectiveness & Efficiency Review report of STS (October 2010), Deloitte stated that "Local market conditions should be considered at all points in the development and evaluation of any service proposal." The report encourages the consortium to place "a value on having local experience as part of the evaluation criteria", provided local experience is not an overriding factor. Although the Deloitte report encourages a routine assessment of local market conditions when procuring and it recommends placing limits on the amount of business given to any single operator for the purpose of avoiding a monopoly situation, the evidence shows that STS has failed to sufficiently assess the scope of local market conditions. There is no indication that STS or any other consortium has conducted a thorough analysis that demonstrates that a monopoly situation will not exist in the mid to long term in their respective region. While consortia have focused on the mechanics of RFP processes, they have not assessed their context outside the scope of the RFP. On the basis of any legal interpretation of the Directive's accountability requirements, conducting a broad analysis of local market conditions is a mandatory best practice.

f) Closed Tendering

According to the Ontario PC leader, "closed tendering" refers to contracts that are automatically renewed, sometimes for extended periods, often related to collective agreements with unions. These are sometimes referred to as 'evergreen contracts'. As a rule, such contracts are not intended to maximize value for money because there is no competitive tension where they are negotiated, as the market is not being tapped in terms of pricing and quality of services. In our experience such contracts are often rolled-over either for the convenience of the buyer and/or for political reasons.

ISBOA does not now and has never supported the use of evergreen contracts, as just described. Operator contracts in the past were performance-based and could be lost at any time for poor performance. The terms were arrived at on an open-book basis, such that the school boards/consortia were in a position to put downward pressure on pricing and other measures of value. It is important to bear in mind that when the cost structure of the service providers is fully transparent to the buyer in a market where the number of service providers is extremely limited and where each service provider has but one or two customers, the buyer controls the market. This is not a conventional market, not one where RFPs make sense. Not only did operators not operate in a "closed tendering" context, as described by the PC leader, but the use of alternatives to RFPs in such a unique market also would not amount to "closed tendering".

The PC leader offered as a basic principle, in the summer of 2012, that all companies should be allowed to bid on government contracts, if they so choose. As a matter of principle, ISBOA shares this view. Procuring in a competitive environment is highly desirable and interested companies should be allowed to enter the market. The broad approach proposed by ISBOA not only strongly discourages the use of the type of evergreen contract described above, but it in fact encourages the development of an approach that will produce more value for money in the provision of student transportation services.

As the discussion below makes clear, the goal of the members of ISBOA is to maximize value for the taxpayers of Ontario, but in a way that is sustainable, and that ensures that a vibrant competitive market will exist in the future. ISBOA is opposed to closed tendering and urges responsible tendering, which is unfortunately not the case in student transportation services today. Responsible tendering requires a much more comprehensive grasp – a command – of the principles that define and support the requirements of the Directive, which the consortia have not demonstrated.

Part 2 – Approaches to Competitive Procurement

Because the precise conditions in each region vary significantly, an RFP in all circumstances is an inappropriate tool. For the same reason, there is no single 'right' approach to procuring that applies all the time, everywhere. Procurement must be 'open, fair and transparent' and it must be sustainable, in the sense that an approach used today that undermines achieving value for money in future procurements is a poor procurement practice that needs to be replaced. Along this line, the consortia should be concerned that current prices being proposed under various RFPs are overly aggressive. The recent decision by Madame Justice Nolan in the Southwestern Ontario Student Transportation Services injunction application shows that pricing from the winning bids in the 2011 RFP were 20% below the benchmark cost study figure set by Deloitte's in their 2007 report (probably based on 2005 figures or earlier). In their report, Deloitte found that operators should receive \$41,500 per bus per year (for a 72 passenger bus, 100 km. route/day for 188 days per year, based on a fuel price of \$0.86/ltr) to provide safe and reliable service. It is also noteworthy that the 20% reduction was achieved one year after the Ministry of Education provided top-up funding to STS operators were already the lowest paid in Ontario.

The important thing when considering alternatives to the use of RFPs is to note first, that what matters the most is not the precise proposed mechanics, but whether the proposed mechanics create competitive tension in a way that will maximize value for money while complying with the Directive and the trade agreement requirements. Second, if the proposed approach does not comply perfectly at all times, the question to ask is whether there is a valid and defensible reason, and what mechanisms can be put in place to comply, in the short and long term? Here again, we are not aware that the consortia have asked the hard questions, much less provided any answers. Doing so would be an expression of 'responsible tendering'.

Below are examples of approaches that are designed to create and sustain a competitive procurement environment that can produce the value normally associated with the use of RFPs, or better. The approaches mentioned are not intended to be applied as presented. They are intended to stimulate and guide a discussion of the unique attributes of the student transportation industry in Ontario. With a deeper understanding of the dynamics of the industry, consortia and operators will be able to construct an approach that may apply differently in each area, and that meets the principles of the Directive and the trade agreements, while operators continue to provide safe and reliable services to consortia.

A. RFPs in Large Urban Areas

There may be situations where issuing an RFP makes sense, possibly in a large urban area where existing operators enjoy several revenue streams. Here the consortium would need to assess which operators provide urban services, and understand specifically what lines of business each operator is in. The consortium would need to assess its market in detail to ensure that the results of the RFP did not decimate the competition within the market in the longer term.

The routes captured by the scope of the RFP would clearly meet the requirement of competitive procurement, but would not automatically meet the principle of “accountability” under the Directive, if it proved that the pricing was artificially low, designed to eliminate competition in the marketplace in the shorter term, so that rates could then be increased once most of the competitors had exited the market. This type of predatory pricing is an example of the kind of thing that consortia need to be looking for when conducting RFP processes. We are not aware that any consortium anywhere in Ontario has conducted an appropriate analysis in this regard, although we have heard directly from some consortia managers who acknowledged explicitly that such predatory practices were occurring, but added that it was not their responsibility to deal with the potential consequences. This is yet another example of irresponsible tendering, the type that should prompt the Ministry of Education to step in to ensure that the interests of taxpayers are protected.

The results of RFP processes in urban areas could be used to set a benchmark for other routes in the region that were not awarded pursuant to an RFP. While an appropriate adjustment could be made in the pricing differential between urban and non-urban routes, routes awarded that tracked the RFP results in the region could not be said to be non-competitive, in the sense of a traditional sole sourcing where free market dynamics are absent.

Routes awarded on a non-RFP basis but tracking the results of an RFP would consistently be subject to competitive tension and would meet the Directive’s main operating principles, including the value for money principle. This practice would be similar to the former Government of Ontario practice of publicly posting all of the negotiated rates, a practice that exerted downward pressure on the rates across the entire market, in a way that no RFP could ever achieve. Applying an objective reference point for routes awarded on a non-RFP basis would not amount to “closed tendering” where contracts are simply rolled over without being tested and validated by the market.

Another approach to establishing the price and the value of the services provided on a non-RFP award could be to compare similar routes in other regions to ensure a fair comparison. Consortia could share relevant information among themselves regarding select comparable routes to maintain competitive pressure. To ensure the viability of the arrangement in the long term, consortia could collaborate to conduct a market cost benchmark study to validate that value for money is achieved. Such an approach would contribute to a sustainable long-term market for student transportation services in the region in question, avoiding the creation of monopolies. The market could also be said to be “open”, since potential new participants could enter the market by bidding into the existing RFPs issued by a specific consortium.

Importantly, the dynamics of the proposed arrangement would also address the concern expressed by the Chair of the Student Transportation Task Force in 2012 that no operator is entitled to a “lifetime guarantee”. Because the contracts awarded on a non-RFP basis would be subject to ongoing competitive pressure, operators would continuously be re-assessing whether they can continue providing the services. Such operators might decide on their own to exit the market at a time of their choosing, when doing so would avoid risking the loss of their investment, or they could be forced out for non-performance, but in a way calculated to avoid risking the loss of their investment, or becoming “casualties”, as the Task Force Chair referred to the brutal loss of an operator’s business. How operators exit the market is discussed below.

B. Annual Rolling RFPs for Small Route Bundles

Similar to A, above, but different, would be for consortia to issue an annual RFP for a small percentage of the overall routes in the region, possibly 10%, with the routes identified corresponding

in some way to the life span of the vehicles in question. As such, an operator that lost routes would be in a less vulnerable position because (i) the number of routes lost would not fatally wound the operator's business and (ii) the bulk of the investor's financial investment associated with certain buses would have been largely recouped.

This arrangement would require a degree of planning and consultation between a consortium and its operators, in keeping with most long-term contractual relationships having attributes of public-private partnerships (P3s). How consortia and operators should work together in a P3 environment is discussed below, in Part 3.

An annual, rolling RFP for a small number of routes would clearly meet the trade agreement requirement of "openness", where new participants could look to enter the market through the bidding process and, if structured carefully, would again avoid the brutal loss of an operator's business. Provided that procurement transactions are not structured for the deliberate purpose of artificially defeating the principles set out in the trade agreements, the agreements impose no restrictions or limitations on the sequencing of opportunities to tap the market. The costs of conducting an annual, rolling RFP is a consideration, one that needs to be weighed against the greater costs of seeing dramatic rate increases resulting from having too few participants in the market.

C. Subcontractor

Canadian federal procurement includes a policy on Industrial Regional Benefits ("IRBs"). The IRB policy ensures that federal Government defence and security procurements generate high value-added business activity for Canadian industry by requiring successful bidders to undertake business activities in Canada, often in particular regions, valued at 100 percent of the value of the defence or security contract that has just been awarded. The IRB "obligation", as it's called, typically requires the successful bidder to subcontract parts of its award to certain local companies to ensure a long-term, thriving market. The obligation is a contractual commitment that forms a part of the overall government procurement contract.

IRB obligations are not appropriate everywhere, at all times, but there is a recognition that public policy may be used to achieve certain economic objectives that contribute to a sustainable, vibrant local market in the longer term. It is well known that some parts of the maritime provinces have benefitted significantly from IRB obligations in the last 10-15 years, a practice that some have mistakenly labeled protectionist.

While IRB obligations are specific to the defence and security industry, the policy has been mandated because it promotes local markets in ways that are valued, for reasons that are justifiable and therefore defensible. With some analysis, it may be possible to apply some form of amended IRB obligations in the student transportation sector in a way that would best serve the long-term interests of the taxpayers, and the majority of the operators. At this time, it is difficult to appreciate why consortia blindly apply RFPs when the circumstances cry out for a more comprehensive analysis, based on approaches that already exist.

D. Exit Strategy

Operators recognize that no "lifetime guarantee" is available, as the Honourable Coulter Osborne described a market where competition is absent. While ISBOA does not support the blanket use of

RFPs for the reasons noted earlier, ISBOA does not support closed tendering or sole sourcing. Whichever alternatives to RFPs might be implemented, ISBOA recognizes that new participants must have a way to enter the market and that existing participants must have a way to exit the market.

Exiting a particular market from having failed in an RFP competition is normal, where market participants enjoy the mobility typically experienced by companies in ordinary markets. A construction company that operates across the province, or nationally, is one example. With student transportation, however, where many operators have a single customer, ordinary market dynamics are not at work. In such a context, the most common competitive vehicle, the RFP, is rarely, if ever, appropriate.

Similarly, a market where the service providers subsidize entirely the investment required to provide the services to their customers is unheard of. To our knowledge there is no industry where service providers routinely absorb the full costs of their investment for the benefit of a single customer, in effect subsidizing the customer, the school boards. While the practice may have made sense when service contracts were rolled over (subject to providing adequate quality services), the practice is unreasonable in an environment where a loss on an RFP competition can mean losing the entire business.

With or without an RFP, given the unique attributes of the student transportation industry where single-customer operators risk the full loss of their investments, a sensible and practicable exit procedure is compulsory. This can take many forms, depending on whether an operator is exiting voluntarily or for cause. A voluntary exit may be triggered by an operator's acceptance that it can no longer continue to compete, for a variety of reasons. In such a case, the operator will better control the conditions of its exit, and may be able to make satisfactory arrangements regarding the disposal of its assets.

An exit for cause, on the other hand, means a loss of control, and the vulnerability that comes with it, in terms of protecting the operator's financial interest. While exits for cause may not be frequent, in a business context where there is no "lifetime guarantee", a clear procedure or policy is required to accommodate the possibility. A policy could be put in place requiring the development of a customized work-out plan to oversee an operator's exit. Such a policy could include broad procedural and financial parameters guiding the exercise.

Alternatively, each services agreement could include a financial formula prescribing the recovery by the operator of its investment from the school board at fair market value, adjusted to reflect the lifecycle of the operator's investment. The contractual relationship between each operator and its consortium would directly reflect the operator's financial investment. Just as the failure of the more than one dozen trust companies in the 1990s was proactively managed by the financial services regulatory bodies so as to avoid harm to depositors and other investors, the unique attributes of the student transportation industry call for a similar regulated approach to market exits for the purpose of mitigating the harm and ensuring a vibrant, reliable, long term competitive student transportation industry in Ontario.

The purpose of this Part D is not to prescribe or recommend any particular exit strategy, but to emphasize that in a market as unique as student transportation where blanket RFPs are inappropriate in most regions, a customized exit strategy is an absolute requirement.

Part 3 – Relationship Management

Contracts between the consortia and the operators for student transportation services are a form of public-private partnership (P3, or PPP), which The Canadian Council for Public-Private Partnerships defines as "A cooperative venture between the public and private sectors, built on the expertise of each partner, that best meets clearly defined public needs through the appropriate allocation of resources, risks and rewards."

A successful long-term relationship is essential in a P3. The commercial arrangement in a P3 must be acceptable to both parties – offering value for money for the public organization and adequate profit for the P3 provider. But as the Ministry of Finance of Singapore puts it clearly in describing the main features of P3 arrangements, while the commercial aspects are important, "the relationship between the [public organization] and the PPP provider – the way they regard each other and work together during the PPP contract life - is vital to ensuring that the PPP does indeed lead to value for money. Good relations between the [public organization] and the PPP provider should foster a climate which encourages both parties to suggest or make improvements in the quality of services delivered."

The use of RFPs by the consortia and the recent refusal by many consortia to directly and openly engage with the operators in discussions about contract extensions and the use of alternative approaches to procuring amounts to a patent disregard of a fundamental best practice in P3 relationships. The current practice also compromises the quality of the services provided, both in the short and longer term, a development that should be of great concern to the Ministry of Education. The lack of insight by consortia into the detailed workings of the Directive, and their related unwillingness to allocate the time and effort to conduct the required analysis, on their own or with the assistance of the operators, flagrantly contravenes the requirements of the Directive.