

memorandum

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To	Bid Evaluation Steering Committee	Your ref	Stage 2 Light Rail Transit Project
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**Trillium DBFM RFP - Technical Evaluation
Bid Evaluation Steering Committee Discretion & Re-Evaluation**

The Bid Evaluation Steering Committee has asked us to clarify the steps it may take in the event that one or more proposals fails the minimum scoring – or has other issues – with respect to the requirements for the Technical Evaluation as set out in the Trillium Design-Build-Finance Maintain (**Trillium DBFM**) Request for Proposals (**RFP**) and the Ottawa LRT Stage-2 Evaluation Framework, RFP, Trillium Line Extension Project dated August 10, 2018 (**Evaluation Framework**).

This memorandum considers whether and to what extent the Bid Evaluation Steering Committee may exercise its discretionary right to allow a Proposal to continue in the evaluations process notwithstanding a failure to achieve a minimum score in one or more of the technical categories, or alternatively require the Technical Evaluation Team to re-evaluate any Proposal or part of a Proposal, as part of the City's evaluation of the RFP.

Summary & Conclusions

In our view, the Bid Evaluation Steering Committee may exercise its discretionary right and make a recommendation to the Executive Steering Committee to allow a Proposal to continue in the evaluations process notwithstanding a failure to achieve a minimum score in one or more of the technical categories. Once that recommendation has been made it should be formally confirmed by the Executive Steering Committee. Based on our analysis of the RFP, and taking into account applicable principles from the relevant trade agreements, the Purchasing Bylaw, and the common law, this discretion may only be exercised during the technical evaluation and before the financial evaluation is considered by the BESC.

The RFP Evaluation Framework and Committees

The evaluation teams and process are defined both in the RFP and the Evaluation Framework. The RFP sets out a general overview but much of the detail is dealt with in the Evaluation Framework, including defining the respective sub-committees or teams and their roles during evaluations.

The RFP does not strictly define the organizational framework for the evaluation process. Section 6.1(1) RFP provides:

The Sponsor will establish an evaluation committee (the “Evaluation Committee”) for the purpose of evaluating Proposals in accordance with the RFP Documents. **The Sponsor, in its sole discretion, will determine the size, structure and composition of the Evaluation Committee and any sub-committees of the Evaluation Committee.** The Evaluation Committee may be assisted by and receive advice from any of the Sponsor’s Advisors, and any other employees or representatives of the Sponsor in any manner determined necessary or desirable by the Sponsor. (emphasis added)

The only limit placed on the composition of the various sub-committees in the RFP itself is that the technical and financial evaluation teams must be different. Section 6.5(1) provides as follows:

The Sponsor will conduct the evaluation process in accordance with the steps below in the manner contemplated in Part 3 of Schedule 3 to this RFP. The Sponsor retains the right to conduct all or part of the evaluations identified in Step 2 and Step 3 concurrently provided that separate evaluation teams for each Step will be composed of different members of the Evaluation Committee. (emphasis in original)

Section 6.5.3(1) RFP reinforces the separation requirement. It states that “The evaluation teams engaged in the Step 2 evaluations will be different than those engaged for the Step 3 evaluations”. Putting these two requirements together, the RFP requires that the team undertaking the financial evaluation be different to the technical evaluation team, and composed of different people.

The remainder of the composition and organization is essentially left to the discretion of the City. The City has, however, set out a clear organizational structure in the Evaluation Framework. Accordingly, the OLRT Bid Evaluation Steering Committee (**BESC**) has a general oversight function and may approve and review evaluation scores submitted by the individual teams. Specifically, section 2.2(2) of the Evaluation Framework defines the powers and role of the BESC as follows:

The OLRT Bid Evaluation Steering Committee is comprised of the individual Participants designated in Appendix 9 to this Evaluation Framework and is responsible for the following:

- (a) approve all documents related to the Evaluation Process;
- (b) propose and approve any divergence from the Evaluation Framework where, in the course of the Evaluation Process, and in accordance with the OLRT Bid Evaluation Steering Committee’s broader Due Diligence function, such divergence is determined to be appropriate under the circumstances and otherwise in accordance with, and respecting the provisions of the RFP;

(c) delegate authority to each team in Section 2.1, Figure 1: Reporting Structure, as defined within this Evaluation Framework;

(d) review the technical conformance review checklist for each Proponent;

(e) may review the Technical Submissions and may review the work of the Evaluation Teams. Will only gain access to Financial Submissions once the results are presented by the financial team lead at the OLRT Bid Evaluation Steering Committee Meeting;

(f) for greater certainty, notwithstanding anything in this evaluation framework, the OLRT Bid Evaluation Steering Committee shall not have access to the financial submission prior to presentation to the OLRT Bid Evaluation Steering Committee pursuant to Section 3.5.3

(g) approve scoring criteria to be used by the Technical Evaluation Team, Financial Evaluation Team and the Technical Conformance Team, all of which are attached as appendices;

(h) review findings from the Conflict Review Team, Completeness Review Team, Technical Conformance Team, Technical Evaluation Team, Financial Evaluation Team, and the Innovation Submission Evaluation Team;

(i) attend any meeting of the Team, listed in Section 2.1, Figure 1: Reporting Structure, excluding the Financial Evaluation Team;

(j) complete Due Diligence with respect to the Rated Criteria, in the manner prescribed in Section 3.5.3;

(k) rule on any non-conformance issue identified by the Completeness Review Team, Technical Conformance Team, Technical Evaluation Team, and Financial Evaluation Team. Any decision whether non-conformance is material, or whether such material non-conformance should be waved must be escalated to the Executive Steering Committee and the Fairness Commissioner;

(l) rank Proponents based on the Final Proposal Score and, in the event of a tie in the Final Proposal Score between two Proponents, gives the Proponent with the higher Financial Score a higher ranking;

(m) may assign additional ex-office members if deemed necessary;

(n) the Team Lead may assign a member of the project team, who is not a team member listed below, as a note taker to take meeting notes; and

(o) endorse the recommendation of the Preferred Proponent at the completion of the Evaluation Process for approval by the OLRT Executive Steering Committee.

For the purposes of the RFP, the OLRT Bid Evaluation Steering Committee derives its authority from the delegated authority of the Director, O-Train Planning and reports to the OLRT Executive Steering Committee.

(emphasis added)

Similarly, the Technical Evaluation Team is defined as being “accountable to the [BESC]” and must both “report to the [BESC] as required” and “provide a final presentation to the [BESC] at the completion of the Evaluation Process”.¹

According to Section 4 of the Evaluation Framework, in conducting its review of the Technical Evaluation, the BESC is granted express powers to ask questions of the Technical Evaluation Team and to require a re-evaluation if deemed necessary, before any financial submission is presented to it. In Section 4.3 “Step 2 – Technical Evaluation and Consensus”,² the Technical Evaluation Team Lead is responsible for presenting the final consensus scores to the BESC.³ The BESC must then perform Due Diligence on the consensus results “in order to arrive at a final Technical Submission Score”,⁴ and may identify issues and ask questions of either the Technical Evaluation Team Lead or the Evaluation Manager.⁵ It may also require that the Technical Evaluation Team re-convene to review and if necessary re-score and re-evaluation the Technical Submission.⁶

It follows from these provisions that the BESC has a residual discretion to modify the scores provided to it on the basis of its due diligence process, although major issues which require clarification from the Technical Evaluation Team will be subject to a formal re-evaluation.

Following any re-evaluation, if the BESC still does not agree with any score or response submitted to it by the Technical Evaluation Team, it has a discretion to “make its own decisions on the issue in accordance with the principles of the RFP and this Evaluation Framework”.⁷ Whether or not a re-evaluation occurred, the BESC then finalizes the scores – if necessary by seeking SME input or escalating any remaining issues to the OLRT Executive Committee.⁸

In summary, provided that it is complying with the provisions of the RFP and remaining within the process laid out in the Evaluation Framework, the BESC has a broad discretion to review and modify scores submitted to it by the Technical Evaluation Team, if necessary following a re-evaluation process. It may also escalate any matter it cannot resolve to the OLRT Executive Committee or seek input from a third-party SME to assist it in making its final decision on technical scoring. The only limit on this process is that any involvement of BESC in relation to the Technical Score must cease when the results of the financial evaluation is submitted to it, and it may not have any access to information about the financial evaluation before it has finalized the technical scores. This includes any decision as to whether a Proposal shall continue to be considered in the RFP process under the minimum scoring provisions, discussed further below.

Non-Compliance and Minimum Scoring

Relevant RFP Provisions

A number of different provisions of the RFP are relevant to the question of what actions the City may take if confronted by a Proponent who has failed to achieve an applicable minimum score during scoring of the Technical Submission.

¹ Evaluation Framework, section 2.2 (8)

² Mis-numbered in the Evaluation Framework, Section 4, as 2.3. To avoid confusion with the earlier Section 2, we have used corrected numbers throughout this memorandum (i.e. 2.2 of Section 4 is referred to as 4.2, while 2.2 of Section 2 is referred to as 2.2, and so on).

³ Evaluation Framework, section 4.3(5)(a)

⁴ Evaluation Framework, section 4.3(5)(d)

⁵ Evaluation Framework, section 4.3(5)(e)

⁶ Evaluation Framework, section 4.3(5)(e)

⁷ Evaluation Framework, section 4.3(6)(c)

⁸ Evaluation Framework, section 4.3(7)

According to the RFP definitions of non-compliance, a proposal is only “non-compliant” if it contains a “Material Deviation”.⁹ A Material Deviation is defined restrictively and does not appear to include a failure to achieve a minimum score. Section 6.4 RFP provides some clarification. Section 6.4(1) RFP provides:

A Proposal that contains a poor quality response and/or a failure to conform to a requirement of the RFP Documents shall not be deemed to be non-compliant and such poor quality response and/or failure to conform shall not be deemed to be a Material Deviation unless, and only unless, such poor quality response and/or failure to conform to the requirement of the RFP Documents, in the sole discretion of the Sponsor, meets the definition of a Material Deviation as set out in RFP Section 6.3(1).

Meanwhile, Section 6.4(3) RFP provides:

The quality of a Proposal, an assessment of which is made during the evaluation and scoring of that Proposal and which is separate and distinct from the assessment of the compliance of a Proposal, may be subject to one or more minimum scoring thresholds in accordance with Part 3 of Schedule 3 to this RFP.

Finally, Section 6.4(5) RFP provides:

The submission of a compliant Proposal that contains a poor quality response and/or any failure by a Proponent to conform with any requirement of the RFP Documents which is not a Material Deviation does not derogate from the obligations of the Preferred Proponent pursuant to RFP Section 9.2, or of Project Co under the Project Agreement to bring all aspects of a Proponent’s proposed design, construction or financing into conformance with the requirements of the Project Agreement, pursuant to its terms.

Putting these three provisions together, and considering the overall scheme of the RFP, it would appear that a failure to achieve an applicable minimum score does not constitute a Material Deviation but merely means that the Proposal is of “poor quality”, unless the failed score is so fundamental that it fits one of the categories for Material Deviation set out in Section 6.3(1) RFP.

In the section of the RFP which deals with the Technical Evaluation, the City has a discretionary right to decide whether the Proposal will continue to be evaluated. Sections 6.5.2(4) and (5) provide as follows:

(4) If a Proponent fails to achieve any of the minimum scores as set out in the applicable provisions of Part B – Proposal Evaluation of Part 3 of Schedule 3 to this RFP, then, **as part of Step 2 of the evaluation process and pursuant to and in accordance with such provisions, the Sponsor may, in its sole discretion, determine whether that Proponent’s Proposal will continue to be considered in the RFP Process.**

(5) In the event that a Proponent’s Technical Submission fails to achieve any of the minimum scores as set out in the applicable provisions of Part B – Proposal Evaluation of Part 3 of Schedule 3 to this RFP and the Sponsor does not exercise its discretionary rights as set out in RFP Section 6.5.2(4), the Proponent’s Proposal will not continue in the evaluation process.

⁹ RFP Section 6.3(1)

(emphasis added)

Schedule 3 Part 3 RFP also provides some clarification to what matters the City may consider in deciding whether or not a Proposal will “continue”. Part B of Schedule 3 Part 3, section 3.0(c) provides:

If a Proponent fails to achieve any of the General Technical Submission Minimum Score, Design Submission Minimum Score, Construction Submission Minimum Score, or the Financing Plan Minimum Score, the Sponsor may, in their sole discretion, determine whether that Proponent’s Proposal will continue to be considered in the RFP Process. **In considering whether the Proponent’s Proposal will continue to be considered in the RFP Process, the Sponsor may take into account, among other matters, any one or more of the following:**

- (i) the severity of the failure to achieve the applicable minimum score;
- (ii) the Proponent’s total Technical Submission or Financial Submission score; and
- (iii) whether multiple Proponents have failed to achieve a minimum score.

(emphasis added)

It is important to note that the total Technical Submission score and the total Financial Submission Score are included as alternatives in the above provision. In our view, this is important. Schedule 3 Part 3, section 3.0, refers back to both section 6.5.2 RFP (Step 2 – Review and Scoring of the Technical Submissions) and 6.5.3 RFP (Step 3 – Review and Scoring of the Financial Submissions). It is intended to provide criteria for both non-continuance provisions set out in those two sections. Considered objectively, if it had been intended that the City should consider the total proposal score including both the technical and financial scores, it could have said so. The total score is a defined term in the RFP, the “Final Proposal Score”. The fact that the Technical and Financial scores are laid out separately supports the view that that the City, in determining whether a Proposal should continue in the evaluation process under Section 6.5.2(4) and (5), should only consider the total Technical Submission score.

The above extract from Schedule 3 Part 3 RFP is also important, in our view, as it provides an illustrative clarification to the open-ended discretion provided for in Sections 6.5.2 and 6.5.3 RFP. If a court were interpreting whether it was appropriate for the City to allow a Proposal to continue, it is likely it would consider this provision as qualifying the discretion in line with the matters to be taken into account. Thus a refusal to allow a Proposal to continue which failed to consider e.g. a failure to meet a minimum score by a minor amount such as 1 or 2 points, or which did not take into account the Total Technical Submission score in its assessment, might be considered arbitrary.

The additional factors in Schedule 3 Part 3 are not exhaustive. They are merely illustrative factors which the City should be taking into account in deciding whether to allow a Proposal to continue in the evaluations process. They also do not limit the broad discretion in Section 6.5.3 RFP.¹⁰ Likewise, the fact that Schedule 3 Part 3 refers to specific scores and does not include e.g. Maintenance and Repair does not mean that the City, in exercising its discretion under Section 6.5.3, should not take the same, or similar factors into account. The City is bound at all times to act in good faith and avoid arbitrariness in deciding whether, and how, to exercise its

¹⁰ This is further supported by Section 2.2.(1) RFP which provides that in case of any inconsistency between the main body of the RFP and its Schedules, the main body of the RFP shall prevail.

discretionary rights. In our view the factors set out in Schedule 3 Part 3 provide examples of factors which the City, exercising its discretion in good faith, should be considering as a matter of course. The City should also, as part of its obligation to Proponents to act in good faith, actively consider whether it is appropriate to exercise its discretion under the RFP. Although it is inherent in a discretionary right that the City may decide not to exercise it, this should in our opinion result from a reasoned decision. Should the City simply attempt to avoid the issue by not giving any consideration to allowing a Proposal to continue based on Section 6.5.3 RFP or the other provisions set out above, it is possible that a court would hold this to be an arbitrary refusal based on a failure to consider relevant factors (such as the severity of the failed score).

There is a tension between the Technical Evaluation provisions (set out in Section 6.5.2 RFP and Schedule 3 Part 3 RFP) and the definition of non-compliance and Material Deviation in Sections 6.3 and 6.4 RFP. In particular, it is unclear whether a failure to achieve a minimum score is considered to be a non-compliance or (non-material) deviation. One possible interpretation is that a failure to achieve a minimum score is a non-compliance, and may therefore be waived at any time pursuant to Section 6.3(3)(a) RFP, in addition to the decision whether or not to continue the evaluation of the proposal. The alternative view is that minimum scoring is in a separate category and may only be waived as part of the Technical Evaluation, i.e. in determining whether the Proposal should or should not continue in the evaluation process.

In our opinion, it would be prudent for the City to assume that the second view is the one that will prevail, for three reasons. First, it is consistent with the scheme of the RFP which distinguishes between compliance review and scoring of the technical submission.¹¹ Second, it is consistent with the schema of general evaluation provisions set out in Section 7 RFP. Section 7.1(1)(c) deals with whether a “failure to comply constitutes a Material Deviation” while subsection (g) deals with scoring and whether a Proposal will “cease to be considered in the evaluation process”. Third, it is the conservative view and avoids any risk that a court preferred the second view and the City were found liable on the basis that it chose to wait until after completion of the Technical Review and sought to rely on Section 6.3(3)(a).

On the second view, it does not appear to be open to the City to waive the minimum scoring requirements *except* as part of the Technical Evaluation process and before any consideration is given by the BESC to the Financial Submission.

For the same reasons, it would entail significant risk to the City were it to rely instead on Section 10.2(3) RFP to attempt to waive the minimum scoring provisions later in the process. Section 10.2 deals with special circumstances, and 10.3(3) provides a discretionary right to the City to waive a Material Deviation or to “decline to disqualify a non-compliant proposal”. Given the separate way in which the competing concepts of disqualification and a decision whether a Proposal should continue to be considered in the evaluations process are defined in Sections 6 and 7 RFP, there is in our opinion a significant risk that a court would find that the non-continuance provision is separate to and independent of any assessment of Material Deviation or any decision to disqualify a Proposal, and can only be exercised during the Technical Evaluation step and before consideration is given by the BESC and/or Executive Committee to the Financial Submission or Financial Evaluation.

Purchasing By-Law, Trade Agreements and Common Law of Tender

Our conclusions above based on a textual and contractual analysis of the RFP documents and the Evaluation Framework are not affected by considerations arising from the City’s Purchasing By-Law, applicable trade agreements, or the common law of tender.

¹¹ See, e.g. Section 6.5.2(1) RFP: “In Step 2 of the evaluation process, the Sponsor will open each Technical Submission and review the contents of the Technical Submission to assess whether it is in compliance with the terms and conditions of the RFP Documents”, which comes before Section 6.5.2(3) RFP: “Technical Submissions will *then* be evaluated and scored in accordance with Parts 1 and 3 of Schedule 3 to this RFP.” (emphasis added)

Purchasing By-Law

The City's Purchasing By-Law¹² binds the City to certain practices with respect to any procurement process issued by the City. There are no provisions in the Purchasing By-Law which specifically deals with minimum scoring.

However, the general article on the request for proposal process indicates that a selection committee "shall review all proposals against the established criteria and reach consensus on the final rating results".¹³

Article 30 of the by-law does indicate the process for administering irregularities in bids, and sets out at Schedule "A" what must occur, including for late bids, missing signatures, etc. While there is no specific irregularity for the current situation, Schedule "A" does provide that "Other Irregularities" can be cured and that "Supply Services shall have authority to waive irregularities which are considered to be trivial or insignificant" and further that "Any Irregularity" can be cured where "Ottawa City Council may waive any irregularity, where Council, in its sole opinion, considers it to be in the best interests of the City of Ottawa."

Trade Agreements

As we have previously indicated, our view is that all Stage 2 procurement processes were sufficiently advanced as at the Canada-European Union Comprehensive Economic and Trade Agreement (**CETA**) effective date (i.e. September 21, 2017) that the procurement provisions of CETA do not directly apply. Despite this, the following analysis of the trade agreements includes both CETA and the Canadian Free Trade Agreement (**CFTA**).

From a substantive perspective, the same principles of non-discrimination, open procurement and transparency guide both CETA and the CFTA. Both CETA and the CFTA contain specific provisions relating to the procedural requirements of procurements including rules relating to notices of intended procurement, conditions for participation, technical specifications, modifications, time periods, negotiation, limited tendering, electronic auctions, treatment of tenders and awarding of contracts, transparency of procurement information, and disclosure of information, etc.

Neither CETA nor CFTA contain a provision which specifically deals with minimum scoring. However, both do contain articles that require tenders to "comply with the **essential requirements** set out in the notices and tender documentation" (emphasis added).¹⁴ There is no definition of "essential requirements" in either agreement. As long as the score is not so low that it could be considered to fail to comply with an essential requirement of the RFP, then this requirement will have been met.

Both trade agreements also contain provisions that permit negotiations with suppliers if: the procuring entity has indicated its intent to conduct negotiations in the tender notice; or it appears from the procuring entity's evaluation that no tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the tender documentation and procuring entities must ensure that any elimination of suppliers participating in negotiations is carried out in accordance with the evaluation criteria set out in the tender documentation, among other things.¹⁵

Waiver of the Minimum Scoring Provisions at Common Law

The City's right to choose whether a Proposal which does not achieve a minimum score in any of the relevant technical categories may nonetheless continue in the evaluation process is, in essence, a form of privilege

¹² A By-Law of the City of Ottawa Respecting The Purchasing of Goods, Services and Construction, By-Law No. 50 of 2000 ["Purchasing By-law"], online at: http://documents.ottawa.ca/sites/documents.ottawa.ca/files/purchasing_bylaw_50_2000_en.PDF.

¹³ Purchasing By-Law, article 20(6).

¹⁴ CETA article 19.14.4; CFTA article 515.4.

¹⁵ CETA article 19.11; CFTA article 512.

clause. It is firmly established that privilege clauses may not be exercised in a way which is arbitrary or unfair, or in bad faith. There is also a long line of case law which makes clear that a sponsor may not use undisclosed criteria to evaluate bids, even in the presence of a privilege clause.

Of particular relevance for present purposes is the case of *Metercor Inc. v. Kamloops (City)*.¹⁶ In that case, the RFP set out applicable scores across the technical and financial bids but did not state explicitly that a failure to achieve a 75% score in the technical categories would prevent the bid from being further evaluated. However the city applied a 75% threshold during its evaluation of the technical bid and as a result screened out all but one of the proponents. The court held both that the city had failed to disclose the minimum scoring requirement to bidders and that the 75% threshold would potentially produce absurd results, as it precluded the city from actually assessing which proposal was best overall, even where the cut-off was missed by only one or two points. As Paul Emanuelli states in *Government Procurement*:

While the court ultimately found that the evaluation was unreasonable, it did not express whether this finding was due to: (i) the Municipality's failure to properly disclose the technical threshold relied on by its evaluators; or (ii) the general application of a technical threshold that disqualified proponents prior to the consideration of price.¹⁷

Three points should be noted from *Metercor*. First, the key distinguishing factor in relation to the Trillium DBFM RFP is that all Proponents are on notice of applicable minimum scoring provisions, and that a failure to achieve a minimum score will result in that Proposal not continuing in the evaluation process unless the City chooses to exercise its discretionary right to allow continuance. By contrast, the bidders in *Metercor* had no such notice of the applicable minimum score.

Second, the criteria set out in Schedule 3 Part 3 as being relevant to the exercise of that discretion are clearly intended to avoid the potential for arbitrary results criticized in *Metercor*. In other words, *Metercor* would tend to support the City exercising its discretionary right to allow a Proposal to continue in circumstances where the failure to meet the minimum score is not so fundamental as to constitute a Material Deviation or otherwise mean that the bid is so technically deficient that, irrespective of price, it ought not to be considered. This also further supports the conclusion above that in exercising the broad discretion under Section 6.5.3 RFP, the City is arguably bound to consider the severity of the failure to achieve the minimum score and the total submission score, irrespective of Schedule 3 Part 3.

Finally, *Metercor* has been treated by later decisions as confined to its facts in relation to the court's findings on the arbitrariness of the minimum threshold.¹⁸ We will consider in a subsequent memo the question of if the City were to refuse to exercise its discretion to allow a Proposal to continue in the evaluation process the potential risks and challenges from the affected Proponent this could present for the City in these circumstances.

¹⁶ 2011 BCSC 382

¹⁷ P. Emanuelli, *Government Procurement* (4th Ed., Lexis-Nexis, 2017), p.612

¹⁸ *Murray Purcha & Son Ltd. v. Barriere (District)*