



*Office of the Auditor General / Bureau du vérificateur général*

**AUDIT OF THE PROCUREMENT PROCESS FOR THE SMARTBUS  
NEXT STOP ANNOUNCEMENT SYSTEM  
AND THE SMARTCARD SYSTEM**

**2010**

**VÉRIFICATION DU PROCESSUS D'ACQUISITION DU SYSTÈME  
D'ANNONCE DES ARRÊTS DANS LES AUTOBUS INTELLIGENTS ET  
DU SYSTÈME DE CARTES À PUCE**



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## EXECUTIVE SUMMARY

### ***Introduction***

The audit was conducted as a result of a Council Motion approved on November 16/17, 2009, wherein the Auditor General was directed to audit the procurement process regarding the SmartBus Next Stop Announcement System and the SmartCard System to ensure that staff complied with all of the City's rules and By-laws with respect to the same.

Motion No. 78/6

*"Be it resolved that the Auditor General be directed to audit the procurement process regarding the SmartBus Next Stop Announcement System and the SmartCard System, to ensure that staff complied with all of the City's rules and by-laws with respect to the same."*

### ***Background***

In 1998, KPMG/IBI Group was commissioned to conduct the OC Transpo Comprehensive Review, which assisted the City in establishing the foundation of the SmartBus vision. The report identified smart operating systems which later become known as the SmartBus. These features were singled out as an effective and efficient means of increasing the fleet reliability and increasing overall customer confidence.

The SmartCard was simultaneously introduced as a project Transit would need to consider in conjunction with the SmartBus. SmartCard is, in brief, a means for riders to pay transit fares using a single, contactless, smartcard for convenience (e.g., rapid boarding, electronic purse, electronic period passes, etc). A similar system has been in existence in Gatineau since 1998.

The Next Stop Announcement System is an integral and planned component of the SmartBus vision.

Transit began spending funds in 2003 on Phase I of the SmartBus project for the development of functionality and software for key features of SmartBus including vehicle location, computer-aided dispatch, schedule adherence, transfer printer and control, and text messaging from control centre to operators of the fleet. Other SmartBus features such as real time arrival information and vehicle system maintenance were part of the 10 year plan for implementing the SmartBus. Bell was the SmartBus supplier of choice as a result of a 2003 competitive RFP process.

Phase II of the SmartBus project was subsequently initiated in 2005 and resulted in the purchase and installation of required Phase I SmartBus equipment on approximately 1030 of 1050 buses.

The Capital Budget for NSAS was approved at \$6.72 million in 2008 and Transit subsequently initiated a request for qualification for the purchase of an "off-the-shelf" system as they knew there was proven technology available in the market. Also in 2008, Transit begins to raise the profile of the SmartCard as there is a one-solution approach being fostered by the province based on the Toronto Transit Commission / Greater Toronto Area initiatives for an across the Province capability. The PRESTO label applies to the province-wide SmartCard approach.

The NSAS procurement process began with the approval of the \$6.72 million funding authority obtained through the submission of the 2008 Capital Budget. The City proceeded with the development of a two-stage procurement process for a Next Stop Announcement System (NSAS). The Request for Qualifications (RFQ), stage one of the two-stage process, aimed to serve as a technical pre-qualification of the systems presented for the City's consideration. Proponents that qualified under this stage of the procurement process were invited to submit a proposal under the Request for Proposal (RFP) stage, the second of the two-stage process. In June 2008, the NSAS RFQ was posted. An evaluation of the proponents was conducted in the fall of 2008 and two proponents successfully qualified to move to the request for proposal stage. In January 2009, the RFP was issued to the two qualified proponents. The RFP closed in March 2009, and subsequently, the submissions were evaluated. One bidder was successful and proceeded to the due diligence stage. The results of the procurement process were presented to the Transit Committee on September 16, 2009. A motion was drafted for Council to approve the award of a \$17 million contract to the successful bidder. The motion was elevated to next scheduled Council meeting, which was held on October 28, 2009.

### ***Audit Objectives and Scope***

As result of Motion 78-6 approved by Council at its meeting of November 16/17, 2009, the Office of the Auditor General was mandated to review specific contracting initiatives in order to determine:

1. Whether the procurement process regarding the SmartBus Next Stop Announcement System and the SmartCard System complied with all of the City's rules and by-laws with respect to the same.
2. The extent to which the SmartCard initiative was linked to the Next Stop Announcement System.
3. That information and briefings provided to Council throughout the contracting process were timely, complete and comprehensive in the discussions of options available to Council.

### ***Summary of Key Findings***

1. In 2008, Council approved funding authority of \$6.72 million for the implementation of NSAS via the capital budget. The amount was estimated /

benchmarked using information from the in-house developed TTC project. In hindsight, it appears, as per City staff, that the cost determination omitted the internal cost of developing the software to run the platform and its labour costs to perform the installation of the hardware on the vehicles.

2. It appears that there was little communication with Council on the procurement of NSAS in the 24 months prior to the September 16, 2009 Transit Committee meeting. An historical look at the communication provided to Council and its sub-committees reveals that information is provided in such a way that it would be challenging for Council to obtain a holistic appreciation of the facts and the extent and direction of the SmartBus project, as well as its cost to the taxpayer.
3. The scenario to proceed when finally brought to Council was highly confusing with numerous issues in play: Higher than estimated bids being submitted, the introduction of optional features to advance introduction of SmartBus features, the potential sources of funding to cover the additional costs of acquisition, ongoing costs to maintain the platform for existing SmartBus features and the parallel tracking / implementation of SmartCard initiative, all with no apparent or pre-existing overarching strategy for Council to refer to for overall progress in implementation of SmartBus features.
4. Purchasing By-law No. 50 of 2000 governs how the City shall purchase goods and services. It allows Supply Management great latitude in decision-making when conducting business activities associated with procurement. However, there are several controls built into the By-law such as prescribed procedures to be followed to make a contract award or to make a recommendation of a contract award to Council. It further gives discretion to Supply Management to submit a contract award to Council where it is a matter of procurement procedure and / or in the opinion of Supply Management, it is in the best interest of the City to do so.
5. Regarding the actual managing of the procurement itself, a comprehensive legal review found no fault with the process, with the exception of the inclusion of the "options" aspect. As the options were not fully described, this element of the RFP did not appear to promote a level playing field for competition. Both bidders were not asked to price the same items.
6. As early as the fall of 2008, through the Request for Qualification evaluation stage, Supply Management and Transit staff are made aware that in a best case scenario there is a likely 30% over budget contract coming. This would have been an opportunity to advise Committee and Council that there was a strong chance that the \$6.72 million budget would not be sufficient to meet the market-based estimate required to undertake the project.
7. Effective July 6, 2009 Supply Management and Transit staff were informed, at the conclusion of the Request for Proposal stage, that the minimum contract

value will be roughly twice the estimated amount for the core NSAS requested. This would have been another opportunity to advise Committee and Council that there was a market-based price that doubled the \$6.72 million budget for NSAS.

8. In the conduct of the RFQ and RFP procurement process, the City utilized a clause in which it reserved the right to terminate the process at any time for convenience. The clause is simply worded and could give anyone not involved in the intricacies of contract and tendering law the impression that the City could exercise this exit strategy without financial impact. However, as the legal opinion offered to the City has made clear, the exercise of the clause cannot be made without cause.

On July 6, 2009, the sole qualified bidder was notified that they were the successful proponent in the RFP. Negotiations to obtain the best and final offer were then entered into. The proponent submitted their Best and Final Offer (BAFO) on July 15 2009. In our opinion, in accordance with the By-law, Supply Management should have gone to Council for authority to proceed when it became apparent that they no longer had a fully funded requisition for the acquisition of the NSAS.

## ***Recommendations and Management Responses***

### **Recommendation 1**

**That Supply Management, in compliance with the By-law, come to Council for authority to proceed when they have an unfunded requisition.**

#### **Management Response**

Management agrees with the recommendation.

This reflects current practice.

The SmartBus program is comprised of many separate, yet interrelated, projects. Although under the larger SmartBus umbrella, budget approval was sought on a project-by-project basis. Article 9(1)(c) of the Purchasing By-law states that Council approval is required “where the cost amount proposed for acceptance is higher than the Council approved branch estimates and the necessary adjustments cannot be made.”

In the case of the SmartBus program, the General Manager, Transit Services had identified funding that could be transferred from other approved SmartBus projects to the NSAS. These programs had been previously approved by Council through the Capital Budget process. Report ACS2009-ICS-TRA-0011 was seeking approval to use these previously approved funds for the NSAS project.

Management believes that no further action is required.

## **Recommendation 2**

**That the City develop guidance for procurement staff for the application of paragraphs 6 (1) and (3) and paragraph 9 (1) (c) of the By-law, for determining under what circumstances and at what stages of the contracting process information should be presented to Council.**

### **Management Response**

Management agrees with the recommendation.

Management believes that pricing at the RFQ stage is unreliable and is generally vague or overstated and that, consequently, there is not sufficient pricing information to go to Council. Training has been provided to procurement staff and guidelines are being developed to aid them in the application of these paragraphs of the Purchasing By-law. Guidelines will be developed by the end of Q3 2010.

With regard to the NSAS project, funding was not considered a significant issue at the time as Transit had identified other funding that could be transferred into the NSAS budget resulting in no necessary increase in funding for the project. The report was initially tabled with the sub-committee of Council to obtain budget approval to reallocate funds. Once this approval was obtained, staff could award the contract under delegated authority in accordance with the Purchasing By-law.

Moreover, it was clearly defined in the RFP process for Evaluation and Selection that identification of the selected proponent did not constitute contract award. The RFP made clear that approval was required by “the appropriate approving authority at the City” prior to executing a contract with the “approved successful proponent” [emphasis added].

The audit appears to confuse the well-established legal/procurement principals of Contract A, being the terms and conditions of the tendering process (with its corresponding duties and liabilities on the parties involved in the process), and Contract B, being the actual contract awarded by the owner to the successful bidder for the delivery of the required goods/services.

## **Recommendation 3**

**That the City modify the Purchasing By-law, or develop other policy, to make clear that unidentified or inadequately described optional elements not be included in the Request for Proposal.**

### **Management Response**

Management agrees with the recommendation.

On October 30, 2009, the Manager of Supply temporarily halted the inclusion of optional value added features in bid solicitation documents until a formal review was conducted.

Following the review, the Purchasing Procedures & Policy Manual was updated to include instructions regarding the use of optional value added features in bid solicitation documents. Where optional value added features are to be included as part of a multi-stage procurement process, staff should review the appropriateness of including these features based on the information obtained in the preliminary phases of the procurement. Where their inclusion is deemed appropriate, these features should be fully described and priced as part of the financial proposal.

Management believes that no further action is required.

#### **Recommendation 4**

**That the City modify its Privilege or Rights Reserved Clause to better assist both the City and potential bidders appreciate the likely consequences which may result should the procurement process be modified or cancelled.**

#### **Management Response**

Management disagrees with the recommendation.

Privilege clauses, and the right to cancel a procurement, are common features in procurements. Contract authorities insert these types of clauses to give them the greatest degree of flexibility in how the procurement process, including evaluations and contract award, will be conducted.

However, like all clauses that give contract authorities flexibility in how procurements are conducted (the so-called privilege clauses); the courts have interpreted those clauses in a way that ensures that all parties are treated fairly and in a manner which ensures the integrity of the procurement process.

Similarly, with respect to cancellations, courts have looked carefully at the reasons that motivate a contract authority to cancel a procurement in order to ensure that the cancellation is not done for improper motives. That is, for a purpose that would have the effect of undermining the integrity of the competitive bidding process.

The privilege clause utilized by staff is very similar to the clause used by PWGSC (excerpted below). Management suggests that it is the application of this clause, and not the clause itself, that requires an increased understanding. Management proposes to provide increased training on the application of this clause in an effort to *“better assist both the City and potential bidders to appreciate the likely consequences which may result should the procurement process be modified or cancelled.”*

## **2003 (2010-01-11) Standard Instructions - Goods or Services - Competitive Requirements**

### **Rights of Canada**

Canada reserves the right to:

- (a) reject any or all bids received in response to the bid solicitation;
- (b) enter into negotiations with bidders on any or all aspects of their bids;
- (c) accept any bid in whole or in part without negotiations;
- (d) cancel the bid solicitation at any time;
- (e) reissue the bid solicitation;
- (f) if no responsive bids are received and the requirement is not substantially modified, reissue the bid solicitation by inviting only the bidders who bid to resubmit bids within a period designated by Canada; and,
- (g) negotiate with the sole responsive Bidder to ensure best value to Canada.

### **Recommendation 5**

**That the City ensure that major procurement initiatives be required to develop and follow a Briefing Strategy in order to ensure that Council is kept abreast of progress against targets and/or phases which are potentially separated by months if not years.**

### **Management Response**

Management agrees with the recommendation. However, management disagrees that Council was not provided with complete and accurate information regarding the NSAS issue.

The background section of report (ACS2009-ICS-TRA-0011), presented to Transit Committee on September 16, 2009, clearly sets out the history of the SmartBus program and how the recommended approach would address any challenges with the program. The Financial section of the report outlines the cost of what staff was recommending to purchase, and the budgets the spending was to be drawn from. Following the September 16, 2009 Transit Committee meeting, members of Council were provided with detailed information to assist in clarifying the situation. The SmartBus technology has been an ongoing discussion with Council since amalgamation. A number of opportunities have been presented by Transit Services to discuss IT technology, including a 2003 KPMG study, Capital Budget requests and three SmartCard reports.

In order to ensure senior management and Council are kept abreast of progress against targets and/or phases of major procurements, Supply Management has implemented a formal Procurement Plan Approval process whereby requirements and strategies are reviewed and approved in advance of a

procurement process. This approval process is aimed at ensuring that requirements, deliverables and timelines are well established and are not unduly restrictive, and that multi-stage procurement processes do not unnecessarily limit competition.

It is proposed that the formal procurement plan be used as a communications tool identifying the timing and proposed strategy for procuring the components comprising the initiative as a whole, and that regular updates be provided to Committee and/or Council on significant changes (technology, schedule, proponents, and costs) and their impact on the procurement plan.

Management believes that no further action is required.

### **Recommendation 6**

**That all parties involved in major procurement initiatives, with respect to their various areas of expertise, ensure that Council receives correct and timely information.**

#### **Management Response**

Management agrees with the recommendation. However, management disagrees that Council was not provided with complete and accurate information regarding the NSAS issue.

The background section of report (ACS2009-ICS-TRA-0011), presented to Transit Committee on September 16, 2009, clearly sets out the history of the SmartBus program and how the recommended approach would address any challenges with the program. The Financial section of the report outlines the cost of what staff was recommending to purchase, and the budgets the spending was to be drawn from. Following the September 16, 2009 Transit Committee meeting, members of Council were provided with detailed information to assist in clarifying the situation. The SmartBus technology has been an ongoing discussion with Council since amalgamation. A number of opportunities have been presented by Transit Services to discuss IT technology, including a 2003 KPMG study, Capital Budget requests and three SmartCard reports.

Management believes that no further action is required.

### **Conclusion**

The initial cost estimate for NSAS omitted key elements and it appears that there was little communication with Council on the procurement of NSAS in the 24 months prior to the September 16, 2009 Transit Committee meeting. It would therefore be challenging to obtain a holistic appreciation of the facts and the extent and direction of the SmartBus project.

The scenario to proceed when finally brought to Council was confusing with numerous issues in play with no apparent overarching strategy for Council to refer to for overall progress in implementation of SmartBus features.

A comprehensive legal review found no fault with the contracting process, with the exception of the inclusion of the “options” aspect. The legal opinion offered to the City also made clear that the exercise of the termination or exit clause cannot be made without cause.

In our opinion, in accordance with the By-law, Supply Management should have gone to Council for authority to proceed when it became apparent that they no longer had a fully funded requisition for the acquisition of the NSAS.

In conclusion it appears to be a situation where management within Supply Management and Transit did not fully appreciate Council's potential concern with the magnitude of cost and/or scope variance in the project given the current economic situation.

### ***Acknowledgement***

We wish to express our appreciation for the cooperation and assistance afforded the audit team by management.



## RÉSUMÉ

### **Introduction**

La vérification du processus d'acquisition du système d'annonce des arrêts dans les autobus intelligents et du système de cartes à puce a été réalisée par suite de l'adoption d'une motion du Conseil en date des 16 et 17 novembre 2009 demandant au vérificateur général de vérifier le processus d'acquisition du système d'annonce des arrêts (SAA) dans les autobus intelligents et du système de cartes à puce afin de s'assurer que le personnel a respecté les règles et règlements municipaux dans ce dossier.

Motion 78/6

*« Il est décidé que le vérificateur général sera chargé d'auditer le processus d'approvisionnement relatif au système d'annonce des arrêts dans les autobus intelligents et au système de cartes à puce, pour s'assurer que le personnel a respecté toutes les règles et tous les règlements applicables. »*

### **Contexte**

En 1998, KPMG et Groupe IBI ont reçu le mandat d'effectuer un examen complet des activités d'OC Transpo, ce qui a aidé la Ville à concevoir les fondements de sa vision des autobus intelligents. Le rapport a dégagé des systèmes d'exploitation intelligents qui sont aujourd'hui appelés « autobus intelligents ». Leurs caractéristiques ont été retenues comme moyens efficaces et rentables d'améliorer la fiabilité du parc de véhicules et d'augmenter la confiance générale de la clientèle.

Le système de cartes à puce a été présenté en même temps comme un projet à prendre en compte par les Services de transport en commun en association avec les autobus intelligents. En bref, les cartes à puce permettent aux passagers de payer les tarifs de transport en commun au moyen d'une seule carte intelligente et pratique, sans contact (par ex. : embarquement rapide, sac électronique, cartes d'autobus périodiques électroniques et autres). Un système semblable est en place à Gatineau depuis 1998.

Le SAA fait composante intégrante et prévue de la vision des autobus intelligents.

En 2003, les Services de transport en commun ont commencé à déboursier des fonds pour la phase 1 du projet des autobus intelligents qui porte sur le développement de fonctionnalités et de logiciels pour les caractéristiques clés des autobus intelligents, notamment l'emplacement des véhicules, la répartition assistée par ordinateur, le suivi des horaires, les imprimantes et contrôles de correspondances et la messagerie texte entre le centre de commande et les chauffeurs. D'autres caractéristiques des autobus intelligents, telles que l'information sur les arrivées en temps réel et la maintenance des systèmes des véhicules, faisaient partie du plan décennal de mise en œuvre des autobus intelligents. Bell a été le fournisseur de

système d'autobus intelligents choisi lors du processus concurrentiel de demande de propositions en 2003.

La phase II du projet d'autobus intelligents a par la suite débuté en 2005 et s'est soldée par l'acquisition et l'installation de l'équipement défini lors de la première phase du projet dans environ 1 030 des 1 050 autobus.

Le budget des immobilisations alloué au SAA a été approuvé à 6,72 millions de dollars en 2008 et les Services de transport en commun ont ensuite soumis une demande de qualification pour l'acquisition d'un système standard sachant qu'il existait une technologie éprouvée sur le marché. Également en 2008, les Services de transport en commun ont commencé à faire la promotion du système de cartes à puce comme il existe une solution unique mise en place par la province basée sur les projets de la Toronto Transit Commission (TTC) et de la région du Grand Toronto pour une capacité au niveau provincial. La marque PRESTO correspond à l'approche dans l'ensemble de la province en matière de cartes à puce.

Le processus d'acquisition du SAA a commencé avec l'autorisation de financement de 6,72 millions de dollars obtenue par la soumission du budget d'immobilisations de 2008. La Ville a alors lancé le développement d'un processus d'acquisition en deux étapes d'un SAA. La demande de qualification (DQ), première étape du processus, se voulait une préqualification technique des systèmes présentés à la Ville aux fins de considération. Les soumissionnaires qualifiés lors de cette étape du processus d'acquisition ont été invités à présenter leur offre lors de la demande de propositions (DP), seconde étape du processus. En juin 2008, la DQ pour le SAA a été publiée. L'évaluation des soumissionnaires a été exécutée à l'automne 2008 et deux d'entre eux se sont qualifiés pour la DP. En janvier 2009, la DP a été remise aux deux soumissionnaires qualifiés. L'étape de la DP a pris fin en mars 2009 et les propositions ont été examinées. Un des soumissionnaires a été choisi et est passé à l'étape de la diligence raisonnable. Les résultats du processus d'acquisition ont été présentés au Comité du transport en commun le 16 septembre 2009. Une ébauche de motion a été soumise au Conseil pour approbation de l'attribution d'un contrat de 17 millions de dollars au soumissionnaire retenu. La motion a été présentée à la réunion du Conseil suivante, soit celle du 28 octobre 2009.

### ***Objectifs et portée de la vérification***

Par suite de l'approbation de la motion 78/6 par le Conseil à sa réunion des 16 et 17 novembre 2009, le Bureau du vérificateur général a reçu le mandat d'évaluer les initiatives de contrat précises afin de déterminer :

1. Si le processus d'acquisition du SAA dans les autobus intelligents et du système de cartes à puce a été exécuté dans le respect des règles et règlements municipaux applicables;
2. Dans quelle mesure le projet de cartes à puce est relié au projet du SAA;

3. Si l'information et les exposés fournis au Conseil lors du processus d'attribution de contrat ont été donnés de manière opportune, complète et entière durant les discussions des options possibles pour le Conseil.

### **Résumé des principales constatations**

1. En 2008, le Conseil a approuvé le financement de 6,72 millions de dollars pour la mise en œuvre du SAA à même le budget d'immobilisations. Le montant a été évalué et étalonné au moyen de l'information provenant du projet du Comité du transport en commun conçu à l'interne. En rétrospective, il semble que, selon le personnel de la Ville, la détermination des coûts ne comprenait pas les coûts internes du développement du logiciel d'exécution de la plateforme et les coûts de main-d'œuvre liés à l'installation du matériel à bord des autobus.
2. Il semble qu'il n'y ait eu que très peu de communications avec le Conseil à propos de l'acquisition du SAA dans les 24 mois qui ont précédé la réunion du Comité du transport en commun du 16 septembre 2009. Après observation des communications antérieures fournies au Conseil et à ses sous-comités, il faut constater que cette information est fournie de telle manière qu'il est difficile au Conseil d'obtenir une appréciation globale des faits, de la portée et de la direction du projet d'autobus intelligents, de même que les coûts liés que devront assumer les contribuables.
3. Le scénario d'exécution, lorsqu'il a été finalement présenté au Conseil, a été très confus, car il soulevait de nombreuses questions : propositions soumises à des coûts plus élevés qu'estimés, introduction de caractéristiques optionnelles pour promouvoir l'introduction des caractéristiques des autobus intelligents, sources possibles de financement pour couvrir les coûts additionnels d'acquisition, coûts permanents de maintien de la plateforme des caractéristiques d'autobus intelligents actuelles et suivi et mise en œuvre simultanés du projet de cartes à puce, le tout sans stratégie-cadre apparente ou préexistante que le Conseil peut utiliser pour suivre la progression globale de la mise en œuvre des caractéristiques d'autobus intelligents.
4. Le *Règlement municipal sur les achats* n° 50 de 2000 régit la procédure d'achat de biens et de services par la Ville. Le Règlement accorde une grande liberté de la Gestion de l'approvisionnement quant à la prise de décisions lors d'activités commerciales associées aux acquisitions. Toutefois, ce règlement comprend plusieurs contrôles tels que des procédures prescrites à suivre lors de l'attribution d'un contrat ou lors d'une recommandation en ce sens au Conseil. Il donne également la possibilité à la Gestion de l'approvisionnement de soumettre une attribution de contrat au Conseil lorsque cela est une question de procédure d'acquisition ou, de l'avis de la Gestion de l'approvisionnement, lorsque l'attribution est dans le meilleur intérêt de la Ville.

5. En ce qui a trait au côté gestion de l'acquisition, un examen complet d'ordre légal n'a trouvé aucune faute dans le processus, à l'exception de l'inclusion de l'aspect « options ». Comme les options n'ont pas été entièrement décrites, cet élément de la DP n'apparaît pas avoir encouragé des conditions équitables de concurrence. Le coût demandé aux deux soumissionnaires ne portait donc pas sur les mêmes éléments.
6. Dès le début de l'automne 2008, à l'étape d'évaluation de la DQ, le personnel de la Gestion de l'approvisionnement et des Services de transport en commun a été informé que, dans le meilleur des cas, il y aurait probablement dépassement des coûts budgétés de 30 %. Ceci aurait été une occasion d'aviser le Comité et le Conseil qu'il y avait un risque élevé d'insuffisance du budget alloué de 6,72 millions de dollars pour supporter le coût prévu du marché pour mener à bien le projet.
7. En date du 6 juillet 2009, le personnel de la Gestion de l'approvisionnement et des Services de transport en commun a été informé, à la fin de l'étape de DP, que la valeur contractuelle minimale serait de près du double du montant prévu pour le SAA de base demandé. Cela aurait été une autre occasion d'aviser le Comité et le Conseil que le coût du marché doublait le budget de 6,72 millions de dollars alloué au SAA.
8. Lors des étapes de DQ et de DP du processus d'acquisition, la Ville a utilisé une clause l'autorisant à annuler le processus en tout temps et aux fins pratiques. Cette clause est rudimentaire et peut donner l'impression à quiconque non informé des subtilités des contrats et des lois sur les appels d'offres que la Ville pouvait exercer cette stratégie de sortie sans répercussion financière. Cependant, comme l'a énoncé clairement l'avis juridique donné à la Ville, cette clause ne peut être exercée sans motif valable.

Le 6 juin 2009, le seul soumissionnaire qualifié a été avisé qu'il était le soumissionnaire retenu de la DP. Des négociations pour obtenir la meilleure offre finale (MOF) ont commencé. Le promoteur a soumis sa MOF le 15 juillet 2009. Selon nous, en conformité avec le règlement, la Gestion de l'approvisionnement aurait dû demander au Conseil l'autorisation de procéder lorsqu'il est devenu clair qu'elle n'avait plus une demande entièrement provisionnée pour l'acquisition du SAA.

## ***Recommandations et réponses de la direction***

### **Recommandation 1**

**Que la Gestion de l'approvisionnement, en conformité avec le Règlement, demande au Conseil l'autorisation de procéder en cas de demande non provisionnée.**

### **Réponse de la direction**

La direction est d'accord avec la recommandation.

Ceci reflète la pratique en vigueur.

Le Programme des autobus intelligents regroupe de nombreux projets distincts, mais associés les uns aux autres. Bien qu'ils appartiennent tous à la catégorie générale des autobus intelligents, l'approbation budgétaire a été demandée de façon individuelle pour chaque projet. L'article 9(1)(c) du *Règlement municipal sur les achats* affirme qu'est soumis à l'approbation du Conseil « tout marché dont le montant de dépenses proposé est supérieur aux prévisions budgétaires de la direction approuvées par le Conseil et auquel les ajustements nécessaires ne peuvent être apportés ».

Dans le cas du Programme des autobus intelligents, le directeur général des Services de transport en commun avait déterminé les fonds qui pourraient être transférés d'autres projets d'autobus intelligents approuvés au système d'annonce des arrêts (SAA). Ces programmes avaient été approuvés précédemment par le Conseil municipal dans le cadre du processus du budget des immobilisations. Le rapport ACS2009-ICS-TRA-0011 demandait l'autorisation d'utiliser ces fonds précédemment approuvés pour le projet du SAA.

La direction estime qu'aucune action supplémentaire n'est nécessaire.

### **Recommandation 2**

**Que la Ville élabore un guide pour le personnel des achats aux fins de l'application des paragraphes 6 (1) et (3) et 9 (1) (c) du règlement, pour déterminer dans quelles situations et à quelles étapes du processus d'attribution de contrat l'information doit être présentée au Conseil.**

### **Réponse de la direction**

La direction est d'accord avec la recommandation.

La direction croit que l'établissement des prix à l'étape de la DQ est peu fiable et généralement imprécis ou exagéré et que, par conséquent, elle ne dispose pas d'information suffisante sur l'établissement des prix pour la présenter au Conseil municipal. Le personnel du Service des achats a reçu une formation et on est en train de préciser des lignes directrices afin de faciliter l'application de ces paragraphes du *Règlement municipal sur les achats*. Les lignes directrices seront parachevées pour la fin du T3 2010.

En ce qui concerne le projet du SAA, on n'a pas considéré le financement comme un problème d'importance à l'époque, car les Services de transport en commun avaient ciblé d'autres fonds qui pourraient être transférés dans le budget de SAA, ce qui n'entraînait aucune hausse du financement du projet. Le rapport a

d'abord été déposé auprès du sous-comité du Conseil municipal pour obtenir l'approbation budgétaire de réaffecter des fonds. Une fois cette approbation obtenue, le personnel pouvait attribuer le contrat sous l'autorité déléguée conformément au *Règlement municipal sur les achats*.

Par ailleurs, il était bien précisé dans la procédure de Demande de propositions (DP) à des fins d'évaluation et de sélection que l'identification de l'auteur de la proposition retenue ne constituait pas une adjudication de contrat. La DP précisait que l'approbation était requise par « l'autorité dûment autorisée de la Ville » avant de signer un contrat avec « l'auteur de la proposition approuvée » [c'est nous qui soulignons].

La vérification semble confondre les principes bien établis qui relèvent des services juridiques et des achats du contrat A, c'est-à-dire les conditions générales de la procédure d'adjudication (avec ses devoirs et responsabilités correspondants concernant les parties au processus), et le contrat B, qui est le contrat réel attribué par le propriétaire au soumissionnaire retenu pour la prestation des biens ou services requis.

### **Recommandation 3**

**Que la Ville modifie le *Règlement municipal sur les achats* ou élabore une autre politique afin de préciser l'exclusion de la DP des éléments optionnels décrits de manière erronée ou non définis.**

#### **Réponse de la direction**

La direction est d'accord avec la recommandation.

Le 30 octobre 2009, le gestionnaire de l'Approvisionnement a suspendu temporairement l'inclusion d'éléments optionnels à valeur ajoutée dans les documents d'appels d'offres jusqu'à ce qu'un examen systématique ait été effectué.

Après l'examen, le Manuel des politiques et des procédures d'achat a été mis à jour afin d'inclure des instructions sur l'utilisation des éléments optionnels à valeur ajoutée dans les documents d'appels d'offres. Si des éléments optionnels à valeur ajoutée doivent être inclus dans une procédure d'achats en plusieurs étapes, le personnel doit évaluer le bien-fondé de l'inclusion de ces éléments optionnels, en se fondant sur l'information obtenue dans les phases préliminaires du processus d'acquisition. Si l'on juge pertinent de les inclure, ces options doivent être décrites en détail et leur prix, indiqué dans la proposition financière.

La direction croit qu'aucune action supplémentaire n'est nécessaire.

### **Recommandation 4**

**Que la Ville modifie sa clause de privilège ou exonératoire afin d'aider tant la Ville que les futurs soumissionnaires à mieux évaluer les conséquences**

## **probables que peut entraîner la modification ou l'annulation du processus d'acquisition.**

### **Réponse de la direction**

La direction est en désaccord avec la recommandation.

Les clauses de privilège et le droit d'annuler un marché sont des modalités courantes des processus d'acquisition. Les autorités contractuelles insèrent ces types de clauses afin d'accroître la flexibilité du processus d'acquisition, y compris les évaluations et l'adjudication du contrat.

Cependant, comme c'est le cas dans toutes les clauses qui confèrent davantage de flexibilité aux autorités contractuelles dans la conduite des processus d'acquisition (appelées clauses de privilège), les tribunaux ont interprété ces clauses de sorte que toutes les parties soient traitées d'une manière équitable qui assure l'intégrité du processus d'acquisition.

De même, en ce qui concerne des annulations, les tribunaux ont examiné attentivement les motifs qui poussent une autorité contractuelle à annuler un marché afin de s'assurer que l'annulation n'est pas faite pour des motifs injustifiés, c'est-à-dire dans un but qui aurait pour effet de miner l'intégrité du processus d'appels d'offres.

La clause de privilège utilisée par le personnel est très similaire à celle utilisée par TSPGC (extrait ci-dessous). La direction suggère que c'est l'application de cette clause, et non la clause elle-même, qui demande une compréhension plus approfondie. La direction propose d'offrir un complément de formation sur l'application de cette clause dans une volonté de « *mieux aider la Ville et les soumissionnaires éventuels à évaluer les conséquences probables de la modification ou de l'annulation du marché* ».

**2003 (2010-01-11)** Instructions uniformisées - biens ou services - besoins concurrentiels

### **Droits du Canada**

Le Canada se réserve le droit :

- a) de rejeter l'une quelconque ou la totalité des soumissions reçues en réponse à la demande de soumissions;
- b) de négocier avec les soumissionnaires n'importe quel aspect de leur soumission;
- c) d'accepter une soumission en totalité ou en partie, sans négociation;
- d) d'annuler la demande de soumissions à n'importe quel moment;

- e) d'émettre de nouveau la demande de soumissions;
- f) si aucune soumission recevable n'est reçue et que le besoin n'est pas modifié substantiellement, d'émettre de nouveau la demande de soumissions en invitant uniquement les soumissionnaires qui ont soumissionné, à soumissionner de nouveau dans un délai indiqué par le Canada; et
- g) de négocier avec le seul soumissionnaire qui a déposé une soumission recevable pour s'assurer que le Canada profitera du meilleur rapport qualité/prix.

### **Recommandation 5**

**Que la Ville s'assure que les projets d'acquisition d'envergure doivent inclure la mise en place et le suivi d'une stratégie d'information garantissant que le Conseil est tenu au courant de la progression selon des cibles ou des étapes échelonnées sur des mois, sinon des années.**

#### **Réponse de la direction**

La direction est d'accord avec la recommandation. Cependant, la direction est en désaccord avec l'affirmation que le Conseil municipal n'a pas reçu d'informations complètes et exactes concernant le problème du SAA.

La section contextuelle du rapport (ACS2009-ICS-TRA-0011), présentée au Comité du transport en commun le 16 septembre 2009, exposait clairement l'historique du Programme des autobus intelligents et la façon dont l'approche recommandée répondrait à tous les défis associés au Programme. La section financière du rapport décrit le coût des recommandations d'achat du personnel et les budgets dont devaient provenir les dépenses. Après la réunion du Comité du transport en commun du 16 septembre 2009, on a fait parvenir aux membres du Conseil municipal des informations détaillées afin de les aider à clarifier la situation. La technologie des autobus intelligents a fait l'objet de discussions continues avec le Conseil municipal depuis la fusion. Les Services du transport en commun ont eu plusieurs occasions de discuter des aspects des TI, notamment lors d'une étude réalisée en 2003 par KPMG, de demandes de budget d'investissement et de trois rapports sur les cartes à puce.

Afin d'assurer que la haute direction et le Conseil sont tenus au courant des progrès réalisés par rapport aux cibles cernées et/ou des étapes des acquisitions importantes, la Direction de l'approvisionnement a mis en œuvre un processus officiel d'approbation des plans d'acquisition selon lequel les exigences et les stratégies sont examinées et approuvées à l'avance du processus d'acquisition. Ce processus d'approbation vise à assurer que les exigences, les livrables et les échéanciers sont bien établis et ne sont pas indûment restrictifs, et que les processus d'acquisition en plusieurs étapes ne limitent pas la concurrence sans raison valable.

On propose que le plan officiel d'acquisition soit utilisé comme un outil de communications qui déterminerait l'échéancier et la stratégie proposée afin de procurer les composantes constituant l'initiative dans son ensemble, et que des mises à jour régulières soient fournies au Comité et/ou au Conseil concernant les changements importants (technologie, calendrier, soumissionnaires et coûts) et leur incidence sur le plan d'acquisition.

La direction croit qu'aucune action supplémentaire n'est nécessaire.

### **Recommandation 6**

**Que toutes les parties concernées par les projets d'acquisition d'envergure, selon leurs divers domaines de compétence, s'assurent que le Conseil reçoit l'information juste en temps opportun.**

#### **Réponse de la direction**

La direction est d'accord avec la recommandation. Cependant, la direction est en désaccord avec l'affirmation que le Conseil municipal n'a pas reçu d'informations complètes et exactes concernant le problème du SAA.

La section contextuelle du rapport (ACS2009-ICS-TRA-0011), présentée au Comité du transport en commun le 16 septembre 2009, exposait clairement l'historique du Programme des autobus intelligents et la façon dont l'approche recommandée répondrait à tous les défis associés au Programme. La section financière du rapport décrit le coût des recommandations d'achat du personnel et les budgets dont devaient provenir les dépenses. Après la réunion du Comité du transport en commun du 16 septembre 2009, on a fait parvenir aux membres du Conseil municipal des informations détaillées afin de les aider à clarifier la situation. La technologie des autobus intelligents a fait l'objet de discussions continues avec le Conseil municipal depuis la fusion. Les Services du transport en commun ont eu plusieurs occasions de discuter des aspects des TI, notamment lors d'une étude réalisée en 2003 par KPMG, de demandes de budget d'investissement et de trois rapports sur les cartes à puce.

La direction croit qu'aucune action supplémentaire n'est nécessaire.

### **Conclusion**

Le coût initial prévu pour le SAA a omis des éléments clés et il semble qu'il n'y ait eu que très peu de communications avec le Conseil à propos de l'acquisition du SAA dans les 24 mois qui ont précédé la réunion du Comité du transport en commun du 16 septembre 2009. Il est donc difficile au Conseil d'obtenir une appréciation globale des faits, de la portée et de la direction du projet d'autobus intelligents.

Le scénario d'exécution lorsqu'il a été finalement présenté au Conseil a été très confus, car il soulevait de nombreuses questions, et ne comprenait aucune stratégie-

cadre apparente que le Conseil aurait pu utiliser pour suivre la progression globale de la mise en œuvre des caractéristiques d'autobus intelligents.

Un examen complet d'ordre légal n'a trouvé aucune faute dans le processus d'attribution de contrat, à l'exception de l'inclusion de l'aspect « options ». L'avis juridique donné à la Ville a également énoncé clairement que la clause de résiliation ne peut être exercée sans motif valable.

Selon nous, en conformité avec le règlement, la Gestion de l'approvisionnement aurait dû demander au Conseil l'autorisation de procéder lorsqu'il est devenu clair qu'elle n'avait plus une demande entièrement provisionnée pour l'acquisition du SAA.

En conclusion, il semble que, dans cette situation, la direction de la Gestion de l'approvisionnement et des Services de transport en commun n'a pas évalué entièrement les préoccupations éventuelles du Conseil quant à l'ampleur des coûts ou aux écarts de portée du projet en fonction de la conjoncture actuelle.

### ***Remerciements***

Nous tenons à remercier la direction de sa bienveillante collaboration et de l'aide qu'elle a apportée à l'équipe de vérification.

## 1 INTRODUCTION

The audit was conducted as a result of a Council Motion approved on November 16/17, 2009, wherein the Auditor General was directed to audit the procurement process regarding the SmartBus Next Stop Announcement System and the SmartCard System to ensure that staff complied with all of the City's rules and By-laws with respect to the same.

Motion No. 78/6

*"Be it resolved that the Auditor General be directed to audit the procurement process regarding the SmartBus Next Stop Announcement System and the SmartCard System, to ensure that staff complied with all of the City's rules and by-laws with respect to the same."*

## 2 BACKGROUND

In 1998, KPMG/IBI Group was commissioned to conduct the OC Transpo Comprehensive Review, which assisted the City in establishing the foundation of the SmartBus vision. The report identified smart operating systems which later become known as the SmartBus. These features were singled out as an effective and efficient means of increasing the fleet reliability and increasing overall customer confidence.

The SmartCard was simultaneously introduced as a project Transit would need to consider in conjunction with the SmartBus. SmartCard is, in brief, a means for riders to pay transit fares using a single, contactless, smartcard for convenience (e.g., rapid boarding, electronic purse, electronic period passes, etc.). A similar system has been in existence in Gatineau since 1998.

The Next Stop Announcement System (NSAS) is an integral and planned component of the SmartBus vision.

Transit began spending funds in 2003 on Phase I of the SmartBus project for the development of functionality and software for key features of SmartBus including vehicle location, computer-aided dispatch, schedule adherence, transfer printer and control, and text messaging from control centre to operators of the fleet. Other SmartBus features such as real time arrival information and vehicle system maintenance were part of the 10-year plan for implementing the SmartBus. Bell was the SmartBus supplier of choice as a result of a 2003 competitive RFP process.

Phase II of the SmartBus project was subsequently initiated in 2005 and resulted in the purchase and installation of required Phase I SmartBus equipment on approximately 1030 of 1050 buses.

The Capital Budget for NSAS was approved at \$6.72 million in 2008 and Transit subsequently initiated a request for qualification for the purchase of an "off-the-shelf" system as they knew there was proven technology available in the market.

Also in 2008, Transit begins to raise the profile of the SmartCard as there is a one-solution approach being fostered by the province based on the Toronto Transit Commission / Greater Toronto Area initiatives for an across the Province capability. The PRESTO label applies to the province-wide SmartCard approach.

The NSAS procurement process began with the approval of the \$6.72 million funding authority obtained through the submission of the 2008 Capital Budget. The City proceeded with the development of a two-stage procurement process for a Next Stop Announcement System. The Request for Qualifications (RFQ), stage one of the two-stage process, aimed to serve as a technical pre-qualification of the systems presented for the City's consideration. Proponents that qualified under this stage of the procurement process were invited to submit a proposal under the Request for Proposal stage, the second of the two-stage process. In June 2008, the NSAS RFQ was posted. An evaluation of the proponents was conducted in the fall of 2008 and two proponents successfully qualified to move to the request for proposal stage. In January 2009, the RFP was issued to the two qualified proponents. The RFP closed in March 2009, and subsequently, the submissions were evaluated. One bidder was successful and proceeded to the due diligence stage. The results of the procurement process were presented to the Transit Committee on September 16, 2009. The Transit Committee carried the report recommendation on September 16, 2009. The Committee report including the recommendation to approve the award of a \$17 million contract to the successful bidder was discussed at the October 14, 2009 Council meeting and deferred to the meeting of October 28, 2009.

### **3 AUDIT OBJECTIVES, SCOPE AND APPROACH**

As result of Motion 78-6 approved by Council at its meeting of November 16/17, 2009, the Office of the Auditor General was mandated to review specific contracting initiatives in order to determine:

1. Whether the procurement process regarding the SmartBus Next Stop Announcement System and the SmartCard System complied with all of the City's rules and by-laws with respect to the same.
2. The extent to which the SmartCard initiative was linked to the Next Stop Announcement System.
3. That information and briefings provided to Council throughout the contracting process were timely, complete and comprehensive in the discussions of options available to Council.

## **4 REVIEW OF THE APPLICATION OF THE PURCHASING BY-LAW REQUIREMENTS IN THE ACQUISITION OF THE NEXT STOP ANNOUNCEMENT SYSTEM**

### **4.1 Application of By-law Requirements**

The current Purchasing By-law, No. 50 of 2000, which governs how the City shall purchase goods and services, states under Application, Paragraph 4, that:

*The procedures prescribed in this by-law shall be followed to make a contract award or to make a recommendation of a contract award to Council.*

The By-law outlines that procurement is a shared responsibility and allows Supply Management and Directors great latitude in decision-making in conducting its business activities associated with procurement activities. One of the few limitations is that:

*Paragraph 20 (10) Awards emanating from a Request for Proposal require Deputy City Manager or Chief Corporate Services Officer approval where greater than \$100,000.*

Notwithstanding the above, there are several controls built into the By-law such as prescribed procedures to be followed to make a contract award or to make a recommendation of a contract award to Council.

The key requirements that appear to apply in the instance of the purchase of the Next Stop Announcement System are under the following paragraphs:

#### *REQUIREMENT FOR APPROVED FUNDS*

*6. (1) The exercise of authority to award a contract is subject to the identification and availability of sufficient funds in appropriate accounts within Council approved estimates.*

*6. (3) Supply Management shall reject all purchase requests for contracts for which sufficient funds are not available and identified unless, in the opinion of Supply Management, the deficiency is minimal and alternative funding has been identified.*

#### *PRESCRIBED COUNCIL APPROVAL*

*9. (1) Despite any other provision of this by-law, the following contracts are subject to Council approval:*

*(c) where the cost amount proposed for acceptance is higher than the Council approved branch estimates and the necessary adjustments cannot be made.*

Regarding the actual managing of the procurement itself, a comprehensive legal review found no fault with the process, with the exception of the inclusion of the options aspect as this element of the RFP did not “appear to promote a level playing

field for competition. Both bidders were not asked to price the same items. Therefore, the objective of competition was arguably not achieved.”<sup>1</sup>

Concerning the application of the controls set out in the By-law for the involvement of Council as set out at paragraphs (6) and (9), there is apparent room for improvement. As early as the fall of 2008, Supply Management and Transit staff knew at the RFQ stage that in a best case scenario, the cost of the NSAS project will likely be a minimum of 30% greater than the approved budget. Supply Management believes pricing at the RFQ stage is unreliable and generally sufficiently vague or over stated and that they did not have sufficient pricing information to go to Council. They further believe that calling upon Council might have jeopardized the integrity of the competitiveness of the tendering process by making this information public. It is our understanding that it was staff's position that it required the final pricing in order to go back to Council to seek budget authority. At the time, this was not considered a significant issue as Transit had identified other funding that could be transferred into the NSAS budget resulting in no necessary increase in funding for the project. The report was initially tabled with the sub-committee of Council to obtain budget approval. Once budget approval was obtained, staff could award the contract under delegated authority in accordance with the Purchasing By-law. It was during the budget approval process that the City received a substantive objection that necessitated that the contract award be made by Council. Notwithstanding the opinion of Supply Management, we believe staff should have taken this opportunity to advise Committee and Council (perhaps in an in-camera session to protect the confidential nature of the process) that there was a very strong chance that the \$6.72 million budget would not be sufficient to meet the market based estimate.

Furthermore, at the conclusion of the RFP process (April 2009), it was further reiterated to Supply Management and Transit staff that the minimum contract value will be roughly twice the estimated amount for the core NSAS. This was confirmed in July 2009 through the BAFO process. It is our understanding that staff's position was that they required the final pricing in order to go back to Council to seek budget authority. Again, this was not considered a significant issue as Transit had identified other funding that could be transferred into the NSAS budget and no new funding would be required. The report was initially tabled with Committee and Council to get budget approval. Once budget approval was obtained, staff could award the contract under delegated authority in accordance with the Purchasing By-law. However, it is our opinion that this also would have been an opportunity to advise Committee and Council that there was a market based price that doubled the \$6.72 million budget for NSAS. Under Paragraph 9 of the Purchasing By-law:

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<sup>1</sup> Memorandum from Borden Ladner Gervais dated October 28, 2009.

9. (2) No provision of the by-law precludes a Director or Supply Management from submitting an award to Council where:

(a) in the opinion of a Director, it is in the best interest of the City to do so, or

(b) it is a matter of procurement procedure and, in the opinion of Supply Management, it is in the best interest of the City to do so.

There was no apparent basis for Supply Management to have determined that the funding issue had been resolved in accordance with the requirements of the By-law, evidenced by the formulation of the motion put forward at the Transit Committee meeting of June 10, 2009, to approve the required \$17 million funding.

Furthermore, it appears that when Supply Management and Transit brought the issue to Council, it was effectively for ratification of a contract as there were no other viable options available.

### **Recommendation 1**

**That Supply Management, in compliance with the By-law, come to Council for authority to proceed when they have an unfunded requisition.**

#### **Management Response**

Management agrees with the recommendation.

This reflects current practice.

The SmartBus program is comprised of many separate, yet interrelated, projects. Although under the larger SmartBus umbrella, budget approval was sought on a project-by-project basis. Article 9(1)(c) of the Purchasing By-law states that Council approval is required “where the cost amount proposed for acceptance is higher than Council approved branch estimates and the necessary adjustments cannot be made.”

In the case of the SmartBus program, the General Manager, Transit Services had identified funding that could be transferred from other approved SmartBus projects to the NSAS. These programs had been previously approved by Council through the Capital Budget process. Report ACS2009-ICS-TRA-0011 was seeking approval to use these previously approved funds for the NSAS project.

Management believes that no further action is required.

### **Recommendation 2**

**That the City develop guidance for procurement staff for the application of paragraphs 6 (1) and (3) and paragraph 9 (1) (c) of the By-law, for determining under what circumstances and at what stages of the contracting process information should be presented to Council.**

### **Management Response**

Management agrees with the recommendation.

Management believes that pricing at the RFQ stage is unreliable and is generally vague or overstated and that, consequently, there is not sufficient pricing information to go to Council. Training has been provided to procurement staff and guidelines are being developed to aid them in the application of these paragraphs of the Purchasing By-law. Guidelines will be developed by the end of Q3 2010.

With regard to the NSAS project, funding was not considered a significant issue at the time as Transit had identified other funding that could be transferred into the NSAS budget resulting in no necessary increase in funding for the project. The report was initially tabled with the sub-committee of Council to obtain budget approval to reallocate funds. Once this approval was obtained, staff could award the contract under delegated authority in accordance with the Purchasing By-law.

Moreover, it was clearly defined in the RFP process for Evaluation and Selection that identification of the selected proponent did not constitute contract award. The RFP made clear that approval was required by “the appropriate approving authority at the City” prior to executing a contract with the “approved successful proponent” [emphasis added].

The audit appears to confuse the well-established legal/procurement principals of Contract A, being the terms and conditions of the tendering process (with its corresponding duties and liabilities on the parties involved in the process), and Contract B, being the actual contract awarded by the owner to the successful bidder for the delivery of the required goods/services.

### **Recommendation 3**

**That the City modify the Purchasing By-law, or develop other policy, to make clear that unidentified or inadequately described optional elements not be included in the Request for Proposal.**

### **Management Response**

Management agrees with the recommendation.

On October 30, 2009, the Manager of Supply temporarily halted the inclusion of optional value added features in bid solicitation documents until a formal review was conducted.

Following the review, the Purchasing Procedures & Policy Manual was updated to include instructions regarding the use of optional value added features in bid solicitation documents. Where optional value added features are to be included as part of a multi-stage procurement process, staff should review the

appropriateness of including these features based on the information obtained in the preliminary phases of the procurement. Where their inclusion is deemed appropriate, these features should be fully described and priced as part of the financial proposal.

Management believes that no further action is required.

#### **4.2 Management believes that no further action is required - Rights Reserved Clause**

In the conduct of the RFQ and RFP procurement process, the City utilized a clause in which it reserved the right to terminate the process at any time for convenience. The clause is simply worded and could give anyone not involved in the intricacies of contract and tendering law the impression that the City could exercise this exit strategy without financial impact. The clause utilized reads:

6. *Rights Reserved*
  - 6.1 *The right is reserved by the City to modify or revise the RFP prior to the closing or due date. In such cases, addenda will be issued to all prospective proponents.*
  - 6.2 *The City of Ottawa similarly reserves the right to cancel this RFP at any time.*
  - 6.3 *Neither the receipt of proposals, nor the completion of any of the RFP's stated evaluation and selection stages constitute an obligation on part of the City of Ottawa to award a contract.*
  - 6.5 *Notwithstanding the terms and conditions of this RFP, the resulting contract with the successful proponent will be governed solely by the negotiation and finalization of a NSAS definitive agreement satisfactory to both parties, where such an agreement will be expected to substantively incorporate the documents cited under section 3.5 or as mutually agreed to by the parties to the agreement.*
  - 6.6 *Should the City be unable to conclude a NSAS definitive agreement with any initially selected proponent, then the City will be under no further legal obligation to that proponent.*
  - 6.7 *The City of Ottawa further reserves the right to do all or any of the following at any time after the RFP due date:*
    - *Terminate the RFP process at any time prior or subsequent to the closing date, and issue a new RFP or cancel the Project completely.*

However, as the legal opinion offered to the City has made clear, the exercise of the clause cannot be made without cause. "An RFP cannot be cancelled without reason.

The courts have implied the obligation on purchasers to cancel procurements only in good faith<sup>2</sup>.

#### **Recommendation 4**

**That the City modify its Privilege or Rights Reserved Clause to better assist both the City and potential bidders appreciate the likely consequences which may result should the procurement process be modified or cancelled.**

#### **Management Response**

Management disagrees with the recommendation.

Privilege clauses, and the right to cancel a procurement, are common features in procurements. Contract authorities insert these types of clauses to give them the greatest degree of flexibility in how the procurement process, including evaluations and contract award, will be conducted.

However, like all clauses that give contract authorities flexibility in how procurements are conducted (the so-called privilege clauses); the courts have interpreted those clauses in a way that ensures that all parties are treated fairly and in a manner which ensures the integrity of the procurement process.

Similarly, with respect to cancellations, courts have looked carefully at the reasons that motivate a contract authority to cancel a procurement in order to ensure that the cancellation is not done for improper motives. That is, for a purpose that would have the effect of undermining the integrity of the competitive bidding process.

The privilege clause utilized by staff is very similar to the clause used by PWGSC (excerpted below). Management suggests that it is the application of this clause, and not the clause itself, that requires an increased understanding. Management proposes to provide increased training on the application of this clause in an effort to *“better assist both the City and potential bidders to appreciate the likely consequences which may result should the procurement process be modified or cancelled.”*

**2003 (2010-01-11) Standard Instructions - Goods or Services - Competitive Requirements**

#### **Rights of Canada**

Canada reserves the right to:

- (a) reject any or all bids received in response to the bid solicitation;
- (b) enter into negotiations with bidders on any or all aspects of their bids;
- (c) accept any bid in whole or in part without negotiations;
- (d) cancel the bid solicitation at any time;

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<sup>2</sup> Memorandum from Borden Ladner Gervais dated October 28, 2009.

- (e) reissue the bid solicitation;
- (f) if no responsive bids are received and the requirement is not substantially modified, reissue the bid solicitation by inviting only the bidders who bid to resubmit bids within a period designated by Canada; and,
- (g) negotiate with the sole responsive Bidder to ensure best value to Canada.

## **5 COMMUNICATIONS WITH THE TRANSIT COMMITTEE AND COUNCIL**

As discussed above at section 1, By-law No. 50 of 2000 establishes under what circumstances contract awards are to be brought before Council. It further gives discretion to Supply Management to elevate contract items submitting an award to Council where it is a matter of procurement procedure and / or in the opinion of Supply Management, it is in the best interest of the City to do so.

While it has already been established that there was no communication with Council on the procurement of NSAS prior to the September 16, 2009 Transit Committee, a historical look at the communication provided to Council and its sub-committees reveals that information is provided in such a way that it would be challenging for Council to obtain a holistic appreciation of the facts and the extent and the direction of the SmartBus project, as well as its cost to the taxpayer.

The approved funding authority for the NSAS was \$6.72 million in the 2008 Capital Budget<sup>3</sup>. During the procurement process it became clear, in our opinion, that this funding level would be insufficient and this fact was eventually communicated to the Transit Committee and Council.

The key stages or developments that came to light during the procurement process are:

1. In June 2008, the NSAS request for qualification (RFQ) was posted. The RFQ evaluation, in the fall of 2008, revealed that the cost estimates provided for the project were significantly greater than the approved funding for the NSAS. Clever Devices provided an estimate of US \$10.527 million<sup>4</sup>, or \$5.64 million<sup>5</sup> over the approved budget. Bell provided an estimate of \$8.684 million<sup>6</sup>, representing an excess of \$1.964 million. As per discussions with City staff it was well known that the existing Bell system would require an investment of

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<sup>3</sup> Transit Committee Minutes taken from the meeting of September 8, 2009.

<sup>4</sup> Email from Senior Policy and Purchasing Officer, dated March 2, 2010.

<sup>5</sup> USD amount converted to Canadian currency utilizing an estimated exchange rate for the time period of the transaction.

<sup>6</sup> Email from Senior Policy and Purchasing Officer, dated March 2, 2010.

\$7.3 million<sup>7</sup> to upgrade the closed-architecture platform to enable the NSAS functionality. As a result, the true cost of the Bell proposal sits at approximately \$15.984 million representing a variance of \$9.264 million over the approved budget authority.

2. In March 2009, Clever Devices finalized its costing for purposes of the RFP submission. Costs were revised to US \$10.75 million<sup>8</sup>, or \$6.66 million<sup>9</sup> greater than the Council-approved budget allocation.

Based on the best available information provided by Transit and Supply Management, our understanding is that there were no recent (within the last 24 months) overarching SmartBus Strategy presentations or updates provided to Council prior to the June 2009 Transit Committee meeting. Based on information provided by Transit and Supply Management, the following represents the timing of the established (pertinent) communication to various audiences:

1. On May 7, 2009, the Vice-Chair of the Transit Committee inquired about the NSAS procurement process and was informed that two proponents have qualified. The Bell submission was disqualified in April. It is unclear why this information was not communicated to the Vice-Chair of the Transit Committee. It is our opinion that the information provided to the Vice-Chair of the Transit Committee was not current and therefore incorrect.
2. On June 10, 2009, the Transit Committee was provided with a report for the consideration of two items:
  - (1) *Advancing the deployment of two SmartBus features being offered as value-added options by the Next Stop Announcement System (NSAS) vendor Clever Devices; and*
  - (2) *A budget of \$17 M for the 2009 Capital Project - Transit Vehicle Information System, which requires no new funding and includes:*
    - (a) *\$6.72 M from previous Council-approved NSAS funding;*
    - (b) *\$5.65 M from a previously identified SmartBus project that will now be incorporated into the Clever Devices' platform;*
    - (c) *\$1.6 M savings within IO 905146 (Bus Growth); and*
    - (d) *\$3.03 M savings within IO 905205 (Bus Replacement).*
3. In July 2009, Clever Devices was selected as the successful proponent subject to approval by the appropriate approving authority at the City as stipulated in the RFP.

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<sup>7</sup> Memorandum from General Manager Transit Services to Mayor and Members of Council dated November 4, 2009 and discussion with City Staff.

<sup>8</sup> Email from Senior Policy and Purchasing Officer, dated March 2, 2010.

<sup>9</sup> USD amount converted to Canadian currency utilizing an estimated exchange rate for the time period of the transaction.

4. A Best and Final Offer negotiation process is initiated with Clever Devices who had been selected as the successful proponent two months earlier.
5. On September 16, 2009, the Committee considers the approval of the recommendation of two items (refer to June 2009 above).
6. The information package included background information dated back to 1998 when KPMG/IBI were commissioned to conduct the OC Transpo Comprehensive Review which assisted the City in establishing the foundation of the SmartBus project; the NSAS is an integral and planned component of the SmartBus. The information includes, as well, a section on the financial cost of NSAS. The cost is communicated to Committee members as a total project requirement of \$17 million. The \$17 million is suggested to be funded via the approved authority of \$6.72 million and with savings and/or efficiencies from previously approved authorities (refer to 2b, 2c, and 2d above). The financial component of the analysis does not completely address the rationale for which the previously approved authority of \$6.72 million is now estimated to cost \$17 million, or approximately 2.5 times the anticipated amount. The General Manager Transit Services indicated to the Transit Committee that the “difference between the \$6.72 million and what is now in front of the Committee (\$17 million) is largely a suite of features that staff intended to buy through other capital budgets”<sup>10</sup>.
7. In hindsight, the increase in the NSAS estimated costs to implement the solution may not impact the overall SmartBus envelope, or expected cost, but it would appear challenging for Council to achieve this observation with certainty, as an overarching strategy to the SmartBus project has not been presented to Council. Such a strategy would assist Council in understanding the larger SmartBus project scope, the variability within each component of the project, and the uncertainty inherent in information technology projects.
8. On October 7, 2009, the Chief Technology Advisor provided input to Council after examining the proposal from a financial and accountability perspective and to support the recommendations of the Mayor’s Task Force on eGovernment as adopted by Council. The letter from the Chief Technology Advisor states that the review did not deal with the underlying technology.
9. On October 8, 2009, a memo from the General Manager Transit Services indicates that the \$17 million investment translates into a \$50 million return over the next 10 years (ROI). The support for this return is based, to the best of our knowledge, in part on information available from the Chicago Transit Authority which experienced, by means of implementing similar SmartBus features in their jurisdiction, (i) an increase in ridership, (ii) a positive influence on the deployment service, an increase in bus availability, and provided for the

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<sup>10</sup> September 16, 2009, from extract of draft minute 36

maintenance organization to convert their services from a reactive operations to a proactive one<sup>11</sup>.

10. On October 9, 2009, the City Clerk and Solicitor, prepared a memo to Council to summarize the legal impediments to the City discussing preferential treatment for local suppliers, why the City is obligated to proceed to awarding contract to Clever Devices, and why the "exit clause" (i.e., the termination for convenience clause) should not be used due to the perception of bad faith by the courts. This appears to be the first official discussion to Council with respect to the re-tendering of the Request for Proposal.
11. On October 28, 2009, the General Manager Transit Services provided a high level roadmap of the SmartBus project to Council, presumably to put the NSAS into perspective. The General Manager and others spoke to the three cost drivers: a next stop announcement system, a platform to run it on and two additional applications.
12. On October 28, 2009, the City Council rejected the Transit Committee recommendations and decided (subject to reconsideration) to re-tender the re-scoped project in a transparent fashion for all interested bidders.
13. On November 4, 2009, the General Manager Transit Services informs Council that if the RFP is re-tendered, the City faces an immediate and additional \$7.3 million of expenditures (over and above the anticipated cost of the NSAS) to upgrade the existing Bell platform in order to accommodate the PRESTO SmartCard project. SmartCard in brief is a means for riders to pay fares using a single contactless smartcard for convenience and facilitates rapid boarding, electronic purse, electronic period passes, etc. In addition the project would be delayed for two years in order to develop and tender new specifications.
14. On November 13, 2009, the City's legal counsel brings factual background information to Council in light of the pending Council discussion on the possible reconsideration motion. The memo explains the exposure to potential lawsuits from Bell and Clever Devices.
15. On November 16-17, 2009, Council reconsiders the motion to re-tender the RFP and approves the award of the \$12.1 million contract to Clever Devices.
16. On December 30, 2009, the City enters into a purchase order agreement with Clever Devices.

It appears that City staff did not have a briefing strategy with respect to this procurement element of the SmartBus. An overarching vision, or roadmap, should have been developed and presented to Council for the complete SmartBus venture in order for Council to appreciate the magnitude as well as the complexity of the project prior to the initiation of NSAS, the next major stage of SmartBus.

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<sup>11</sup> September 8, 2009 Transit Committee Minutes.

Not only does it appear that Council was not briefed adequately on the vision, its inherent costs and its challenges, Council was presented with an array of confusing information on the project at hand. The lack of a pre-existing strategy for Council to refer to contributed to the communication problem.

The NSAS was brought before Council at the same time two major projects were proceeding: the SmartBus and the SmartCard. On the surface, the two terms appear to be interchangeable until the reader becomes intimate with the background information relevant to each venture. In addition, the timing of the communication with Council appears to be such that the procurement decisions are already laid out with few options at hand. For example, in September 2009, Council was asked to approve the \$17 million project to the successful proponent when, in reality, Clever Devices had already been notified they were selected as the successful proponent. In addition, in October 2009, Council was faced with making a decision with respect to the direction of the procurement process which entailed the selection of a \$17 million contract or the decision to re-tender the RFP which exposes the City to significant legal ramifications from Clever Devices. Important to note is the fact that Council has yet, as of October 2009, to approve the funding for the project, whether it was \$17 million or \$12 million.

Council should be at the forefront and should not be seen as the last bureaucratic obstacle in the procurement process. In situations where Council's approval is required, staff should not award or offer a preliminary successful communication to the proponent prior to the approval of the funding from Council. The absence of both an overall strategy for the life of SmartBus and a briefing strategy for the NSAS procurement contributed to effectively taking the decision making out of the hands of Council in this situation.

### **Recommendation 5**

**That the City ensure that major procurement initiatives be required to develop and follow a Briefing Strategy in order to ensure that Council is kept abreast of progress against targets and/or phases which are potentially separated by months if not years.**

#### **Management Response**

Management agrees with the recommendation. However, management disagrees that Council was not provided with complete and accurate information regarding the NSAS issue.

The background section of report (ACS2009-ICS-TRA-0011), presented to Transit Committee on September 16, 2009, clearly sets out the history of the SmartBus program and how the recommended approach would address any challenges with the program. The Financial section of the report outlines the cost of what staff was recommending to purchase, and the budgets the spending was to be drawn from. Following the September 16, 2009 Transit Committee meeting,

members of Council were provided with detailed information to assist in clarifying the situation. The SmartBus technology has been an ongoing discussion with Council since amalgamation. A number of opportunities have been presented by Transit Services to discuss IT technology, including a 2003 KPMG study, Capital Budget requests and three SmartCard reports.

In order to ensure senior management and Council are kept abreast of progress against targets and/or phases of major procurements, Supply Management has implemented a formal Procurement Plan Approval process whereby requirements and strategies are reviewed and approved in advance of a procurement process. This approval process is aimed at ensuring that requirements, deliverables and timelines are well established and are not unduly restrictive, and that multi-stage procurement processes do not unnecessarily limit competition.

It is proposed that the formal procurement plan be used as a communications tool identifying the timing and proposed strategy for procuring the components comprising the initiative as a whole, and that regular updates be provided to Committee and/or Council on significant changes (technology, schedule, proponents, and costs) and their impact on the procurement plan.

Management believes that no further action is required.

### **Recommendation 6**

**That all parties involved in major procurement initiatives, with respect to their various areas of expertise, ensure that Council receives correct and timely information.**

#### **Management Response**

Management agrees with the recommendation. However, management disagrees that Council was not provided with complete and accurate information regarding the NSAS issue.

The background section of report (ACS2009-ICS-TRA-0011), presented to Transit Committee on September 16, 2009, clearly sets out the history of the SmartBus program and how the recommended approach would address any challenges with the program. The Financial section of the report outlines the cost of what staff was recommending to purchase, and the budgets the spending was to be drawn from. Following the September 16, 2009 Transit Committee meeting, members of Council were provided with detailed information to assist in clarifying the situation. The SmartBus technology has been an ongoing discussion with Council since amalgamation. A number of opportunities have been presented by Transit Services to discuss IT technology, including a 2003 KPMG study, Capital Budget requests and three SmartCard reports.

Management believes that no further action is required.

## **6 THE EXTENT TO WHICH THE SMARTCARD/SMARTBUS INITIATIVE WAS LINKED TO THE NEXT STOP ANNOUNCEMENT SYSTEM**

In 1998, the KPMG/IBI Group was commissioned to conduct the OC Transpo Comprehensive Review to identify challenges in providing excellent customer service and opportunities for improvements throughout the system. Smart operating systems (later referred to as “SmartBus”) were singled out as an exceptionally effective and efficient method of increasing the fleet’s reliability, while providing a multitude of ways to increase customer confidence in the system itself. By leveraging technology used in the operation and deployment of buses via a Global Positioning System (GPS), customer could benefit from real-time communication<sup>12</sup>.

We were advised that in 2001, Council (at amalgamation) approved a capital budget funding of \$8 million for the SmartBus project. We were also advised that concurrently, the 2001 capital budget approved funding of \$23 million for the SmartCard which, in a nutshell, is a means for riders to pay transit fares using a single, contactless, smartcard for convenience (e.g., rapid boarding, electronic purse, electronic period passes, etc.).

In 2003, Transit initiated the SmartBus capital project with Bell. City staff members have indicated that the SmartBus project was to be fully implemented over a 10-year horizon. Phase I of the project addresses the development of the closed architecture functionality as well as its necessary software to operate the key selected features of the SmartBus. These features included vehicle location, computer-aided dispatch, schedule adherence, transfer printer and control, as well as text messaging from control centre to the various bus operators. Due to capacity and financial constraints, the desired features were prioritized and planned for an eventual integration in the near future. Features of significant interest included real time arrival information, vehicle system maintenance which would enable Transit to convert their services from a reactive operation to a proactive one, and an automated stop announcement system.

In 2005, Phase II of the Bell SmartBus project was initiated and transformed the SmartBus blueprint into purchase and installation of the equipment and software on the majority of the fleet (i.e., approximately 1030 of 1050 buses).

In 2007, the Toronto Transit Commission (TTC) received an order by the Ontario Human Rights Commission to announce all stops on board their vehicles. The City of Ottawa received a similar order through the Canadian Transportation Agency (CTA). The order required that the City adhere to its own policy regarding the requirement to announce the schedule stops on the bus routes. At this time, the

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<sup>12</sup> Transit Committee Minutes September 8, 2009.

NSAS was considered an unprioritized component of the SmartBus as the capital budget to implement this component has not been approved by Council. In 2008, the Council approved funding authority of \$6.72 million for the implementation of NSAS via the capital budget. The amount was estimated / benchmarked using information from the in-house developed TTC project. In hindsight, it appears, as per City staff, that the cost determination omitted the internal cost of developing the software to run the platform and its labour costs to perform the installation of the hardware on the vehicles.

2008 also witnessed the resurgence of the SmartCard profile with an emphasis to integrate a province-wide compatibility feature. In particular, the Government of Ontario, GO Transit and nine municipal transit partners in the Greater Toronto and Hamilton Area and in Ottawa, have undertaken the design, development and implementation of a seamless regional transit fare card system, PRESTO, based on contactless ("SmartCard") technology. PRESTO will allow customers to ride on any participating transit system without pre-purchasing (physical) tickets or having to search for the correct change. The PRESTO card, which is the size of a gift or debit card, will use "stored-value" in the form of a common electronic purse (e-Purse) as the medium for all fare payment transactions<sup>13</sup>.

Transit had always considered NSAS as an integral element of the SmartBus project. The technology available during the partnership with Bell was in its infancy stage. As such, Bell's solution was through a closed architecture platform where custom development would provide desired features at an agreed upon cost. As technology evolved, the availability of proven technology turnkey products also became a desirable idea. At the time the drafting of the RFQ was being considered, Transit was well aware that if they chose a supplier other than Bell, it could obtain a stand-alone platform utilizing an open architecture design. A disadvantage of changing supplier would be the necessity to implement and run two separate platforms until such a time as the integration to the new platform would be complete, which was estimated (by City staff) to be a period of approximately 18 to 24 months. The disadvantage however is offset by the having the benefits of the integration of features provided by other suppliers thereby increasing the available technology-proven features on the market while ensuring the costs are as competitive as possible.

In summary, the next-stop announcement system is not a new concept which was added to the SmartBus project in 2008, when it received the \$6.72 million Council-approved funding. The NSAS formed part of the SmartBus concept as early as 2001, if not earlier. A complicating and confusing feature of discussions with Council, however, was how to proceed with the CTA mandated introduction of NSAS if the contract with Clever Devices was not approved. To proceed with the current supplier of initial SmartBus services would potentially add a significant

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<sup>13</sup> <https://www.prestocard.ca>

amount of additional money, approximately \$7.3 million<sup>14</sup>, to the overall project cost (as estimated by IT) due to technological obsolescence (display screen, printer, modem, and technology nearing its end-of-life, etc.). Costs were detailed in the briefing note to Council.

As stated earlier, the details concerning the various elements of the technology around SmartBus and SmartCard can be confusing, with numerous issues in play: ongoing costs to maintain Bell's platform for existing SmartBus features, parallel tracking / implementation of SmartCard initiative, higher than estimated bids being submitted, the introduction of optional features to advance introduction of SmartBus features and the potential sources of funding to cover the additional costs of acquisition of the technology.

This situation is exacerbated by the absence of an overarching strategy for Council to refer to for overall progress in implementation of SmartBus initiative.

It is our opinion that Recommendation 5 would address the issues identified in this section of the report.

## **7 CONCLUSION**

The initial cost estimate for NSAS omitted key elements and it appears that there was little communication with Council on the procurement of NSAS in the 24 months prior to the September 16, 2009 Transit Committee meeting. It would therefore be challenging to obtain a holistic appreciation of the facts and the extent and direction of the SmartBus project.

The scenario to proceed when finally brought to Council was confusing with numerous issues in play with no apparent overarching strategy for Council to refer to for overall progress in implementation of SmartBus features.

A comprehensive legal review found no fault with the contracting process, with the exception of the inclusion of the "options" aspect. The legal opinion offered to the City also made clear that the exercise of the termination or exit clause cannot be made without cause.

In our opinion, in accordance with the By-law, Supply Management should have gone to Council for authority to proceed when it became apparent that they no longer had a fully funded requisition for the acquisition of the NSAS.

In conclusion it appears to be a situation where management within Supply Management and Transit did not fully appreciate Council's potential concern with the magnitude of cost and/or scope variance in the project given the current economic situation.

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<sup>14</sup> Memorandum from General Manager Transit Services, to Mayor and Members of Council dated November 4, 2009

## **8 ACKNOWLEDGEMENT**

We wish to express our appreciation for the cooperation and assistance afforded the audit team by management.