



**Ministry of  
Transportation Ontario**

**REQUEST FOR PROPOSALS**

**to**

**DESIGN BUILD FINANCE OPERATE AND MAINTAIN**

**ONTARIO HIGHWAY SERVICE CENTRES**

**Infrastructure Ontario**

**RFP No. OIPC-09-00-M085**

**Issued February 27, 2009**

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# REQUEST FOR PROPOSALS

## SECTION 1 – INTRODUCTION

### 1.1 General

(1) This Request for Proposals (“**RFP**”) is issued by the Ontario Infrastructure Projects Corporation (“**Infrastructure Ontario**”, also known as “**OIPC**”), in conjunction with the client or clients (referred to collectively as the “**Client**”) named in the RFP Data Sheet. Infrastructure Ontario and the Client are collectively referred to as the “**Sponsors**” for the purposes of this RFP.

(2) In this RFP, Prequalified Parties that submit documents in response to this RFP are referred to as “**Proponents**” and their submissions are referred to as “**Proposals**”. The entity that is selected by the Sponsors to proceed to Phase 2 of Stage 2 of the RFP Process pursuant to RFP Section 1.3 is referred to as the “**Negotiations Proponent**”. For the purposes of convenience, in this RFP the expression “**Proponents**” also includes Prequalified Parties prior to the submission of their Proposals.

(3) Except as provided in RFP Section 1.3(1)(a) and subject to rights of the Sponsors in this RFP, the procurement process shall commence with the issuance of this RFP and shall terminate on the Closing Date (the “**RFP Process**”).

(4) Infrastructure Ontario will manage the RFP Process on behalf of the Sponsors and Infrastructure Ontario shall be the single point of contact for Proponents on behalf of the Sponsors. During the RFP Process, Proponents shall contact Infrastructure Ontario only through the Contact Person as set out in RFP Section 3.2.1.

(5) The Project to which this RFP applies is a ReNew Ontario initiative and has been approved to proceed as an alternative financing and procurement project. Details relating to the Ministry of Public Infrastructure Renewal’s (now, the Ministry of Energy and Infrastructure) “Building a Better Tomorrow: An Infrastructure Planning, Financing and Procurement Framework for Ontario’s Public Sector” (the “**IPFP Framework**”) are available at [www.pir.gov.on.ca](http://www.pir.gov.on.ca). The IPFP Framework sets out five fundamental principles for the procurement of public infrastructure, including the Project, as follows:

- (a) The public interest is paramount;
- (b) Value for the investment of public money must be demonstrated;
- (c) Appropriate public control and ownership must be maintained;
- (d) Accountability must be maintained; and
- (e) Fair, transparent and efficient processes must be used.

(6) A brief description of the project that is the subject of this RFP (the “**Project**”) is set out in the RFP Data Sheet. A detailed description of the Project is contained in the documentation in the Data Room.

(7) While the Sponsors will manage the procurement process in respect of the Project, the Negotiations Proponent, subject to the requirements and conditions of the RFP Documents, would actually enter into the Final Project Agreement with the party or parties named as the signing party or parties in the RFP Data Sheet (the “**Signing Parties**”). Unless listed as Signing Parties to the Final Project Agreement in the RFP Data Sheet, Infrastructure Ontario will not be a party to the Final Project Agreement.

## **1.2 Prior RFP, Prequalified Parties and Proponent Representatives**

(1) The prior request for proposals for the Project (the “**Prior RFP**”) has been cancelled.

(2) The prequalified parties eligible to participate in this RFP Process are listed in the RFP Data Sheet (“**Prequalified Parties**”). The Prequalified Parties were prequalified through the Project’s prior Request for Qualifications (“**RFQ**”) process that preceded the Prior RFP. The prequalification documents submitted by each of the Prequalified Parties in the RFQ process are referred to as a Prequalified Party’s “**Prequalification Submission**”.

(3) All correspondence from the Sponsors to a Proponent will be sent to the Person identified in the Proponent’s Prequalification Submission to receive information and notices on behalf of the Proponent (the “**Proponent Representative**”). Each Proponent is solely responsible to ensure that all contact information of the Proponent Representative is accurate and updated at all times during the RFP Process. Proponents may update or revise their Proponent Representatives’ information by notifying the Contact Person, in writing.

## **1.3 Overview of the Stages of Project Procurement and Implementation**

(1) The Sponsors will carry out the procurement and implementation of the Project in accordance with the following stages:

(a) Stage 1 – Prequalification Stage

The prequalification stage (“**Prequalification Stage**”) preceded the Prior RFP Process and identified the Prequalified Parties and other parties prequalified pursuant to the RFQ (“**Collective Prequalified Parties**”). The Prequalification Stage is a stand alone independent stage and is complete once the Collective Prequalified Parties are identified by the Sponsors (whether identified initially as prequalified parties or added subsequently in accordance with the RFQ documents) and have received notification by the Sponsors that they were prequalified under the RFQ.

(b) Stage 2 – RFP Procurement Process

(i) Stage 2 (Phase 1) - Phase 1 of Stage 2 of the RFP procurement process is the competitive procurement process described in detail in this RFP that results in the selection of the Negotiations Proponent.

(ii) Stage 2 (Phase 2) – Phase 2 of Stage 2 of the RFP procurement process involves the negotiation and settlement of the Final Project Agreement by the Sponsors and the Negotiations Proponent. As part of Phase 2 of Stage 2, the Negotiations Proponent may be requested to perform certain early works, consisting of certain design professional services and applications for Project Co Permits, Licences and Approvals, on terms and conditions to be negotiated and agreed upon by the Sponsors and the Negotiations Proponent.

(c) Stage 3 – Implementation of the Final Project Agreement

Once the Signing Parties and the Negotiations Proponent have executed the Final Project Agreement, the terms and conditions of the Final Project Agreement shall determine how the Project is to proceed.

#### 1.4 Fairness Monitor

(1) The Sponsors have retained the Fairness Monitor named in the RFP Data Sheet to monitor the RFP Process.

### SECTION 2 – THE RFP DOCUMENTS AND THE DATA ROOM

#### 2.1 RFP Documents

(1) The RFP Documents (the “**RFP Documents**”) are:

- (a) this RFP;
- (b) Schedule 1 – RFP Data Sheet;
- (c) Schedule 2 **Error! Reference source not found.** – Submission Requirements and Evaluation Criteria;
- (d) Schedule 3 – Proposal Submission Form;
- (e) Schedule 4 – Proponent Team Member Declaration;
- (f) Schedule 5 – Strategic Infrastructure Investment and Fuel Products Annual Payment Submission Form for Subsidy Based Submission;
- (g) Schedule 6 – Administrative Checklist;
- (h) Schedule 7 – Form of Project Agreement;
- (i) Schedule 8 – Replacement Table 1 to Schedule 11 to Project Agreement; and

(j) Addenda to the RFP Documents, if any.

(2) Subject to RFP Section 2.2(1), the RFP Documents shall be read as a whole. The Schedules and Addenda, if any, constitute an integral part of this RFP and are incorporated by reference. For greater clarity, Background Information is not an RFP Document.

## **2.2 Conflicts or Inconsistencies in Documents**

(1) For the purpose of the RFP Process, if there are any conflicts or inconsistencies among the terms and conditions of the documents comprising RFP Documents the following shall apply:

- (a) in respect of matters of interpretation related to the RFP Process and all competitive procurement process matters, this RFP shall prevail over the Schedules to this RFP during the RFP Process;
- (b) in respect of all matters of interpretation of the Project and the Project Agreement during the RFP Process, the Project Agreement shall prevail over this RFP and all other Schedules to this RFP; and
- (c) for the purpose of resolving conflicts or inconsistencies among the documents that constitute the Project Agreement, the provisions of the Project Agreement dealing with conflicts or inconsistencies shall govern.

(2) Despite RFP Section 2.2(1), if the Proponent believes that there is any term or condition in any RFP Document that is ambiguous, or that conflicts or is inconsistent with any other term or condition in the RFP Documents, the Proponent shall notify the Contract Person of that ambiguity, conflict or inconsistency electronically in accordance with RFP Section 3.2.1.

(3) If there is a conflict or inconsistency between:

- (a) the Sponsors' electronic version of an RFP Document as contained in the Data Room; and
- (b) any other version of the same RFP Document (whether in electronic or hard copy);

the Sponsors' electronic version as contained in the Data Room shall govern.

(4) If there is any conflict or inconsistency between documents, including RFP Documents, contained in the Data Room and documents that are downloaded by the Proponent, the documents contained in the Data Room shall govern.

(5) If there is any conflict or inconsistency between two versions of the same RFP Document contained in the Data Room, the RFP Document of the later date or version number shall prevail over the same RFP Document of an earlier date or version number. Unless otherwise indicated, for the purposes of this RFP Section 2.2(5), the date of each RFP Document



shall be determined by the date and time when that document was placed in the Data Room by Infrastructure Ontario.

### 2.3 Distribution of Documents to Proponents

(1) The Sponsors will circulate this RFP directly to each Proponent's Representative by e-mail. Except as provided in RFP Section 2.3(2), Infrastructure Ontario will circulate all other RFP Documents, including Addenda, by placing them in the Data Room and notifying the Proponent Representatives by e-mail that RFP Documents or Addenda, as applicable, have been added to the Data Room. Notification to Proponents by Infrastructure Ontario that documents have been added to the Data Room is a courtesy only and Proponents are solely responsible to ensure that they reviewed all documents in the Data Room in accordance with RFP Section 2.4(3) and, in particular, have reviewed all documents in the Data Room immediately prior to submitting Proposals.

(2) The Sponsors may circulate some RFP Documents in paper copy. If the Sponsors circulate any RFP Documents in paper copy, Proponents will be notified of a paper copy circulation by way of a notice in the Data Room.

### 2.4 Data Room

(1) The Sponsors have established an electronic data room (the "**Data Room**") at a secure website address for:

- (a) the distribution of RFP Documents and Addenda (including "black-lined" RFP Documents revised by Addenda); and
- (b) the provision of various types of background information for the Proponents' review ("**Background Information**").

(2) Subject to RFP Section 3.8.2, the Data Room is currently accessible to Proponents. The Sponsors may add, delete or amend documents in the Data Room at any time.

(3) Each Proponent is solely responsible to ensure that it:

- (a) contacts the Contact Person at the coordinates set out in the RFP Data Sheet to arrange access to the Data Room and receipt of a Data Room password;
- (b) has the appropriate software which allows the Proponent to access and download RFP Documents and Background Information from the Data Room; and
- (c) checks the Data Room frequently for the addition, deletion or amendment of RFP Documents and Background Information and, at all times, bases its actions or submissions during the RFP Process on only the most current RFP Documents or Background Information.

## 2.5 Proponent Investigations

(1) Each Proponent and each of its Proponent Team Members is solely responsible, at its own cost and expense, to carry out its own independent research, due diligence or to perform any other investigations, including seeking independent advice, considered necessary by the Proponent to satisfy itself as to all existing conditions affecting the Project or the Project Agreement. The Proponents' and Proponent Team Members' obligations set out in this RFP Section 2.5 apply irrespective of any Background Information in the Data Room or information contained in the RFP Documents. The Proponents' and Proponent Team Members' obligation to carry out independent research, investigations, due diligence or to seek independent advice or, if applicable, their ability to rely on information provided by the Sponsors is more particularly set out in the Project Agreement.

(2) Except as explicitly provided in the Project Agreement, the Sponsors do not represent or warrant the accuracy or completeness of any information set out in the RFP Documents or made available to Proponents or Proponent Team Members in the Data Room as Background Information or of any other background or reference information or documents prepared by the Sponsors or by third parties and which may be made available to Proponents or Proponent Team Members by or through the Sponsors. Proponents and Proponent Team Members shall make such independent assessments as they consider necessary to verify and confirm the accuracy and completeness of all such information as any use of or reliance by Proponents or Proponent Team Members on any and all such information shall be at the Proponents' and Proponent Team Members' sole risk and without recourse against the Sponsors or the Province.

(3) Neither the Sponsors nor the Government are responsible in any way whatsoever for any misunderstanding by the Proponent or any of its Proponent Team Members of the RFP Documents, Background Information, any documents placed in the Data Room or any other type of information provided by or communication made by the Sponsors.

## SECTION 3 – THE RFP PROCESS

### 3.1 RFP Process Timetable

(1) The deadline for the submission of Proposals (the “**Submission Deadline**”) and the general timetable for the RFP Process (the “**Timetable**”) are set out in the RFP Data Sheet.

(2) The Sponsors may amend the Timetable in their sole discretion:

- (a) at any time prior to the Submission Deadline for events that are to occur prior to or on the Submission Deadline, including the Submission Deadline itself; and
- (b) at any time in the RFP Process for events that are to occur after the Submission Deadline.

## **3.2 Contact Person**

### **3.2.1 Contact Person**

(1) The Proponents shall submit all communications regarding this RFP, the RFP Process, the Project Agreement and their Proposals to the Contact Person electronically at the coordinates listed in the RFP Data Sheet. The RFP Process shall not include a clarification or request for information process.

## **3.3 Communications Restrictions**

### **3.3.1 Communications with Municipalities, Other Governmental Authorities and Utilities**

(1) Subject to the restrictions in RFP Section 3.3.2 and any special rules set out in the RFP Data Sheet, Proponents, Proponent Team Members and their respective Advisors are permitted to communicate directly with any municipality, Governmental Authority or utility with respect to municipal, utility or other types of governmental requirements related to the Project. Under no circumstances will any special rules set out in the RFP Data Sheet in accordance with this RFP Section 3.3.1(1) override the provisions of RFP Section 3.3.2.

(2) The Sponsors are not, in any way whatsoever, responsible for any representations, statements, assurances, commitments or agreements which Proponents, Proponent Team Members or their respective Advisors receive or believe they may have received from a municipality, a Governmental Authority, or a utility. Proponents, Proponent Team Members and their respective Advisors rely on any such representations, assurances, commitments or agreements at their sole risk without recourse against the Sponsors or the Province.

### **3.3.2 Prohibited Contacts and Lobbying Prohibition**

(1) Proponents and Proponent Team Members and all of their respective Advisors, employees and representatives are prohibited from engaging in any form of political or other lobbying, of any kind whatsoever, to influence the outcome of the RFP Process.

(2) Without limiting the generality of RFP Section 3.3.2(1), none of the Proponents, Proponent Team Members or any of their respective Advisors, employees or representatives shall contact or attempt to contact, either directly or indirectly, at any time during the RFP Process, any of the following Persons or organizations on matters related to the RFP Process, the RFP Documents, or the Proposals:

- (a) any member of the Evaluation Committee;
- (b) any Advisor to the Sponsors or the Evaluation Committee;
- (c) any employee or representative of:
  - (i) the Sponsors;

- (ii) the Ministry of Energy and Infrastructure or any other Ministry, agency or entity listed in the RFP Data Sheet; or
- (iii) the Premier of Ontario's office or the Ontario Cabinet office;
- (d) any Member of the Provincial Parliament (including the Premier) or his or her staff or representatives; or
- (e) any directors, officers or consultants of any entity listed in RFP Sections 3.3.2(2)(a) to (d).

(3) If a Proponent or a Proponent Team Member or any of their respective Advisors, employees or representatives, in the opinion of the Sponsors, contravenes RFP Sections 3.3.2(1) or (2), the Sponsors may, in their sole discretion:

- (a) take any action in accordance with RFP Section 7.2; or
- (b) impose conditions on the Proponent's or Proponent Team Member's continued participation in the RFP Process that the Sponsors consider, in their sole discretion, to be appropriate.

For clarity, the Sponsors are not obliged to take the actions set out in RFP Sections 3.3.2(3)(a) or (b).

### 3.3.3 Media Releases, Public Disclosures and Public Announcements

(1) A Proponent shall not, and shall ensure that its Advisors, employees, representatives and Proponent Team Members, and their respective Advisors, employees and representatives do not, issue or disseminate any media release, public announcement or public disclosure (whether for publication in the press, on the radio, television, internet or any other medium) that relates to the RFP Process, the RFP Documents or the Project or any matters related thereto, without the prior written consent of the Sponsors.

(2) None of the Proponents or the Proponent Team Members or any of their respective Advisors, employees or representatives shall make any public comment, respond to questions in a public forum, or carry out any activities to either criticize another Proponent or Proposal or to publicly promote or advertise their own qualifications, interest in or participation in the RFP Process without the Sponsors' prior written consent, which consent may be withheld in the Sponsors' sole discretion. Notwithstanding this RFP Section 3.3.3(2), Proponents, Proponent Team Members and their respective Advisors, employees and representatives are permitted to state publicly that they are participating in the RFP Process.

(3) For the purpose of greater clarity, RFP Section 3.3.3(2) does not prohibit disclosures necessary to permit the Proponent to discuss the Project with prospective subcontractors but such disclosure is permitted only to the extent necessary to solicit those subcontractors' participation in the Project.

### 3.3.4 Restrictions on Communications between Proponents – No Collusion

(1) A Proponent shall not discuss or communicate, directly or indirectly, with any other Proponent, any information whatsoever regarding the preparation of its own Proposal or the Proposal of the other Proponent in a fashion that would contravene Applicable Law. Proponents shall prepare and submit Proposals independently and without any connection, knowledge, comparison of information or arrangement, direct or indirect, with any other Proponent.

(2) For greater clarity, RFP Section 3.3.4(1) applies to Proponents and Proponent Team Members and their respective Advisors, employees and representatives.

### 3.4 **Meetings with Proponents**

(1) The RFP Process shall not include Proponent meetings, including commercially confidential meetings.

### 3.5 **Site Visits**

#### 3.5.1 Site Visits

- (1) Proponents are not permitted to access any Sites. The foregoing shall not restrict:
- (a) a Proponent or Proponent Team Member's activities in relation to those Sites for which it is currently involved in providing services; or
  - (b) visits to those portions of the Sites that are accessible to members of the public for the usual purposes that members of the public visit the Sites.

### 3.6 **Changes to Proponents and Proponent Team Members**

(1) Proponents shall not change their shareholders (unless the Proponent is a company whose equity securities are listed on a recognized stock exchange), Proponent Team Members, Key Individuals, or other parties identified in the Proponents' Prequalification Submissions (the "**Identified Proponent Parties**") without the prior written consent of the Sponsors.

(2) Despite RFP Section 3.6(1), Proponents are permitted to request a change in their Identified Proponent Parties in accordance with this RFP Section 3.6.

(3) If, prior to the Submission Deadline, a Proponent wishes to request a change in its Identified Proponent Parties, the Proponent shall notify the Contact Person as soon as possible and, in any event, no later than seven days prior to the Submission Deadline. That notification shall clearly identify the proposed change in the Identified Proponent Party including a proposed substitute and including sufficient documentation to demonstrate that the proposed substitute would have met or exceeded any applicable criteria applied during the RFQ process.

(4) The Proponent shall provide any further documentation as may be reasonably requested by the Sponsors to assess any proposed substitute. If the Sponsors, in their sole discretion, consider the proposed substitute to be acceptable the Sponsors may consent to the substitution. The Sponsors' consent to such substitution, however, may be subject to such terms and conditions as the Sponsors may require. If the proposed substitute is not acceptable to the Sponsors, the Proponent shall propose an alternate substitute for review by the Sponsors in the same manner as the first proposed substitute. The Sponsors may, in their sole discretion, disallow any actual or proposed change.

(5) In the case of an actual change in the Identified Proponent Parties previously made by the Proponent without consent by the Sponsors or a change proposed after the Submission Deadline, the Sponsors may, in their sole discretion, disqualify the Proponent and terminate the Proponent's continued involvement in the RFP Process or allow the Proponent to continue under such terms and conditions as the Sponsors, in their sole discretion, may require.

(6) If, on or after the Submission Deadline and prior to the Closing Date, there is an actual or proposed addition, deletion, substitution or other change in the membership or effective control of an Identified Proponent Party, or if there is a change in circumstances that may materially adversely affect an Identified Proponent Party in a way which could impair the Proponent's or the Identified Proponent Party's ability to perform their respective obligations under the Project Agreement, then the Proponent shall promptly notify the Sponsors in writing by delivery or facsimile to the Contact Person. The Sponsors may, in their sole discretion, refuse to accept a change in an Identified Proponent Party that occurs or is requested by the Proponent after the Submission Deadline and may, in their sole discretion, disqualify the Proponent from continuing in the RFP Process.

(7) Proponents are advised that RFP Section 3.11 shall apply, mutatis mutandis, with respect to any proposed changes to Proponents and Proponent Team Members under this RFP Section 3.6.

### **3.7 Addenda/Changes to the RFP Documents**

(1) The Sponsors may, in their sole discretion, amend or supplement the RFP Documents prior to the Submission Deadline. The Sponsors shall issue changes to the RFP Documents by Addenda only. No other statement, whether oral or written, made by the Sponsors or the Sponsors' Advisors, employees or representatives, including, for clarity, the Contact Person, or any other Person, shall amend the RFP Documents.

(2) The Proponent is solely responsible to ensure that it has received all Addenda issued by the Sponsors. Proponents may, in writing, seek confirmation of the number of Addenda issued under this RFP from the Contact Person.

(3) The Sponsors shall issue Addenda by placing them in the Data Room and notifying the Proponents' Representatives by e-mail that an Addendum has been placed in the Data Room.

(4) Any reference to any one or all of the RFP Documents in the RFP Documents includes any amendments to the RFP Documents made in accordance with this RFP Section 3.7.

### **3.8 Freedom of Information, Confidentiality and Copyright Matters**

#### **3.8.1 Freedom of Information and Protection of Privacy Act**

(1) Proponents are advised that the Sponsors may be required to disclose the RFP Documents and a part or parts of any Proposal pursuant to the *Freedom of Information and Protection of Privacy Act* (Ontario) (“**FIPPA**”).

(2) Proponents are also advised that FIPPA may provide protection for confidential and proprietary business information. Proponents are strongly advised to consult their own legal Advisors as to the appropriate way in which confidential or proprietary business information should be marked as such in their Proposals.

(3) Subject to the provisions of FIPPA, the Sponsors will use reasonable commercial efforts to safeguard the confidentiality of any information identified by the Proponent as confidential but shall not be liable in any way whatsoever to any Proponent or Proponent Team Member if such information is disclosed based on an order or decision of the Information and Privacy Commissioner or otherwise as required under Applicable Law.

#### **3.8.2 Confidentiality Agreements**

(1) Only those Prequalified Parties who have executed and delivered to the Sponsors a confidentiality agreement in a form prescribed by and with terms and conditions acceptable to the Sponsors shall be provided with access to the Data Room. To the extent that the provisions of the confidentiality agreements are inconsistent or conflict with the requirements of RFP Section 3.8.3, the more stringent confidentiality obligation shall govern and otherwise, such confidentiality agreements shall continue to apply and shall be binding in accordance with their terms, applied *mutatis mutandis* to this RFP, and all references in such other agreements to the RFQ shall be read to include this RFP.

#### **3.8.3 Confidential Information**

(1) For the purpose of this RFP Process, “**Confidential Information**” means all material, data, information or any item in any form, whether oral or written, including in electronic or hard-copy format, supplied by, obtained from or otherwise provided by the Sponsors or the Province in connection with the RFP Process, the RFP Documents or the Project, whether supplied, obtained from or provided before or after the RFP Process.

(2) The Proponent agrees that all Confidential Information:

- (a) shall remain the sole property of the Province or the Sponsors, as applicable, and the Proponent shall treat it as confidential;
- (b) shall not be used by the Proponent for any purpose other than developing and submitting a Proposal in response to this RFP Process or the

performance of any subsequent agreement relating to the Project with the Signing Parties;

- (c) shall not be disclosed by the Proponent to any Person who is not involved in the Proponent's preparation of its Proposal or the performance of any subsequent agreement relating to the Project with the Signing Parties, without prior written consent of the Sponsors or the Province, as applicable;
- (d) shall not be used in any way detrimental to the Sponsors or the Province; and
- (e) if requested by the Sponsors, all Confidential Information shall be returned by the Proponents to the Sponsors no later than ten calendar days after that request.

(3) Each Proponent shall be responsible for any breach of the provisions of this RFP Section 3.8.3 by any Person to whom it discloses the Confidential Information including, for greater clarity, the Proponent's employees, representatives and Advisors and the Proponent Team Members and their employees, representatives and Advisors. Each Proponent shall indemnify each of the Sponsors and each of their related entities and each of their respective directors, officers, consultants, employees, agents and representatives and save each of them fully harmless from and against any and all loss, cost, damage, expense, fine, suit, claim, penalty, demand, action, obligation and liability of any kind or nature (including, without limitation, professional fees on a full indemnity basis) suffered or incurred by any of them arising as a result of or in connection with any breach of any of the provisions of this RFP Section 3.8.3 by the Proponent or by any Person to whom the Proponent has disclosed the Confidential Information. Each Proponent agrees that the Sponsors act as trustee for each of their related entities and each of their respective directors, officers, consultants, employees, agents and representatives with respect to all rights contemplated hereunder arising in favour of a related entity or any of their respective directors, officers, consultants, employees, agents or representatives and that the Sponsors have agreed to accept such trust and hold and enforce such rights on behalf of each related entity and each of their respective directors, officers, consultants, employees, agents and representatives.

(4) Each Proponent acknowledges and agrees that a breach of the provisions of this RFP Section 3.8.3 would cause the Sponsors and their related entities to suffer loss that could not be adequately compensated by damages, and that the Sponsors and any of their related entities may, in addition to any other remedy or relief, enforce any of the provisions of this RFP Section 3.8.3 upon application to a court of competent jurisdiction without proof of actual damage to the Sponsors or any of their related entities.

(5) Notwithstanding anything else to the contrary in this RFP, the provisions of this RFP Section 3.8.3 shall survive any cancellation of this RFP Process and the conclusion of the RFP Process and, for greater clarity, shall be legally binding on all Prequalified Parties, whether or not they submit a Proposal.



(6) The confidentiality obligations of the Proponent shall not apply to any information which falls within the following exceptions:

- (a) information that is lawfully in the public domain at the time of first disclosure to the Proponent, or which, after disclosure to the Proponent, becomes part of the public domain other than by a breach of the Proponent's confidentiality obligations or by any act or fault of the Proponent;
- (b) information which was in the Proponent's possession prior to its disclosure to the Proponent by the Sponsors, and provided that it was not acquired by the Proponent under an obligation of confidence; or
- (c) information which was lawfully obtained by the Proponent from a third party without restriction of disclosure, provided such third party was at the time of disclosure under no obligation of secrecy with respect to such information.

#### 3.8.4 Copyright and Use of Information in Proposals

(1) The Sponsors' rights, as set out in this RFP Section 3.8.4, to the Proposal and all Proposal Information submitted by the Proponent during the RFP Process shall be granted to the Sponsors upon submission of the Proposal.

(2) Proponents shall not use or incorporate into their Proposals any concepts, products or processes which are subject to copyright, patents, trademarks or other intellectual property rights of third parties unless Proponents have, or will procure through licensing without cost to the Sponsors, the right to use and employ such concepts, products and processes in and for the Project.

(3) All requirements, designs, documents plans and information supplied by the Sponsors to the Proponents in connection with this RFP are and shall remain the property of the Sponsors. Upon request of the Sponsors, all such designs, documents, plans and information (and any copies thereof in any format or medium created by or on behalf of the Proponent) must be returned to the Sponsors.

(4) The Proponent shall grant to the Client a non-exclusive, perpetual, irrevocable, world-wide, fully paid and royalty free license (fully assignable without the consent of the Proponent and with the right to sub-license without the consent of the Proponent) to use the Proposal Information (the "**Proposal Information Licence**"). Without limiting the foregoing, the Proposal Information Licence shall include the right to modify the Proposal Information, and, where applicable, to use it, or any modified form of it, anywhere in the world. Under no circumstances shall the Proponent, except Project Co (as defined in the Project Agreement) in relation to this Project, be liable to the Sponsors or to any other Person or entity for any damages, losses, costs, expenses, claims or actions whatsoever arising directly or indirectly from the use of the Proposal Information pursuant to the Proposal Information Licence.

(5) For the purpose of RFP Section 3.8.4(4), “**Proposal Information**” means all information and all ideas, concepts, products, alternatives, processes, recommendations and suggestions contained in a Proposal or which are disclosed by or through a Proponent to the Sponsors during the evaluation of Proposals or during the process of executing any Project Agreement, but for greater certainty, shall not include information or ideas, concepts, products, alternatives, processes, recommendations and suggestions referred to but not included in a Proposal or referred to but not included in information or ideas, concepts, products, alternatives, processes, recommendations and suggestions provided by a Proponent during the evaluation process.

(6) Proponents shall ensure that all intellectual property rights associated with any and all of the Proposal Information (including copyright and moral rights but excluding patent rights) provide for and give the Client the rights set out in this RFP Section 3.8.4. It is expressly understood and agreed that any actual or purported restriction in the future on the ability of the Client to use any of the Proposal Information, or anything else obtained by or through Proponents, shall be absolutely null and void and unenforceable as against the Sponsors, and each of their respective Advisors, and that the provisions of this RFP Section 3.8.4 shall take precedence and govern.

### **3.9 Conflict of Interest and Ineligible Persons**

#### **3.9.1 Conflict of Interest**

(1) Proponents and Proponent Team Members and each of their Advisors, shall disclose, in their Proposal Submission Forms, all perceived, potential and actual Conflicts of Interest.

(2) If a Proponent, a Proponent Team Member or any of their respective Advisors, prior to or following submission of its Proposal, discovers any perceived, potential or actual Conflicts of Interest, the Proponent shall promptly disclose the perceived, potential or actual Conflict of Interest to the Sponsors in a written statement to the Contact Person.

(3) At the request of the Sponsors, the Proponent shall provide the Sponsors with the Proponent’s proposed means to mitigate and minimize to the greatest extent practicable any perceived, potential or actual Conflict of Interest. The Proponent shall submit any additional information to the Sponsors that the Sponsors consider necessary to properly assess the perceived, potential or actual Conflict of Interest.

(4) The Sponsors may, in their sole discretion, exclude any Proponent Team Member or Proponent Advisor on the grounds of Conflict of Interest.

(5) Without limiting the generality of RFP Sections 3.9.1(4) or (6), the Sponsors may, in their sole discretion, require the Proponent or Proponent Team Member to substitute a new Person or entity for the Person or entity giving rise to the Conflict of Interest.

(6) The Sponsors may, in their sole discretion, waive any and all perceived, potential or actual Conflicts of Interest of Proponents or Proponent Team Members, or any of their

respective Advisors. A waiver may be upon such terms and conditions as the Sponsors, in their sole discretion, require to satisfy themselves that the Conflict of Interest has been appropriately managed, mitigated and minimized, including requiring the Proponent to put into place such policies, procedures, measures and other safeguards as may be required by and be acceptable to the Sponsors, in their sole discretion, to manage, mitigate and minimize the impact of such Conflict of Interest.

(7) For the purposes of this RFP Process “**Conflict of Interest**” includes any situation or circumstance where, in relation to the Project, the Proponent’s or any Proponent Team Member’s or Proponent Advisors’ other commitments, relationships or financial interests:

- (a) could or could be seen to exercise an improper influence over the objective, unbiased and impartial exercise of independent judgment by any personnel of the Sponsors or their Advisors; or
- (b) could or could be seen to compromise, impair or be incompatible with the effective performance of a Proponent’s obligations under the Final Project Agreement if that Proponent was determined to be the Negotiations Proponent under the RFP Process.

### 3.9.2 Ineligible Persons

(1) As a result of their involvement in the Project, the Persons named in the RFP Data Sheet as “**Ineligible Persons**”, their employees, and any of their subcontractors, advisors, consultants or representatives engaged in respect of this Project and, subject to RFP Sections 3.9.2(3) and 3.9.2(4) any Person controlled by, that controls or that is under common control with the Ineligible Persons (each an “**Ineligible Person’s Affiliate**”) are not eligible to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider.

(2) The Sponsors may amend the Ineligible Persons list in the RFP Data Sheet from time to time during the RFP Process.

(3) An Ineligible Person’s Affiliate may be eligible to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider only after it has obtained a written consent from the Sponsors permitting it to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider. To obtain consent for an Ineligible Person’s Affiliate to participate as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider, the Proponent must submit a request for consent to the Contact Person that includes the following information:

- (a) the full legal name of the Ineligible Person’s Affiliate that the Proponent wishes to include on its team or as a Proponent Team Member, Advisor to the Proponent, Financial Services Provider or Advisor to a Financial Services Provider;

- (b) information regarding the Ineligible Person's Affiliate's relationship to the Ineligible Person listed in the RFP Data Sheet; and
- (c) a description of the policies and procedures that will be put in place to manage, mitigate or minimize the impact of any potential Conflict of Interest.

(4) Upon the Contact Person's receipt of a Proponent's properly completed request for consent in accordance with RFP Section 3.9.2(3), the Sponsors shall, in their sole discretion, make a determination as to whether they consider there to be a real, perceived or potential Conflict of Interest and whether the impact of such real perceived or potential Conflict of Interest can be appropriately managed, mitigated or minimized. The Proponent shall be notified of the Sponsors' decision by means of a consent letter setting out the nature of the consent and the management, mitigation or minimization measures required as a condition of consent. If the Ineligible Person's Affiliate is considered to have a Conflict of Interest, the impact of which cannot be properly managed, mitigated or minimized, the Sponsors shall add the Ineligible Person's Affiliate to the Ineligible Persons list by Addendum.

### **3.10 Proponent Costs**

(1) The Proponent and the Proponent Team Members shall bear all costs and expenses incurred by them relating to any aspect of their participation in this RFP Process, including all costs and expenses related to the Proponent's involvement in:

- (a) the preparation, presentation and submission of its Proposal;
- (b) due diligence and information gathering processes;
- (c) preparation of responses to questions or requests for information from the Sponsors; and
- (d) negotiations and settlement of the Final Project Agreement.

(2) In no event shall the Sponsors be liable to pay any costs or expenses of any Proponent or to reimburse or compensate a Proponent under any circumstances, regardless of the conduct or outcome of the RFP Process.

### **3.11 Right to Participate on More than One Team**

(1) No Prime Team Member or Restricted Key Individual, or Persons related to any Prime Team Member or Restricted Key Individual may be a Proponent Team Member of or otherwise participate in another Proponent team.

(2) For clarity, any Proponent Team Member or Key Individual may be a Proponent Team Member of or otherwise participate in another Proponent team if it, or if he or she:

- (a) is not a Prime Team Member of another Proponent;

- (b) is not a Restricted Key Individual of another Proponent; or
- (c) is not a Person related to any Prime Team Member or Restricted Key Individual of another Proponent.

## **SECTION 4 – PROPOSAL FORM AND CONTENT REQUIREMENTS**

### **4.1 Format and Content of the Proposal**

(1) Proponents should submit Proposals organized in accordance with and in the format set out in **Error! Reference source not found.** to this RFP.

(2) Proponents shall submit Proposals in three parts as follows:

- (a) Part A – Proposal Submission Form (**Error! Reference source not found.** to this RFP) and a Proponent Team Member Declaration (**Error! Reference source not found.** to this RFP) for each Proponent Team Member;
- (b) Part B – Subsidy Based Submission; and
- (c) Part C – Reduced Subsidy Submission.

(3) Proponents shall submit each of Parts A, B and C of their Proposals in accordance with the requirements and instructions set out in **Error! Reference source not found.** to this RFP.

### **4.2 Compliance with Format Submission Requirements**

While a Proponent will likely be evaluated more favourably if its Proposal is in the format set out in Schedule 1 to this RFP, a Proponent is not obligated to comply with the format requirements of Schedule 1 to this RFP in order to have its Proposal evaluated under this RFP. For clarity, this principle applies whether or not the expressions “must” or “shall” are used to describe what is required of the Proponent.

## **SECTION 5 – SUBMISSION, WITHDRAWAL AND MODIFICATION OF THE PROPOSAL**

### **5.1 Project Agreement**

(1) The Project Agreement attached to this RFP as Schedule 7 **Error! Reference source not found.** bearing the footer “Final Version 2 - December 12, 2008” shall be used by all Proponents as the basis for the Subsidy Based Submission, with the following amendments:

- (a) Table 1 to Schedule 11 to the Project Agreement is replaced with Schedule 8 to this RFP;

- (b) with respect to Project Co Permits, Licences and Approvals, the Province shall apply for and be responsible to obtain WWS Permits from MOE and approvals under the MTO Class EA required in connection with the Required Services and delays in connection therewith (not caused by the Proponent) shall be considered both Delay Events and Compensation Events;
- (c) Proponents may propose a new Performance Monitoring Program, as described in RFP Section 5.1(2);
- (d) unless and until the Strategic Infrastructure Investment has been reduced to a nil amount, Project Co shall not be required to pay any of the Base Rent, Fuel Products Annual Payment or Percentage Rent; provided that, at such time and so long as the Strategic Infrastructure Investment is reduced to a nil amount, Project Co shall pay the following amounts to the Province, in the following order of priority: first, the Base Rent, second, the Fuel Products Annual Payment, and third, Percentage Rent; and
- (e) Schedule 29 to the Project Agreement – Strategic Infrastructure Investment, shall be amended to delete the reference to the Competitive Financing Process and to substitute therefor a reference to Phase 2 of Stage 2 of the procurement process set out in this RFP.

(2) The Output Specifications make reference to a performance monitoring program for the Project Operations (the “**Performance Monitoring Program**”) based upon Key Performance Indicators to measure performance with regard to categories of Customer Service, Operations and Financial, a Performance Scorecard that measures performance, and a regime for the allocation of Failure Event Points if performance standards are not met. The Project Agreement also establishes a regime for Warning Notices and Monitoring Notices if a certain threshold number of Failure Event Points are accumulated within a specified time period.

It is intended that the Performance Monitoring Program for the Project Operations reflect a partnership approach between the Province and Project Co and an atmosphere of openness, disclosure and accountability.

For the purpose of the Subsidy Based Submission and in keeping with this partnership approach, Proponents may propose alternative market based methodologies for reporting, monitoring and enforcing the Key Performance Indicators that are pertinent, measurable and verifiable. For greater clarity, Proponents may not change any of the Key Performance Indicators, Performance Standards or Performance Measures set out in the Output Specifications, but may propose an alternate approach to the Performance Scorecard with respect to any or all of the following matters: Category, Tolerance, Reporting Frequency, Monitoring Method and Failure Event Points. Proponents are to document these alternative methodologies to reporting, monitoring and enforcing Key Performance Indicators in a term sheet (the “**Performance Monitoring Program Term Sheet**”) forming part of the Subsidy Based Submission.

(3) For the purpose of the Reduced Subsidy Submission, each Proponent may propose such variations, amendments and additions to the Project Agreement and its Subsidy Based Submission as may be necessary in order to minimize or eliminate any investment to be made by the Province, while still maintaining a quality suite of services for the traveling public. Such variations, amendments and additions shall be included in a term sheet (the “**Reduced Subsidy Term Sheet**”) forming part of the Reduced Subsidy Submission.

## **5.2 Submission of Proposal**

(1) Each Proponent shall submit its Proposal before the Submission Deadline. For the purposes of the RFP Process, the determination of whether the Proposal is submitted before the Submission Deadline shall be based on the time and date stamp the Proponent must ensure it receives from Infrastructure Ontario at the address for submission set out in the RFP Data Sheet. A Proposal received after the Submission Deadline, in each case as documented by the time and date stamp, shall be returned unopened to the sender.

(2) Proponents shall submit their Proposals by sending them by pre-paid courier or hand delivery to Infrastructure Ontario at the address set out in the RFP Data Sheet. It is the sole responsibility of the Proponent to ensure that the Proposal is received by Infrastructure Ontario prior to the Submission Deadline and to ensure it receives a date and time stamp receipt from Infrastructure Ontario confirming the timely delivery of the Proposal. The Sponsors will not accept Proposals delivered by electronic mail.

(3) Proponents shall provide such number and type of hard and electronic copies of Proposals as specified in **Error! Reference source not found.** to this RFP.

(4) If there is any difference whatsoever between the electronic copy of a Proposal and the original hard copy of the Proposal, the original hard copy of the Proposal shall govern.

## **5.3 Withdrawal of Proposals**

(1) A Proponent may withdraw its Proposal only by giving written notice before the Submission Deadline to the Contact Person. The Sponsors will return, unopened, a Proposal that has been withdrawn in accordance with this RFP Section 5.3.

## **5.4 Amendment of Proposal**

(1) Proponents may amend their Proposals after submission but only if the Proposal is resubmitted before the Submission Deadline in accordance with the following:

- (a) the Proponent shall withdraw its original Proposal by notifying the Contact Person in writing before the Submission Deadline; and
- (b) the Proponent shall submit a revised replacement Proposal in accordance with the RFP Documents and before the Submission Deadline in accordance with the requirements of RFP Section 5.2.

## **5.5 Proposals Non-Binding**

(1) Notwithstanding any other provision of this RFP, this RFP is not a tender and is not an offer to enter into either a bidding contract (often referred to as “**Contract A**”) or a contract to carry out the Project (often referred to as “**Contract B**”). For greater clarity, the purpose of the RFP Process is to identify a Negotiations Proponent with whom the Sponsors may enter into negotiations to endeavour to settle the Final Project Agreement (without any obligation on either party to do so), subject to and in accordance with the provisions of this RFP.

(2) All Proposals, including all pricing information provided therein are indicative only and not binding other than Part A thereof (Proposal Submission Form and Proponent Form Team Member Declaration), which shall be binding, and constitute neither an offer nor an acceptance of an offer. Proposals, including pricing information will be assessed during the evaluation of Proposals and accordingly, misleading and incomplete information, including withdrawn or altered pricing during contract negotiations, could adversely impact any such evaluation or negotiations and result in the cessation of negotiations with that Proponent.

## **SECTION 6 – EVALUATION, CLARIFICATION AND VERIFICATION OF PROPOSALS**

### **6.1 Evaluation Committee and Advisors**

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

### **6.2 Sponsors’ Clarification and Verification of Proposals, Interviews and Presentations**

(1) The Sponsors may:

- (a) require the Proponent to clarify or verify the contents of its Proposal or any statement made by the Proponent;
- (b) require the Proponent to submit supplementary documentation clarifying or verifying any matters contained in its Proposal;
- (c) seek a Proponent’s acknowledgement of a Sponsor’s interpretation of the Proposal or any part of the Proposal; and
- (d) request that a Proponent, or permit a Proponent to, be interviewed or make a presentation in respect of its Proposal, provided that if any such request is made or permission granted to any Proponent, each Proponent shall be given a similar opportunity to be interviewed or make a presentation, in



each case, solely for the purpose of clarifying or verifying the contents of its Proposal.

(2) The Sponsors are not obliged to seek clarification or verification of any aspect of a Proposal or any statement by a Proponent, including an ambiguity in a Proposal or in any statement made by a Proponent.

(3) Any written information received by the Sponsors from a Proponent pursuant to a request for clarification or verification from the Sponsors as part of the RFP Process may, in the Sponsors' sole discretion, be considered as an integral part of the applicable Proposal.

### **6.3 Evaluation Process**

#### **6.3.1 Compliance of Proposals**

(1) The Sponsors will open each Proposal and will review the contents of each Proposal to assess whether it is in compliance with the terms and conditions of the RFP Documents, including whether all documents required to be submitted have been appropriately submitted.

(2) If, in the sole discretion of the Sponsors, a Proposal does not comply with the requirements set out in the RFP Documents, the Sponsors may, in their sole discretion, without liability, cost or penalty, eliminate the Proposal and the Proposal shall not be given any further consideration.

(3) For purposes of this RFP, "comply" and "compliance" mean that the Proposal conforms to the requirements of the RFP Documents without material deviation. A "material deviation" in a Proposal is any failure to comply with an RFP Document requirement that, in the sole discretion of the Sponsors:

- (a) impedes, in any material way, the ability of the Sponsors to evaluate the Proposal;
- (b) affects the Sponsors' ability to enforce the Proponent's obligations pursuant to the RFP Documents; or
- (c) constitutes an attempt by the Proponent to revise the Sponsors' or the Proponent's rights or obligations under the RFP Documents in a way not permitted by this RFP.

(4) A requirement in this RFP or in the Schedules to this RFP that a Proponent "must" or "shall" do anything is not intended to supersede this RFP Section 6.3.1 or, for greater clarity, to supersede the concepts of "comply", "compliance" or "material deviation" set out in this RFP Section 6.3.1.

(5) A Proponent's submission of a complete but poor quality Proposal shall not be considered a failure to comply but may affect the Proponent's evaluated score.

(6) If, at any time during the RFP Process, the Sponsors determine that a Proposal is non-compliant pursuant to this RFP Section 6.3.1, the Sponsors may, in their sole discretion and without liability, cost or penalty, declare the Proposal to be non-compliant and the Proposal shall not be given any further consideration.

(7) For the purpose of clarity, each Proponent acknowledges and agrees that the Sponsors' evaluation of compliance with the RFP Documents is not an evaluation of absolute compliance and that the Sponsors may waive failures to comply that, in the Sponsors' sole discretion, do not constitute a material deviation in accordance with this RFP Section 6.3.1. For clarity, the Sponsors may also waive a material deviation under RFP Section 10.2(3).

#### 6.3.2 Step 1 - Review of the Proposal Submission Form and Proponent Team Member Declaration

(1) In Step 1, the Evaluation Committee shall review the Proposal Submission Form and Proponent Team Member Declaration(s) to:

- (a) ensure that the forms have been properly completed and signed;
- (b) ensure that there have been no changes to the Proponent, Proponent Team Members or Key Individuals from their Prequalification Submissions, except for changes that have been approved by the Sponsors in accordance with RFP Section 3.6; and
- (c) assess the Conflict of Interest and Confidential Information section of the Proposal Submission Form and Proponent Team Member Declaration.

#### 6.3.3 Step 2 – Review and Scoring of the Subsidy Based Submission and Reduced Subsidy Submission

(1) In Step 2, each of the Subsidy Based Submission and the Reduced Subsidy Submission of a Proponent will be evaluated in accordance with Schedule 2 to this RFP.

#### 6.3.4 Step 3 – Establishing a Final Submission Score

(1) Each Submission will be separately evaluated based on the evaluation criteria set out in Schedule 2 and assigned a separate Final Submission Score.

#### 6.3.5 Step 4 – Ranking the Proponents

(1) In Step 4, the Evaluation Committee shall rank only those Proponents that have met all requirements in Steps 1 through 3 and shall base the ranking on the Final Submission Score of each Submission. The Proponent that submits the Subsidy Based Submission or Reduced Subsidy Submission which receives the highest Final Submission Score will, in the sole discretion of the Sponsors, be selected as the Negotiations Proponent.

## **SECTION 7 – GENERAL EVALUATION AND DISQUALIFICATION PROVISIONS**

### **7.1 Sponsors' Sole Discretion in Determining Compliance, Scoring and Ranking**

- (1) The Sponsors shall, in their sole discretion, determine:
  - (a) the membership of the Evaluation Committee and any sub-committees of the Evaluation Committee;
  - (b) whether a Proposal is compliant with the RFP Documents;
  - (c) whether a failure to comply constitutes a material deviation;
  - (d) the Final Submission Score of a Submission;
  - (e) the rankings of the Submissions;
  - (f) whether a Proposal or a Proponent,
    - (i) is disqualified; or
    - (ii) will cease to be considered in the evaluation process; and
  - (g) whether the negotiations with the Negotiations Proponent are proceeding on a basis acceptable to the Sponsors.

(2) The Sponsors' sole discretion in determining compliance, scores, ranking, short-listing disqualification and progress of negotiations of and with the Proponents and their Proposals and other matters under RFP Section 7.1(1) is not limited or restricted in any way by the fact that a prequalification process preceded this RFP Process.

### **7.2 Disqualification**

- (1) The Sponsors may, in their sole discretion, disqualify a Proposal or reverse their decision to make an award (even if the award has already been made) to a Negotiations Proponent under this RFP, at any time prior to the Closing Date, if,
  - (a) the Proposal is determined to be non-compliant pursuant to RFP Section 6.3.1;
  - (b) the Proponent fails to cooperate in any attempt by the Sponsors to verify any information provided by the Proponent in its Proposal or interview;
  - (c) the Proponent contravenes RFP Sections 3.3.2 or 3.3.3;
  - (d) the Proponent fails to comply with Applicable Law;
  - (e) the Proposal contains false or misleading information or a misrepresentation;

- (f) the Proposal, in the opinion of the Sponsors, acting reasonably, reveals a material Conflict of Interest as described in RFP Section 3.9 and the Proponent,
  - (i) does not receive a waiver from the Sponsors in accordance with RFP Section 3.9.1(6) or does not receive a consent in accordance with RFP Section 3.9.2(4), as applicable; or
  - (ii) fails to substitute the Person or entity giving rise to the Conflict of Interest in accordance with RFP Section 3.9.1(5);
- (g) in the opinion of the Sponsors, acting reasonably, the Proponent or a Proponent Team Member or any of their respective Advisors, employees or representatives directly or indirectly colluded with one or more other Proponents or its Proponent Team Members or any of their respective Advisors, employees or representatives in the preparation or submission of a Proponent's Proposal or otherwise contravened RFP Section 3.3.4;
- (h) the Proponent has committed a material breach of any existing agreement between the Proponent and a Sponsor;
- (i) the Proponent has been convicted of an offence in connection with, or any services rendered to the Sponsors or any Ministry, agency, Board or Commission of the Province; or
- (j) the negotiations with the Negotiations Proponent are not proceeding on a basis acceptable to the Sponsors in their sole discretion.

## **SECTION 8 – IDENTIFICATION OF A NEGOTIATIONS PROPONENT**

### **8.1 Evaluation Results and the Identification of a Negotiations Proponent**

(1) Based on the Final Submission Scores, the Sponsors may, in their sole discretion, identify the highest ranked Proponent as the Negotiations Proponent and thereafter enter into negotiations with the Negotiations Proponent to finalize the Project Agreement.

(2) The Sponsors and the Negotiations Proponent shall use the negotiations process to negotiate any aspect of an applicable Proponent's Proposal and the Project Agreement in order to settle the Final Project Agreement. Without limiting the foregoing, the Sponsors expressly reserve the right to negotiate modifications to any Proposal and/or the Project Agreement without obligation to communicate negotiations or review similar modifications with other Proponents and the Sponsors shall incur no liability to any other Proponent as a result of such negotiation or modifications.

(3) If, in accordance with this RFP Section 8.1, the Negotiations Proponent and the Sponsors negotiate revisions to the Project Agreement, the Sponsors and the Negotiations Proponent shall develop a revised Project Agreement and, for the purposes of this RFP, the revised Project Agreement shall be the "**Final Project Agreement**".

(4) Either the Sponsors or the Negotiations Proponent may withdraw from negotiations at any time and in such event (and without limiting the rights of the Sponsors under RFP Sections 10.1 and 10.2) the Sponsors may, in their sole discretion, proceed to negotiate with the next highest ranking Proponent.

## **SECTION 9 – NEGOTIATIONS PROPONENT**

### **9.1 Identification of the Negotiations Proponent**

(1) Subject to RFP Sections 10.1 and 10.2, the Sponsors intend to identify a Negotiations Proponent in accordance with RFP Section 8.1.

(2) The Negotiations Proponent shall provide access and shall promptly make available to the Sponsors and their advisors, agents and representatives such documentation, financial and technical information as may be reasonably requested by the Sponsors from time to time in connection with the Sponsors' due diligence investigations. The Negotiations Proponent shall provide to the Sponsors, in a timely fashion, final draft versions of all documents required to be delivered by the Sponsors in accordance with the Final Project Agreement, together with such other documentation as the Sponsors may reasonably request from time to time.

(3) The Negotiations Proponent acknowledges and agrees that the entering into of the Final Project Agreement by the Signing Party or Parties is conditional on and subject to the Signing Party or Parties obtaining any necessary authorizations and approvals required in connection with the Project, including, for certainty, the approval of any relevant government authority.

## **SECTION 10 – GENERAL LEGAL MATTERS**

### **10.1 General Rights of the Sponsors**

(1) Subject to, but without limiting RFP Section 5.5, the Sponsors may, in their sole discretion:

- (a) reject any or all of the Proposals;
- (b) enter into negotiations with any Proponent, person or persons with respect to the Project or any part thereof that is the subject of this RFP;
- (c) withdraw from negotiations with any Proponent, person or persons with respect to the Project or any part thereof that is the subject of this RFP at any time or times;
- (d) accept any Proposal;
- (e) elect not to proceed with the RFP;
- (f) if only one Proposal is received, elect to accept or reject it or enter into negotiations with the applicable Proponent;

- (g) change or elect to discontinue the RFP Process at any time before the end of the RFP Process, including after the identification of a Negotiations Proponent but before the Closing Date;
- (h) alter the Timetable, the RFP Process or any other aspect of this RFP; and
- (i) cancel this RFP Process and subsequently conduct another competitive process for the Project (or any part thereof) that is the subject of this RFP or subsequently enter into negotiations with any person or persons with respect to the Project (or any part thereof) that is the subject of this RFP or advertise or call for new submissions for the same subject matter of these RFP Documents, or proceed in any other manner they determine in their sole discretion.

(2) These terms are included for greater certainty and are not intended to limit the rights of the Sponsors or the Proponents to conduct themselves in accordance with the common law governing direct commercial negotiations in effect and in accordance with Applicable Law.

## 10.2 Special Circumstances

(1) If the Sponsors determine that all of the Proposals submitted are non-compliant in accordance with RFP Section 6.3.1, the Sponsors may, in their sole discretion:

- (a) take any action in accordance with RFP Section 10.1;
- (b) carry out a process whereby all Proponents are directed to correct the material deviations in their Proposals for re-submission; or
- (c) enter into negotiations with any one or more of the Proponents to attempt to finalize an agreement.

(2) If the Sponsors receive,

- (a) one Proposal and that Proposal is compliant; or
- (b) more than one Proposal, but only one compliant Proposal,

the Sponsors may, in their sole discretion:

- (c) take any action in accordance with RFP Sections 10.1(1) or 10.2(3); or
- (d) cancel this RFP and subsequently enter into negotiations with the Proponent that submitted a compliant Proposal.

(3) The Sponsors, in their sole discretion, may waive a material deviation in a Proposal and therefore, waive a material failure to comply with the requirements of the RFP Documents. The Sponsors may, in their sole discretion, decline to disqualify a non-compliant Proposal.

### **10.3 Sponsors' Liability for Proponent's Costs**

#### **10.3.1 General**

(1) The Sponsors shall not be liable for any expense, cost, loss or damage incurred or suffered by any Proponent, any Proponent Team Member, any Proponent Advisor or any Person connected with any one of them, as a result of any action taken by the Sponsors in accordance with RFP Sections 10.1 or 10.2.

### **10.4 Applicable Law, Attornment and Limit on Liability**

(1) This RFP shall be governed by and construed in accordance with Applicable Law as defined in the Project Agreement.

(2) The Proponent agrees that,

- (a) any action or proceeding relating to this RFP Process shall be brought in any court of competent jurisdiction in the Province of Ontario and for that purpose the Proponent irrevocably and unconditionally attorns and submits to the jurisdiction of that Ontario court;
- (b) it irrevocably waives any right to and shall not oppose any Ontario action or proceeding relating to this RFP Process on any jurisdictional basis, including *forum non conveniens*; and
- (c) it shall not oppose the enforcement against it, in any other jurisdiction, of any judgment or order duly obtained from an Ontario court as contemplated by this RFP Section 10.4.

(3) The Sponsors and each Proponent acknowledge and agree that in accordance with RFP Section 5.5 it is not the intention of any entity involved in this RFP Process to create a bidding contract or a contract to carry out the Project. Notwithstanding this, the Proponent and any other entities that may be involved in this RFP Process agree that if any of the Sponsors is found to be liable in any way for any act or omission during this RFP Process, the total liability of the Sponsors to any Proponent or any other entity participating in this RFP Process and the aggregate amount of damages recoverable against the Sponsors for any matter relating to or arising from any act or omission, whether based upon an action or claim in contract warranty, equity, negligence, intended conduct or otherwise, including any action or claim arising from the acts or omissions, negligent or otherwise, of the Sponsors shall not be greater than the Proponent's cost of preparing its Proposal or Fifty Thousand Dollars (\$50,000), whichever is less.

### **10.5 Licences, Permits, etc.**

(1) If a Proponent is required by Applicable Law to hold or obtain a licence, permit, consent or authorization to carry on an activity contemplated in its Proposal or in the Project Agreement, neither acceptance of the Proposal nor execution of the Project Agreement by the

Sponsors shall be considered to be approval by the Sponsors of carrying on such activity without the requisite licence, permit, consent or authorization.

## **10.6 Power of Legislative Assembly**

(1) Proponents are advised that no provision of the RFP Documents (including a provision stating the intention of the Sponsors) is intended to operate, nor shall any such provision have the effect of operating, in any way, so as to interfere with or otherwise fetter the sole discretion of the Legislative Assembly of Ontario in the exercise of its legislative powers.

## **SECTION 11 – NOTIFICATION AND DEBRIEFING**

(1) Any time after the Negotiations Proponent has been identified, the Sponsors will formally notify all Proponents who were not successful in the RFP Process that they have not been selected.

(2) Any time after the Closing Date, the Sponsors, and a member or members of the Evaluation Committee will meet with any unsuccessful Proponents, at the request of the unsuccessful Proponent, to provide a de-briefing.

## **SECTION 12 – DEFINITIONS**

### **12.1 General**

(1) Unless otherwise defined in this RFP Section 12, capitalized terms and expressions used in this RFP have the meaning given to them in the Project Agreement.

(2) In this RFP, the singular shall include the plural and the plural shall include the singular, except where the context otherwise requires.

(3) Unless explicitly otherwise stated in this RFP, all references in this RFP to the Sponsors' "**sole discretion**" means the unqualified subjective discretion of the party or parties exercising the discretion.

### **12.2 RFP Definitions**

Whenever used in the RFP:

**"Addendum"** means a written addendum to the RFP Documents issued by the Sponsors as set out in RFP Section 3.7;

**"Advisors"** means any Person retained to provide professional advice to any one of the Sponsors, a Proponent, a Proponent Team Member or a Financial Services Provider, as applicable;

**"Background Information"** means various types of information provided by the Sponsors and is defined in RFP Section 2.4(1)(b);



“**Client**” means the client or clients listed in the RFP Data Sheet in respect of RFP Section 1.1(1);

“**Closing Financial Model**” means the financial model of the Negotiations Proponent for the Project finalized as part of the settlement of the Project Agreement;

“**Collective Pre-Qualified Parties**” is defined in RFP Section 1.3(1);

“**Confidential Information**” is defined in RFP Section 3.8.3(1);

“**Conflict of Interest**” is defined in RFP Section 3.9.1;

“**Contact Person**” is described in RFP Section 3.2.1;

“**Data Room**” is defined in RFP Section 2.4;

“**Evaluation Committee**” is defined in RFP Section 6.1;

“**Fairness Monitor**” is defined in the RFP Data Sheet;

“**Final Project Agreement**” is defined in RFP Section 8.1(3);

“**Final Submission Score**” is defined in the RFP Section 6.3.4;

“**Financial Services Provider**” means any Leasehold Mortgagee and any other provider of financial services or products;

“**FIPPA**” is defined in RFP Section 3.8.1(1);

“**Identified Financial Variables**” is defined in Table 4.3 of Schedule 2;

“**Identified Proponent Parties**” is defined in RFP Section 3.6(1);

“**includes**” and “**including**” means “**includes without limitation**” and “**including without limitation**” respectively;

“**Indicative Strategic Infrastructure Investment**” means the Strategic Infrastructure Investment proposed by a Proponent in its Subsidy Based Financial Model;

“**Ineligible Person’s Affiliate**” is defined in RFP Section 3.9.2(1);

“**Ineligible Persons**” is defined in RFP Section 3.9.2(1);

“**Infrastructure Ontario**” is defined in RFP Section 1.1(1);

“**IPFP Framework**” is defined in RFP Section 1.1(5);

“**Key Individual**” means those individuals identified in the Proponent’s Prequalification Submission as a key individual;

“**Negotiations Proponent**” is defined in RFP Section 1.1(2);

“**OIPC**” is defined in RFP Section 1.1(1);

“**Performance Monitoring Program**” is defined in RFP Section 5.1(2);

“**Performance Monitoring Program Term Sheet**” is defined in RFP Section 5.1(2);

“**Person**” means any individual, partnership, limited partnership, joint venture, syndicate, sole proprietorship, company, corporation or body corporate with or without share capital, unincorporated association, trust, trustee, executor, administrator or other legal personal representative, regulatory body or agency, government or governmental agency authority or entity however designated or constituted;

“**Prequalification Stage**” is defined in RFP Section 1.3(1)(a);

“**Prequalification Submission**” is defined in RFP Section 1.2(2);

“**Prequalified Parties**” is defined in RFP Section 1.2(2);

“**Prime Team Member**” means any Person that:

- (a) has or will have a risk capital interest, an equity interest or other financial interest in Project Co;
- (b) will undertake, in respect of all or part of the Highway Service Centre Portfolio, any of the functions set out in Items 3(a) or 4(a) of Table 1 of Appendix B or Item 6(b) of Table 2 of Appendix B to the RFQ; or
- (c) is in possession of or will come into possession of sensitive commercial or financial information pertaining to the Proponent of which the Prime Team Member is a Proponent Team Member, which, if disclosed to another Proponent, could or could be seen to provide an unfair or improper competitive advantage to such Proponent in the RFP Process,

and for greater clarity, a Person who is not a Prime Team Member pursuant to paragraphs (a) or (b) of this definition, and who is acting only as a subcontractor to Project Co (e.g. a subcontractor supplying fuel or food services) and is not otherwise in possession of and will not come into possession of sensitive commercial or financial information relating to the Proponent or its Proposal, shall not be considered a Prime Team Member and may be a Proponent Team Member of more than one Proponent.

“**Prior RFP**” is defined in RFP Section 1.2(1);

“**Project**” is defined in RFP Section 1.1(6);

“**Project Agreement**” are those documents listed as the “Project Agreement” in the RFP Data Sheet, together with the amendments described in RFP Section 5.1;

“**Proponent**” is defined in RFP Section 1.1(2);

“**Proponent Representative**” is defined in RFP Section 1.2(3);

“**Proponent Team Members**” means all members of the Proponent team that were identified in the RFQ process and were prequalified as a Proponent team to submit a Proposal in this RFP Process, including a Prime Team Member and any Key Individual;

“**Proposal**” is defined in RFP Section 1.1(2);

“**Proposal Information**” is defined in RFP Section 3.8.4(5);

“**Proposal Information Licence**” is defined in RFP Section 3.8.4(4);

“**Province**” means Her Majesty the Queen in Right of Ontario, as represented by the Minister of Transportation;

“**Reduced Subsidy Financial Model**” is defined in Table **Error! Reference source not found.** of **Error! Reference source not found.** to this RFP;

“**Reduced Subsidy Term Sheet**” is defined in RFP Section 5.1(3); and

“**Reduced Subsidy Submission**” is defined in Section 4.4 of **Error! Reference source not found.** to this RFP.

“**related**” when used in relation to a Person, means a Person not dealing at arm’s length with the first mentioned Person, as the term “**arm’s length**” is defined in the *Income Tax Act* (Canada);

“**Restricted Key Individual**” means a Key Individual of a Proponent who is the senior person in charge of managing the provision of any of the functions identified in any of Items 3(a) or 4(a) of Table 1 of Appendix B to the RFQ, or Item 6(b) of Table 2 of Appendix B to the RFQ, in respect of all or any part of the Highway Service Centre Portfolio.

“**RFP**” is defined in Section 1.1(1);

“**RFP Data Sheet**” means **Error! Reference source not found.** to this RFP;

“**RFP Documents**” is defined in RFP Section 2.1;

“**RFP Process**” is defined in RFP Section 1.1(3);

“**RFQ**” is defined in RFP Section 1.2(1);

“**Signing Parties**” is defined in RFP Section 1.1(7);

“**Sponsors**” is defined in RFP Section 1.1(1);

**“Submission”** means either the Subsidy Based Submission or the Reduced Subsidy Submission and **“Submissions”** means, collectively, the Subsidy Based Submission and the Reduced Subsidy Submission;

**“Submission Deadline”** is defined in RFP Section 3.1(1);

**“Submission Requirements”** means all of the submission requirements set out in this RFP;

**“Subsidy Based Financial Model”** is defined in Table **Error! Reference source not found.** of **Error! Reference source not found.** to this RFP;

**“Subsidy Based Submission”** is defined in Section **Error! Reference source not found.** of **Error! Reference source not found.** to this RFP;

**“Targeted Closing Date”** is the Targeted Closing Date set out in the Timetable in the RFP Data Sheet;

**“Timetable”** is defined in RFP Section 3.1(1);

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