

Overview Report Role of Infrastructure Ontario in the OLRT Project

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1. Scope of Overview Report

1. This overview report provides an outline of the role the Ontario Infrastructure and Lands Corporation (Infrastructure Ontario or IO) played in Stage 1 of the Ottawa Light Rail Transit Project (the OLRT Project or the Project).
2. The City of Ottawa (the City) engaged IO as Commercial Procurement Lead for the Project.¹
3. This overview report is divided into two parts:
 - a. Description of Infrastructure Ontario; and
 - b. Infrastructure Ontario's role in the Project as defined in its Memorandum of Understanding (MOU) with the City.

DISCLAIMER

Please note that in accordance with the Commission's Rules of Procedure, the statements in this Overview Report may be challenged or supplemented through evidence led before the Commission or submissions made to the Commissioner. The Commissioner will consider all the evidence entered in the Commission's public hearings in determining the weight to be ascribed to anything contained in the Overview Report.

2. Description of Infrastructure Ontario

General

4. Infrastructure Ontario is a Crown agency and corporation without share capital that was created by the Province of Ontario in 2006.² It is owned by the Province of Ontario and is established in its current form by the *Ontario Infrastructure and Lands Corporation Act, 2011*.³ It is composed of the members of its board of directors, who are appointed by the Lieutenant Governor in Council on recommendation of the Minister of Infrastructure.⁴ IO reports to the Minister of Infrastructure, including by submitting an annual report to the Minister to be tabled in the legislature, but operates independently on a day-to-day basis.⁵ IO requires direction from the Minister of Infrastructure to undertake work such as providing advice or services on P3 infrastructure projects.⁶ Further details on the relationship between the Minister and IO are set out in the MOU between them, effective August 22, 2012.⁷
5. For some of the province's larger, complex infrastructure projects, IO uses a public-private partnership (P3) delivery model also known as Alternative Financing and Procurement (AFP), at the direction of the Minister of Infrastructure. This approach is often employed on public sector projects that have a capital cost of over \$100 Million or involve significant risk and complexity.⁸
6. Pursuant to the Memorandum of Understanding between IO and the Minister of Infrastructure effective August 22, 2012, IO was subject to five fundamental principles "in relation to all infrastructure projects it manages and/or advice it provides:"⁹
 - a. The public interest is paramount;
 - b. Value for money must be demonstrated for all public infrastructure investments;
 - c. Appropriate public control and ownership of public assets must be preserved;
 - d. Accountability must be maintained; and
 - e. All processes must be fair, transparent, and efficient.
7. These remain the key principles governing IO's projects.¹⁰

IO as Commercial Procurement Lead for the Project

8. Ottawa City Council approved the appointment of IO to lead the procurement process for the Project on July 14, 2011.¹¹ IO brought P3/AFP expertise to the Project. IO's role as Commercial Procurement Lead included "developing the RFP [Request for Proposal] and Project Agreement in conjunction with the City."¹²
9. The OLRT project was IO's first municipal project as Commercial Procurement Lead for municipal transit projects receiving provincial funding.¹³ In the context of provincial P3/AFP projects, IO would typically act as Crown agent, leading the procurement process and participating in executive decision-making as to whether to award the contract.¹⁴ In respect to the Project, which was not a provincial P3/AFP project, IO led the procurement process and was involved in evaluating the proposals and recommending the preferred proponent to City Council but did not have an executive role in determining whether to award the contract.
10. By letter dated August 31, 2011, Minister of Infrastructure Bob Chiarelli directed IO to "work with the City of Ottawa on the competitive procurement of the Ottawa Light Rail Transit Project ... using the AFP model as per the City of Ottawa's City Council decision on July 14, 2011." The Minister's direction was subject to two conditions:
 - a. IO would make an express written declaration that it would not be acting as Crown agent in its provision of services to the Project; and
 - b. Costs incurred by IO in providing services on the Project would be paid in accordance with an agreement to be entered into by IO and the City, which would expressly state that "the Crown is not liable for any liability or obligation of [IO] with respect to or in any way relating to the Project."¹⁵
11. These conditions are reflected in the MOU, discussed below.

3. Infrastructure Ontario's Role in the Project as Defined in its Memorandum of Understanding with the City

12. IO and the City executed an MOU effective October 26, 2011. The MOU sets out the relationship between IO as advisor and the City as final decision maker in respect to the OLRT Project. It is provided as Exhibit #COM0000234.¹⁶ IO and the City concluded an Amending Agreement to the MOU on September 26, 2013. It is

provided as Exhibit # COM0000233.¹⁷ A summary of certain key provisions of the MOU and the Amending Agreement follows.

Memorandum of Understanding Effective October 26, 2011

13. **Relationship** (section 2.1): The City engaged IO as its “Commercial Procurement Lead” for the Project’s procurement process, to provide expertise, information, processes, practices, and documents to aid the City in delivering the Project using AFP principles. The parties recognized IO’s expertise in determining AFP risk allocation to achieve viable AFP projects. Decisions and disputes would be made according to the procedures set out in the MOU, and the City and IO would conduct themselves “in a spirit of partnership and cooperation.”
14. **Consultation and communication** (section 2.2): The City and IO agreed to make “best efforts” to keep the other apprised of information and developments that could concern the other in the exercise of its responsibilities.
15. **Key positions and contacts** (section 2.3): The City and IO identified key individuals who would be responsible for matters relating to the Project.
16. **Effective project management** (section 2.4): To effectively manage the Project, the City and IO agreed that the Project would be implemented in compliance with the City’s Project Charter and Project Management Plan.¹⁸ Among other things, those documents would outline a “detailed milestone schedule” the parties would commit to, the applicable risk management framework, and a framework for developing an ongoing management and implementation plan.
17. **Governing structure and organization** (section 2.5): The City’s OLRT Executive Steering Committee (composed of representatives from the City and two representatives from IO) was charged with overseeing the Project’s “procurement and overall implementation.” IO representatives would lead the procurement phase of the Project¹⁹ (the period of the Project before Financial Close²⁰), reporting to the Director of the Rail Implementation Office.²¹ At the end of the RFP process, the Executive Steering Committee would recommend the preferred proposal, its proponents, and the Project Agreement that the City would conclude with the preferred proponents to City Council for approval.²² The committee’s

recommendation would be based on a report prepared by the Evaluation Team, the composition of which remained to be determined when the MOU was executed.

18. The schedules to the MOU set out the governance and organizational structure for the Project:
 - a. Schedule A set out the governance model for the Project. This included a vertical reporting structure with City Council at the top. The Finance and Economic Development Committee reported to Council, the OLRT Executive Steering Committee reported to the Finance and Economic Development Committee, and the Rail Implementation Office (which oversaw several working groups) reported to the OLRT Executive Steering Committee;
 - b. Schedule B set out the organizational chart for the Project; and
 - c. Schedule C set out the composition of the OLRT Executive Steering Committee and the Procurement Team.
19. **Decision-making and dispute resolution** (section 2.6): The City retained “final approval on all decision making.”
20. IO and the City agreed that the process for resolving any dispute arising in connection with the Project or the MOU would involve attempts to resolve disputes informally between designated individuals at IO and the City. Unresolved disputes would be escalated up the chain of command, ultimately reaching the IO Chief Executive Officer (CEO) and the City Manager. If a dispute remained unresolved, the City Manager’s position would prevail.
21. **Advisors and consultants** (section 2.7): Unless otherwise agreed, the City would be responsible for retaining all external advisors and consultants. To allow IO to receive information from and discuss matters directly with the City’s external advisors and consultants, the City and IO would enter a “common interest arrangement.”
22. **Fees** (section 2.8): The agreed fee for IO’s services up to and including the milestone of Financial Close was \$1,706,915. The estimated fee for IO’s services for the implementation phase of the Project (the period of the Project after Financial Close and before the “substantial completion of the project”) was \$4,043,377. The actual fee would not exceed that estimate.

23. **Key responsibilities** (section 3.1): The City would engage IO as its Commercial Procurement Lead for the Project to manage the procurement of the Project, including developing the RFP and Project Agreement in conjunction with the City (subject to the City's ultimate decision-making authority).
24. IO's specific responsibilities included:
- a. Developing the procurement documents and negotiating the terms of the Project Agreement in conjunction with the City. These would be based on IO "standard processes and documents," modified as appropriate for the Project.
 - b. Coordinating development of the Project Specific Output Specifications (PSOS) for the Project, incorporating information developed by the City.
 - c. Providing advisory support for the City's contract management activities during the implementation of the Project and, "as requested by the City," into the maintenance term of the Project (the period after the "completion or substantial completion of the Project facilities").
 - d. Working with the City to liaise with federal, provincial, and municipal agencies, including to obtain applicable licences, permits, approvals, and agreements.
 - e. Working "closely and cooperatively" with the City and keeping the City informed as to the status of the Project's procurement.
25. The City's specific responsibilities included:
- a. Ensuring the Project met the requirements of the Executive Steering Committee, any statutory or public policy requirements, and technical requirements.
 - b. Developing the design documents for the Project to the level required for the procurement process.
 - c. Working in conjunction with IO to develop the Project budget, technical requirements, policy requirements, and procurement and contract documents.
 - d. Preparing the land corridor for the Project to allow the Project Agreement to be implemented, including making property acquisitions and relocating certain utilities.
 - e. Obtaining applicable licences, permits, approvals, and agreements from federal, provincial, and municipal agencies.
 - f. Consulting with IO with respect to:
 - i. Any disputes that arose between the City and the company contracted to implement the Project under the Project Agreement;

- ii. Fulfilling its role in determining the completion of the Project as outlined in the Project Agreement; and
 - iii. Any change orders under the Project Agreement.
 - g. Ensuring that appropriate planning, technical, administrative, project management, and other resources required as inputs to the RFP and Project Agreement were provided in a timely manner.
 - h. Developing a “disruption mitigation plan” to be implemented during the Project’s construction.
26. **Communications protocol** (section 3.2): IO and the City agreed to develop a communications protocol to ensure the public would be “informed and engaged where necessary” and the procurement process would be regarded as “open, fair and transparent.”²³ The Project Agreement would also contain a “detailed communications protocol” consistent with that developed between IO and the City.²⁴
27. **Term and termination** (section 4.3): The MOU would terminate either upon mutual written agreement between IO and the City, or the final discharge of the rights and obligations of either IO or the City “in respect of design, construction and maintenance of the Project” under the Project Agreement, whichever was earlier.
28. **IO not a Crown agent** (section 4.4): IO declared that it would “not be acting as a Crown agent” in providing services to the City under the MOU and in respect to the Project. IO and the City also agreed that IO would be an independent contractor in respect to the matters contemplated by the MOU. IO would not be a partner, joint venturer, nor agent of the City.

Amending Agreement, September 26, 2013

29. **IO fees** (section 2.(a)): IO and the City agreed to replace the provision in the MOU setting out IO’s fees (section 2.8) with a new fee chart, largely to reflect IO and the City’s agreement on a “fixed Implementation Phase IO Fee” and to account for IO’s additional services relating to work on Highway 417 that was required for the Project and was added after the date of the MOU.²⁵
30. The fees payable to IO for its services under the MOU were replaced with the following:

- a. For services provided that did not relate to the highway:
 - i. \$1,706,915 for services during the period up to and including Financial Close; and
 - ii. \$700,000 for services during the implementation phase of the Project (after Financial Close to “Final Completion”).
 - b. For services provided in relation to the highway:
 - i. \$704,057 for services during the period up to and including Financial Close; and
 - ii. \$70,000 for services during the implementation phase of the Project.
31. If the fees for the implementation phase of the Project did not ultimately reimburse IO for the estimated costs it expended in providing that work, IO and the City would agree on an increase.
32. IO and the City also agreed to settle on IO’s fees for services to be provided during the long-term maintenance term at a later date.
33. **Key responsibilities** (section 3.1): IO and the City agreed that advisory work requested by the City in respect to the maintenance term of the contract would be provided by IO “if the Parties agree on the amount of the Maintenance Phase IO Fee” (the fee to be paid for services to be provided during the maintenance term). A modified provision accordingly replaced section 3.1(i)(d) of the MOU.

NOTES

¹ Infrastructure Ontario and City of Ottawa, *Memorandum of Understanding between Ontario Infrastructure and Lands Corporation and City of Ottawa for the Ottawa LRT Project*, effective October 26, 2011, see section 2.1. (COM0000234)

² Tanalex Corp. *Discussion Paper on Using Infrastructure Ontario for the Delivery of the Downtown Ottawa Transit Tunnel (DOTT) Project*. January 13, 2010, p. 8. (COW0532653)

³ *Ontario Infrastructure and Lands Corporation Act, 2011*, SO 2011, c. 9, Sch. 32 [IO Act]. The 2011 Act amalgamated the Ontario Infrastructure Projects Corporation with the Ontario Realty Corporation and the Stadium Corporation of Ontario Limited: section 2(1). Between 2006 and

2011, IO was a corporation without share capital established under the *Ontario Infrastructure Projects Corporation Act, 2006*, SO 2006, c. 9, Sch I. Between 2005 and 2006, IO was established as a corporation under the *Business Corporations Act*, RSO 1990, c. B.16.

⁴ *IO Act*, section 9. The term “Lieutenant Governor in Council” is used in many government documents; it refers to the Lieutenant Governor acting on and with the advice of the Executive Council or Cabinet.

⁵ *IO Act*, sections 18(1), 18.1, 19.

⁶ *IO Act*, section 4(1). *Ministry of Infrastructure Act, 2011*, SO 2011, c. 9, Sch. 27, section 7(4)(j).

⁷ Minister of Infrastructure and Infrastructure Ontario, *Memorandum of Understanding between the Minister of Infrastructure and Chair of the Ontario Infrastructure and Lands Corporation*, August 2012. (COM0000237) The MOU would continue in effect for not more than five years from the effective date: section 15.1.1.

⁸ Infrastructure Ontario. "Our Public-Private Partnerships (P3) Model," n.d., <https://www.infrastructureontario.ca/Our-P3-Model/>. (COM0010101)

⁹ Minister of Infrastructure/IO, *Memorandum of Understanding*, August 2012, section 3.2.5(vi). (COM0000237)

¹⁰ Infrastructure Ontario. "FAQs—Public Private Partnerships (P3s)," n.d., <https://www.infrastructureontario.ca/P3s-Frequently-Asked-Questions/>. (COM0010099)

¹¹ City of Ottawa. *Project Charter: Ottawa Light Rail Transit Project, Phase 1, Increment 1 - Tunney's Pasture to Blair Station*, October 26, 2011, see section 2.1 [OLRT Project Charter]. (COM0000235)

¹² Ottawa, *OLRT Project Charter*, section 7.2.2. (COM0000235)

¹³ Infrastructure Ontario. *A year of transformation: Annual Report 2012-13*, p. 16 [Annual Report – 2012-2013]. (COM0010100). IO also filled an advisory role for the Waterloo light rail transit project.

¹⁴ IO, *Annual Report – 2012-2013*, pp. 4-15. (COM0010100); IO, "FAQs—Public Private Partnerships." (COM0010099)

¹⁵ Infrastructure Ontario. *2010/2011 Letter of Direction—AFP Projects, Project Management and Advisory Services*, letter from Minister of Infrastructure Bob Chiarelli to Mr. D. Anthony Ross, Chair, Infrastructure Ontario, 2011, see Appendix A, section 11. (COM0000236)

¹⁶ IO/Ottawa, *Memorandum of Understanding*. (COM0000234)

¹⁷ Infrastructure Ontario and City of Ottawa, *Amending Agreement between Ontario Infrastructure and Lands Corporation and City of Ottawa*, September 26, 2013 [2013 Amending Agreement]. (COM0000233)

¹⁸ See Ottawa, *OLRT Project Charter*; (COM0000235) see City of Ottawa, *Project Management Plan*, March 30, 2012; (IFO0004372) and see Ottawa Light Rail, *Project Management Plan Endorsement and Signoff*, March 30, 2012. (IFO0004383; parent document: IFO0024115)

¹⁹ See Ottawa, *OLRT Project Charter*, section 7.2.2. (COM0000235)

²⁰ City of Ottawa, *Schedule 1 to Project Agreement*, February 12, 2013. (COM0000159) “Financial Close” is defined in section 1.270 as “the first date that funding is available under the

Lending Agreements.” The “Financial Close Target Date” is identified as February 12, 2013 in section 1.271. See also City of Ottawa, *Ottawa Light Rail Transit Project RFP Preparation Period: Approach, Structure, Organization and Work Products Including Project Specific Output Specifications (PSOS)*, July 13, 2011, pp. 3 and 9. (IFO0064804); and City of Ottawa, *Ottawa Light Rail Transit Project Technical Subject Matter Expert Orientation: In-Market or Open Period (RFP Release through Financial Close)*, October 5, 2011, pp. 5 and 41. (IFO0041972)

²¹ See Ottawa, *OLRT Project Charter*, section 7.2.2. (COM0000235)

²² City of Ottawa and Rideau Transit Group General Partnership. *Project Agreement: Ottawa Light Rail Transit Project*, February 12, 2013. (COM0000158)

²³ The communications plan or protocol, which is independent of the Communications Protocol in Schedule 18 to the Project Agreement, has not been provided in productions from the City.

²⁴ Ottawa and Rideau Transit Group. *Project Agreement: Ottawa Light Rail Transit Project, Schedule 18 - Communications and Public Consultation Protocol*. (COM0000179)

²⁵ See IO/Ottawa, *2013 Amending Agreement*, Second Recital, for an explanation of the reason for amending fees. (COM0000233)