



Proposal Description	Supply and Delivery of Twelve (12) Metre Diesel Transit Buses, 12m Hybrid, 18m Diesel and 18m CNG
Proposal Number	RFP-2023-PROC-450

## Purchase Agreement

### Schedule E to the Master Agreement

**THIS PURCHASE AGREEMENT** for the Supply and Delivery of twelve (12) Meter Diesel Transit Buses

(with options for 12m Hybrid, 18m Diesel and 18m CNG)

effective as of the

**January 29, 2024**

(the "Effective Date")

BETWEEN:

**The Corporation of the City of Sault Ste. Marie**

(the "Purchaser")

- and -

**New Flyer Industries Canada ULC**

(the "Vendor")

In consideration of their respective agreements set out below and subject to the terms of the Master Agreement between Metrolinx and New Flyer Industries Canada ULC, dated January 29, 2024 referencing RFP-2023-PROC-450, the Parties covenant and agree to the terms as contained in this Purchase Agreement.

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## General Conditions of this Purchase Agreement

### 1.0 Interpretation

#### 1.1 Definitions

- (a) Capitalized terms used in this Purchase Agreement shall have the respective meanings ascribed thereto in Schedule A - Definitions.

#### 1.2 Time of the Essence

- (a) Time is of the essence in the performance of a Party's respective obligations under this Purchase Agreement. Extension, waiver or variation of any provision of this Purchase Agreement shall not be deemed to affect this provision and there shall be no implied waiver of this provision.

#### 1.3 Currency

- (a) All prices and sums of money and all payments made under this Purchase Agreement shall be in Canadian dollars.

#### 1.4 Units of Measure

- (a) All dimensions, quantities, performance specifications, calibrations and other quantitative elements used in this Purchase Agreement shall be expressed in the International System of Units (SI), except where otherwise indicated.

#### 1.5 Language

- (a) All communication between the Purchaser and the Vendor and between the Vendor and each of the Subvendors with regard to the Work shall be in the English language.

#### 1.6 Vendor Acknowledgement

- (a) The Vendor and Purchaser acknowledge and agree that Metrolinx and its Successors shall not be liable or responsible to either the Vendor or the Purchaser for any matter arising under this Purchase Agreement or through the provision of the Deliverables and, without limiting the generality of the foregoing, the Vendor and Purchaser acknowledge and agree that Metrolinx and its Successors will not be liable or responsible for any payment or other obligation relating to the purchase of the Buses or other Work or Deliverables provided under this Purchase Agreement, which obligations remain the sole and exclusive obligation of the Purchaser. The Purchaser agrees that this provision is for the benefit of Metrolinx and that Metrolinx is a third-party beneficiary of this provision and consequently, Metrolinx has the right to enforce this provision as if it was a party to this Purchase Agreement.

#### 1.7 References

- (a) Each reference to a statute in this Purchase Agreement is deemed to be a reference to that statute and to the regulations made under that statute, all as amended or re-enacted from time to time. Following any and all changes to Applicable Laws, the Vendor shall perform the Work in accordance with

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the terms of this Purchase Agreement, including in compliance with Applicable Laws.

- (b) Unless specified otherwise, a reference in this Purchase Agreement to an agreement, document or Standard (including, for avoidance of doubt, this Purchase Agreement and any Ministry or Metrolinx safety standard) at any time refers (subject to all relevant Approvals) to that agreement, document or Standard as amended, supplemented, restated, substituted, replaced, notated or assigned at such time.
- (c) Any provision establishing a higher standard of safety, reliability, performance or service shall take precedence over a provision establishing a lower standard of safety, reliability, durability, performance or service.
- (d) Each reference, whether express or implied, to a Standard of any technical organization or authority is deemed to be a reference, to that Standard as amended, supplemented, restated, substituted or replaced.
- (e) Unless otherwise defined herein, words or abbreviations which have well-known trade meanings are used herein in accordance with those meanings.
- (f) In this Purchase Agreement, “including” means including without limitation, and the terms “include”, “includes”, and “included” have similar meanings.
- (g) In this Purchase Agreement, "herein", "hereby", "hereof", "hereto" and "hereunder" and words of similar import refer to this Purchase Agreement as a whole and not to any particular portion of it.
- (h) Each reference to an Article or Section within this Purchase Agreement or Schedules shall refer to that Article or Section number in this Purchase Agreement or the Schedule in which the reference occurs unless otherwise specified.
- (i) The headings in this Purchase Agreement are for convenience of reference only and in no manner modify, interpret or construe this Purchase Agreement.
- (j) In this Purchase Agreement words in the singular include the plural and vice-versa and words in one (1) gender include all genders.

#### 1.8 Time

- (a) For purposes of this Purchase Agreement, a period of days shall be deemed to begin on the first day after the event which began the period and to end at 4:00 p.m. (Eastern Standard Time or Eastern daylight time, as the case may be) on the last day of the period. If, however, the last day of the period does not fall on a Business Day, the period shall be deemed to end at 4:00 p.m. (Eastern Standard Time or Eastern daylight time, as the case may be) on the next Business Day.
- (b) Unless otherwise specified, references to time of day or date mean the local time or date in Toronto, Ontario. When any period of time is referred to in this Purchase Agreement by days between two dates, it will be calculated by excluding the first and including the last day of such period.

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- (c) If any action is required by this Purchase Agreement to be taken on or by a day which is not a Business Day, such action shall be valid if taken on or by the next succeeding Business Day.
- (d) Unless otherwise specified, references to “day” shall mean calendar day.

#### 1.9 Schedules

- (a) The Schedules to this Purchase Agreement form a part of this Purchase Agreement and are as follows:
  - (i) Schedule A - Definitions
  - (ii) Schedule B - Financial Terms
  - (iii) Schedule C – Deliverables
  - (iv) Schedule D - Price

#### 1.10 Order of Precedence

- (a) In the event of discrepancies, inconsistencies or ambiguities of the wording of the documents noted in the Table of Contents, the wording of the document that first appears in the Table of Contents shall prevail over the wording of a document subsequently appearing in the Table of Contents.
- (b) In the event of a conflict or inconsistency in any provisions in the Contract for the purposes of this Purchase Agreement alone: (a) the main body of this Purchase Agreement shall govern over the Schedules to this Purchase Agreement; (b) subject to the last sentence in Section 2.3(c) (Purchase Agreements) of the Master Agreement, the Master Agreement (including its Schedules) shall govern over this Purchase Agreement.

## 2.0 Performance By Vendor

### 2.1 Vendor Representative

- (a) The Vendor shall assign a Vendor Representative who will direct the provision of the Work. During the Term, the Vendor Representative will maintain ongoing contact with the Purchaser to ensure that issues are dealt with in an efficient, effective and timely manner. The Vendor Representative shall be the primary point of contact for the Purchaser for significant issues including commercial issues and Disputes and shall have overall responsibility for coordinating the performance of the Vendor obligations under this Purchase Agreement.
- (b) The Vendor’s representative for purposes of this Purchase Agreement shall be:
  - Name: Adrian Graca
  - Title: Business Segment Director
  - Email: [Adrian\\_graca@newflyer.com](mailto:Adrian_graca@newflyer.com)
  - Telephone: 204-470-5521
- (c) The Vendor acknowledges and agrees that the Vendor’s representative named above has authority to legally bind the Vendor.

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## 2.2 Purchaser Representative

- (a) The Purchaser Representative is the individual who represents the Purchaser under this Purchase Agreement and is responsible for communicating with the Vendor regarding any issues with respect to Deliverables and, for greater certainty, as of the Effective Date, and until the Vendor receives notification for the Purchaser that there has been a change in representative, such representative shall be:

Name: Nicole Maione  
Title: Director of Community Services  
Email: n.maione@cityssm.on.ca  
Telephone: 705-759-5264

- (b) The Purchaser Representative will represent the Purchaser until such time as all Buses have been accepted by the Purchaser. The Purchaser Representative's responsibilities include:
- (i) being the one-window point of contact for the Vendor;
  - (ii) exchanging information between the Vendor and Purchaser;
  - (iii) identifying any issues related to the performance of the Deliverables in respect of this Purchase Agreement;
  - (iv) coordinating approval of "equivalent" requests as per Section 18.3 (Equivalent Materials and Equipment).

## 2.3 Notification by Vendor

- (a) During the Term, the Vendor shall advise the Purchaser and Metrolinx promptly of
- (i) any contradictions, discrepancies or errors found or noted in this Purchase Agreement;
  - (ii) supplementary details, instructions or directions that do not correspond with those contained in this Purchase Agreement;
  - (iii) any omissions or other faults that become evident and should be corrected in order to provide the Deliverables in accordance with this Purchase Agreement and Applicable Laws; and
  - (iv) any warranty information, product recall information or safety or security information related to a Deliverable or a component part of a Deliverable.

## 2.4 Condonation Not a Waiver

- (a) Any failure by the Purchaser to insist in one or more instances upon strict performance by the Vendor of any of the terms or conditions of this Purchase Agreement shall not be construed as a waiver by the Purchaser or Metrolinx of its right to require strict performance of any such terms or conditions, and the obligations of the Vendor with respect to such performance shall continue in full force and effect.

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## 2.5 No Subcontracting or Assignment

- (a) The Vendor shall not subcontract or assign the whole or any part of this Purchase Agreement or any monies due under it without the prior written consent (a) with respect to the Master Agreement or the Contract as a whole, of Metrolinx; and (b) with respect to this Purchase Agreement, of the Purchaser. Such consent shall be in the sole discretion of Metrolinx and/or the Purchaser respectively, as, and may be subject to the terms and conditions that may be imposed by Metrolinx and/or the Purchaser. Without limiting the generality of the conditions which Metrolinx and/or the Purchaser may require prior to consenting to the Vendor use of a Subvendor, every Contract entered into by the Vendor with a Subvendor shall adopt all of the terms and conditions of this Purchase Agreement as far as applicable to those parts of the Deliverables provided by the Subvendor. Nothing contained in this Purchase Agreement, nor any consent granted under this paragraph, shall create a contractual relationship between any Subvendor or its employees and Metrolinx or the Purchaser.

## 2.6 Notice

- (a) Notices shall be in writing and shall be delivered by postage-prepaid envelope, personal delivery, e-mail or other electronic means and shall be addressed to, respectively, the Purchaser's Address to the attention of the Purchaser's Representative, to the Metrolinx Address to the attention of the Metrolinx Representative and to the Vendor Address to the attention of the Vendor Representative. Notices shall be deemed to have been given (a) in the case of postage-prepaid envelope, seven (7) calendar days after such notice is mailed; or (b) in the case of personal delivery or e-mail one (1) Business Day after such notice is delivered. In the event of a postal disruption, notices must be given by personal delivery, email or other electronic means. Unless the Parties expressly agree in writing to additional methods of notice, notices may only be provided by the methods contemplated in this paragraph. The Parties may amend their respective addresses by providing to the other at least fourteen (14) calendar days written notice of such change in compliance with the terms of this Section 2.6 (Notice).

## 2.7 Duty to Disclose Change of Control

- (a) Except for any internal reorganization activities, such as mergers or intercompany changes, wherein the Contract is held by a party with as good or better financial position as the Vendor, in the event that the Vendor undergoes a change in control, either de facto or de jure, the Vendor shall immediately disclose such change in control to the Purchaser and shall comply with any terms and conditions subsequently prescribed by the Purchaser resulting from the disclosure.

## 2.8 Conflict of Interest Acknowledgement and Agreement

- (a) For the purposes of this Purchase Agreement, a "Conflict of Interest" includes any situation or circumstances where, in relation to the performance

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of its contractual obligations in this Purchase Agreement, the Vendor's other commitments, relationships or financial interests:

- (i) could or could be seen to exercise an improper influence over the objective, unbiased and impartial exercise of its independent judgment; or
  - (ii) could or could be seen to compromise, impair or be incompatible with the effective performance of its contractual obligations.
- (b) The Vendor acknowledges that participation (directly or indirectly) in any procurement process arising from or related to this Purchase Agreement (the "Prohibited Procurements") would constitute a Conflict of Interest with this Purchase Agreement, and the Vendor agrees that it shall not, and shall take reasonable steps (including obtaining covenants substantially similar to those set out in this Section 2.8 (Conflict of Interest Acknowledgement and Agreement)) to ensure that its Subvendors do not participate in or be involved with such Prohibited Procurements either directly or indirectly, including as a bidder or as a Subvendor, subcontractor or advisor to any bidder.
- (c) The Vendor shall:
- (i) avoid any Conflict of Interest in the performance of its contractual obligations;
  - (ii) disclose without delay any actual or potential Conflict of Interest that arises during the performance of its contractual obligations to both the Project Officer and the relevant Purchaser; and
  - (iii) comply with any requirements prescribed by Metrolinx or the Purchaser to resolve any Conflict of Interest.
- (d) In addition to all other contractual rights or rights available at law or in equity, the Purchaser shall have the right to immediately terminate this Purchase Agreement, by giving notice in writing to the Vendor, where:
- (i) the Vendor fails to disclose an actual or potential Conflict of Interest;
  - (ii) the Vendor fails to comply with any requirements prescribed by the Purchaser and/or Metrolinx to resolve a Conflict of Interest; or
  - (iii) the Vendor's Conflict of Interest cannot be resolved.
- (e) This Section shall survive any termination or expiry of this Purchase Agreement.

## 2.9 Exclusivity and Work Volumes

- (a) The Vendor acknowledges that it is providing the Deliverables on an exclusive basis for Buses ordered during the Base Year, and during the Option Year as applicable, where the Purchaser and/or Metrolinx has exercised the Option to purchase on an exclusive basis. The Purchaser makes no representation regarding the volume of Deliverables and Work to

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be ordered under this Purchase Agreement in the Base or Option Year, if exercised.

### **3.0 Purchaser Responsibilities**

#### **3.1 Purchaser Responsibilities**

- (a) The Purchaser will be responsible for administering this Purchase Agreement.
- (b) The Purchaser shall:
  - (i) inspect each Bus upon delivery and prior to issuing an acceptance certificate;
  - (ii) receive invoices sent by the Vendor and shall be responsible for ensuring payment;
- (c) Deal directly with the Vendor with respect to any post-delivery issues specific to this Purchase Agreement including warranty and other repair issues. The Purchaser consents to the release of its usage information by the Vendor to Metrolinx in the Base Year, Option Year, if exercised, or a further extension of the Term of the Master Agreement.
- (d) If there are multiple separate purchases for Buses by a Purchaser, the Vendor and Purchaser shall execute at least one Purchase Agreement. Any subsequent purchases may be through another Purchase Agreement or purchase order and such purchase order shall be attached as a subsequent Schedule to the original Purchase Agreement.

### **4.0 Health and Safety**

- 4.1 All health and safety terms applicable to this Purchase Agreement and the Work are set out in Article 3.0 (Health and Safety) of the Master Agreement and the Vendor shall comply with all such terms.

### **5.0 Financial Terms**

- 5.1 All financial and payment terms applicable to this Purchase Agreement and the Work are set out in Schedule B - Financial Terms.

### **6.0 Right of Ownership and Use**

#### **6.1 Purchaser Intellectual Property**

- (a) The Vendor agrees that all Intellectual Property and every other right, title and interest in and to all concepts, techniques, ideas, information and materials, however recorded, (including images and data) provided by the Purchaser to the Vendor shall remain the sole property of the Purchaser at all times.

#### **6.2 No Use of Purchaser Insignia**

- (a) The Vendor shall not use any insignia or logo of the Purchaser except where required to provide the Deliverables, and only if it has received the prior written permission of the Purchaser to do so.

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- 6.3 Vendor Representation and Warranty Regarding Third-Party Intellectual Property
- (a) The Vendor represents and warrants that the provision of the Deliverables shall not infringe or induce the infringement of any third-party Intellectual Property rights. The Vendor further represents and warrants that it has obtained assurances with respect to any Vendor Intellectual Property and third-party Intellectual Property that any rights of integrity or any other moral rights associated therewith have been waived.
- 6.4 Purchaser May Prescribe Further Compliance
- (a) The Purchaser reserves the right to prescribe the specific manner in which the Vendor shall perform their obligations relating to this Article 6 (Right of Ownership and Use).
- 6.5 Survival
- (a) The obligations contained in this Article 6 (Right of Ownership and Use) shall survive the termination or expiry of this Purchase Agreement.
- 6.6 Ownership of Purchaser IP
- (a) Unless otherwise expressly agreed, the Purchaser is and will be the exclusive owner of, and shall retain all right, title and interest (including Intellectual Property Rights) in and to all of the following Intellectual Property (collectively, the “**Purchaser IP**”):
- (i) all Purchaser Materials;
  - (ii) all Deliverables;
  - (iii) all reports and other information created, generated, output or displayed by the Deliverables or as a result of the performance of receipt of the Work; and
  - (iv) all modifications or enhancements made to the items listed in Sections 6.6(a)(i) to (iii) hereof.
- (b) All right, title and interest, including all Intellectual Property Rights, in Purchaser IP will vest in the Purchaser, following creation.
- (c) The Vendor will acquire no rights to any Purchaser IP other than the licence rights expressly granted in Section 6.8 (Grant of Licences by the Purchaser to Vendor).
- (d) The Vendor:
- (i) hereby assigns and transfers to the Purchaser; and
  - (ii) agrees (to the extent required in the future) to assign and transfer to the Purchaser, as and when created, all right, title and interest, including Intellectual Property Rights, throughout the world in and to all Purchaser IP (to the extent any right, title, interest or Intellectual Property Right in Purchaser IP does not automatically and immediately vest in the Purchaser).

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- (e) The Vendor shall obtain from each an assignment of any rights they have to the Purchaser IP and a waiver, for the benefit of the Purchaser and its respective Successors, assigns, licensees and contractors, of their respective moral rights (and any similar rights to the extent that such rights exist and may be waived in each and any jurisdiction throughout the world) in and to the Purchaser IP. The Vendor shall provide copies of such documentation to the Purchaser upon request.
- (f) The Purchaser agrees that prior to providing any Deliverables to a third party, the Purchaser shall obtain from such third party a “non-reliance” letter addressed to the Vendor in which such third party will agree that (i) any Deliverable that is provided, or made available, to it was prepared for the sole benefit of the Purchaser and is not be relied upon by it and (ii) the Vendor accepts no responsibility or liability in respect of any advice, recommendations or other information contained in any such Deliverable. The Purchaser shall provide any such non-reliance letter to the Vendor promptly after its receipt.
- (g) For certainty, the Vendor shall not be precluded from independently developing for itself, or for others, materials which are competitive with the Deliverables, irrespective of their similarity to the Deliverables and the Vendor shall be free to use, without restriction, any Vendor Intellectual Property and its general knowledge, skills and experience, and any ideas, concepts, know-how, and techniques within the scope of its business that are used or acquired in the course of providing the Work, so long as the Vendor does not disclose or use any Confidential Information, work product or proprietary information without the Purchaser’s express written consent.
- (h) Nothing in this Purchase Agreement shall prevent the Vendor from providing similar Work to other parties.

#### 6.7 Ownership of Vendor Intellectual Property

- (a) The Vendor is and will be the exclusive owner of, and shall retain all right, title and interest (including Intellectual Property Rights) in and to all Vendor Intellectual Property.
- (b) The Purchaser will acquire no rights to the Vendor Intellectual Property other than the licence rights expressly granted in Section 6.9 (Grant of Licences by the Vendor to the Purchaser) or otherwise under or in respect of this Purchase Agreement.

#### 6.8 Grant of Licences by the Purchaser to Vendor

- (a) The Purchaser grants to the Vendor, during the Term, a non-exclusive, non-transferable, royalty-free right and licence to:
  - (i) access, use, copy, support, maintain and, to the extent reasonably necessary to provide the Work, modify, the Purchaser IP solely for the purposes of fulfilling the Vendor’s obligations under this Purchase Agreement; and

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(ii) sublicense the Purchaser IP to Subvendors solely to the extent necessary to enable such Subvendors to fulfill the Vendor's obligations under this Purchase Agreement.

(b) Any exercise by the Vendor of the rights granted pursuant to Section 6.3(a) (Vendor Representation and Warranty Regarding Third-Party Intellectual Property) shall be subject to the terms and conditions of this Purchase Agreement, including always the Vendor's obligations with respect to Confidential Information set out in Article 9 (Confidential Information, Personal Information, Freedom of Information, Access and Audit Rights).

(c) If the Vendor desires to use the Purchaser IP other than as permitted under clause (a) hereof, such use must be set out in a separate license agreement (such licence to require the approval of the Purchaser, which may be withheld at the Purchaser's discretion).

#### 6.9 Grant of Licences by the Vendor to the Purchaser

(a) The Vendor grants to the Purchaser a perpetual, irrevocable, fully paid-up, royalty-free, worldwide, non-exclusive right and licence to access, use, copy, support, maintain, distribute or otherwise exploit any Vendor Intellectual Property that is integrated with, embedded in, forms part of or is otherwise required to access, use, copy, support, maintain, distribute or otherwise exploit any Purchaser IP; provided, however, that the foregoing licence does not permit the Purchaser to use the Vendor Intellectual Property in its standalone form or for any purpose other than as part of or in conjunction with the Purchaser IP it is associated with.

(b) If the Vendor integrates with or embeds in any Deliverables any Intellectual Property provided by a third party Vendor, subcontractor, independent contractor, Subvendor or other Person, the Vendor shall obtain for the Purchaser the same license rights for the Purchaser in respect of such third party Intellectual Property as set forth in Section 6.9(a) (Grant of Licences by the Vendor the Purchaser) hereof.

### 7.0 Insurance

#### 7.1 Insurance Requirements

(a) The Vendor agrees to purchase and maintain in force, at its own expense and for the duration of this Purchaser Agreement, the policies of insurance set forth in Schedule C – Insurance of the Master Agreement, which policies will be in a form and with an insurer or insurers acceptable to Metrolinx. A certificate of these policies originally signed by the insurer or an authorized agent of the insurer and copies of the policies must be delivered to Metrolinx and the Purchaser prior to the commencement of the Work.

### 8.0 Changes

#### 8.1 Vendor to Comply with Reasonable Change Requests

(a) The Purchaser may request changes, in writing, to this Purchase Agreement, which may include altering, adding to, or deleting any of the Deliverables.

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The Vendor shall comply with all reasonable Purchaser change requests and the performance of such requests shall be in accordance with the terms and conditions of this Purchase Agreement. If the Vendor is unable to comply with the change request, it shall promptly notify the Purchaser and Metrolinx and provide reasons for such non-compliance. In any event, any such change request shall not be effective until a written amendment reflecting the change has been executed by the Parties to this Purchase Agreement.

- (b) If the Vendor is of the reasonable opinion that it is necessary for reasons beyond the Vendor's control to alter, deduct from, add to or omit any part of the Deliverables to accomplish the result intended by this Purchase Agreement, it shall provide written notice of this requirement and details of same to the Purchaser. The Purchaser may in its sole discretion determine whether or not to accept such proposed change and such change request shall not be effective until a written agreement reflecting the change has been executed by the Parties to this Purchase Agreement. Subject to Section 8.2 (Change Management Process), in no event will any such change result in an increase to the Price.

## 8.2 Change Management Process

- (a) Where a Purchaser change request revises the scope of the previously contemplated Deliverables, the Purchaser shall set out, in its change request, the contemplated changes. The Vendor shall:
  - (i) include reasonable market pricing for the particular type of goods or services contemplated in the change request and the Vendor shall not unreasonably refuse to provide those goods or services. The Purchaser may request the Vendor to substantiate the pricing provided for engineering, materials, and labour through such documentation and other supporting information as it reasonably requires. The Vendor shall provide such documentation to the Purchaser within five (5) Business Days of receipt of any such request;
  - (ii) identify the full engineering costs that shall be adjusted when requests are used on subsequent purchases as non-reoccurring costs;
  - (iii) negotiate the Price with the Purchaser within a reasonable period of time; or
  - (iv) if the Purchaser identifies that certain components may be supplied by the Purchaser (i.e. customer supplied components), in lieu of those provided by the Vendor, the Vendor shall design and install such items at a reasonable market price, and shall provide documentation demonstrating that such pricing is at market value and commercially reasonable. The Purchaser may request the Vendor to substantiate the pricing provided for engineering, materials, and labour, and to identify the full engineering costs that shall be adjusted when requests are used on subsequent purchases as non-reoccurring costs;

and in any event, such change request shall not become effective until a written amendment reflecting the change has been executed by the Parties.

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### 8.3 Rights and Remedies and Vendor Obligations Not Limited to Purchase Agreement

- (a) The express rights and remedies of the Purchaser and obligations of the Vendor set out in this Purchase Agreement are in addition to and shall not limit any other rights and remedies available to the Purchaser or any other obligations of the Vendor at law or in equity.

### 8.4 Price Adjustments Due to Regulation and/or Statutory Changes

- (a) If the Vendor is of the opinion that at any time after the execution of this Purchase Agreement or after the commencement of this Purchase Agreement, the Prices have to be adjusted as a result of any change in Applicable Laws or regulations occurring subsequent to this Purchase Agreement Effective Date, it shall forward to Metrolinx and the Purchaser written notice of the rationale for the change (including a description of the law requiring the change), the nature of the change, the timing and required Price adjustment. These Price adjustments shall be treated by the Parties as the new Prices, subject to written approval of Metrolinx and the Purchaser, acting reasonably.

### 8.5 Obsolete Components

- (a) If the Vendor is unable to offer a component due to obsolesce a replacement, of equal value, must be identified and shared with the Purchaser at no additional cost or delay to delivery.

### 8.6 Set Off

- (a) The Purchaser shall have the right to satisfy any amount from time to time owing by it to the Vendor under the Contract by way of a set-off against any amount from time to time owing by the Vendor to the Purchaser under the Contract, including but not limited to any amount owing to the Purchaser pursuant to the Vendor's indemnification of the Purchaser in this Contract.

## **9.0 Confidential Information, Personal Information, Freedom of Information, Access and Audit Rights**

### 9.1 Confidential Information

- (a) The Vendor shall keep all Confidential Information confidential. Without limiting the generality of the foregoing, the Vendor shall:
  - (i) not disclose, reveal, publish, or disseminate any Confidential Information to anyone, except as permitted pursuant to this Purchase Agreement;
  - (ii) use Confidential Information only in connection with this Purchase Agreement and the performance of the Work;
  - (iii) take all reasonable steps required to prevent any unauthorized reproduction, use, disclosure, publication, or dissemination of the Confidential Information;
  - (iv) not copy, reproduce in any form or store the Confidential Information in a retrieval system or database, without the prior written consent of

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the Purchaser, and, in respect of any Confidential Information about any third-party, the written consent of such third-party; and

- (v) immediately notify the Purchaser in the event that it becomes aware of any unauthorized disclosure of Confidential Information.
- (vi) return all Confidential Information to the Purchaser before the termination or expiry of the Term, with no copy or portion kept by the Vendor.

#### 9.2 Restrictions on Copying

- (a) The Vendor shall not copy any Confidential Information, in whole or in part, unless copying is essential for the provision of the Deliverables. On each copy made by the Vendor, the Vendor must reproduce all notices which appear on the original.

#### 9.3 Permitted Disclosure

- (a) Notwithstanding the obligations set out in Section 9.1 (Confidential Information), the Vendor may disclose the Purchaser's Confidential Information to those of its Subvendors and Vendor's Personnel who need to know such Confidential Information in connection with this Purchase Agreement, and to third party service providers who need to know such Confidential Information for regulatory compliance purposes, provided that such persons are subject to obligations of confidentiality substantially similar to those contained in this Article 9 (Confidential Information, Personal Information, Freedom of Information, Access and Audit Rights).

#### 9.4 Exceptions

- (a) The obligations of confidentiality set out in Section 9.1 (Confidential Information) shall not apply to Confidential Information which:
  - (i) becomes generally available to the public through no fault of the Vendor;
  - (ii) prior to receipt from the Purchaser, was known to the Vendor on a non-confidential basis and is not subject to another obligation of secrecy and non-use, as documented by written records possessed by the Vendor;
  - (iii) was independently developed by the Vendor prior to receipt from the Purchaser, as documented by written records possessed by the Vendor; or
  - (iv) becomes available to the Vendor on a non-confidential basis from a source other than the Purchaser that is not under other obligations of confidence.
- (b) If the Vendor or any of its directors, officers, employees, agents, representatives or advisors become legally compelled to disclose any Confidential Information, the Vendor will provide the Purchaser and/or Metrolinx with prompt notice to that effect in order to allow the Purchaser and/or Metrolinx to seek one (1) or more protective orders or other

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appropriate remedies to prevent or limit such disclosure, and it shall cooperate with the Purchaser and/or Metrolinx) and their legal counsel to the fullest extent. If such protective orders or other remedies are not obtained, the Vendor will disclose only that portion of Confidential Information which the Vendor are legally compelled to disclose, only to such Person or Persons to which the Vendor is legally compelled to disclose, and the Vendor shall provide notice to each such recipient (in co-operation with legal counsel for the Purchaser and/or Metrolinx) that such Confidential Information is confidential and subject to non-disclosure on terms and conditions equal to those contained in this Purchase Agreement and, if possible, shall obtain each recipient's written agreement to receive and use such Confidential Information subject to those terms and conditions.

- (c) Without limiting the generality of Section (a) and notwithstanding Section (b), the Parties acknowledge and agree that the treatment and disclosure of Confidential Information shall in all cases be subject to the requirements of MFIPPA.

#### 9.5 Security Measures

- (a) The Vendor shall select, implement (prior to the commencement of the Work), use and maintain the most appropriate products, tools, measures and procedures to ensure the security of all Confidential Information, as determined with reference to and generally in compliance with Applicable Laws, Industry Standards, and the security requirements specified in Appendix A – Technical Specifications and best practices, or as otherwise prescribed by the Purchaser during the Term. Without limiting the generality of the foregoing, such practices shall include:
  - (i) privacy due diligence safeguards; and
  - (ii) physical and electronic security measures and confidentiality enhancing technologies to guard against unauthorized disclosures, access and use, such as firewalls, encryption, the use of user identification and passwords, software or other automated systems to control and track the addition and deletion of users, and software or other automated systems to control and track user access to areas and features of information systems.
- (b) For greater certainty, the Purchaser reserves the right to prescribe the specific manner in which Vendor shall perform its obligations relating to this Section 9.5 (Security Measures).

#### 9.6 Return or Destruction of Confidential Information

- (a) Immediately upon expiration or termination of this Purchase Agreement or at any other time upon the request of the Purchaser, and subject to Section 9.10 (Audit Rights), the Vendor agrees to:
  - (i) promptly return all Confidential Information (other than the Contract Records) to the Purchaser; or

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- (ii) promptly delete or destroy the Confidential Information (other than the Contract Records) and all copies thereof in any form whatsoever under its power or control and provide the Purchaser with a destruction certificate signed by an appropriate officer of the Vendor certifying such destruction.
- (b) Notwithstanding the foregoing, the Vendor shall have no obligation to return or destroy:
  - (i) Confidential Information that is captured and retained within the Vendor's routine computer systems backup processes, provided that (a) no specific effort is made to retrieve such archived Confidential Information for purposes that would violate the confidentiality obligations under this Purchase Agreement and (b) the confidentiality obligations of under this Purchase Agreement shall continue to apply to such archived Confidential Information for so long as such information is retained; and
  - (ii) working papers or other documentation which it is required to retain pursuant to Applicable Law or any rules of professional conduct applicable to the Vendor or the Vendor Personnel.

#### 9.7 MFIPPA and Personal Information

- (a) The Purchaser and the Vendor acknowledge and agree the collection, use, retention and disclosure of Personal Information is governed by MFIPPA. Metrolinx acknowledges that the Vendor may also be subject to the requirements of PIPEDA. In the event of a conflict between the requirements of MFIPPA and the requirements of PIPEDA or any other legislation governing the treatment of Personal Information, the more onerous provision shall apply.
- (b) The Vendor shall ensure that all collection, access, use, retention and disclosure of Personal Information under this Purchase Agreement, whether through the performance of the Work or otherwise, complies with Applicable Laws including MFIPPA, PIPEDA, Standards, and applicable requirements to collect, record and retain relevant consents pertaining to the collection, access, use, retention and disclosure of Personal Information in respect of the Work.
- (c) At the Purchaser's request at any time during the Term, the Vendor shall fully participate in a Privacy Impact Assessment with respect to the performance of the Work. The Privacy Impact Assessment may be conducted by the Purchaser or external third party advisors to the Purchaser at various times throughout the Term. The Vendor and all Vendor Personnel shall cooperate with the Purchaser and/or its third party advisors to provide the resources required to facilitate and fulfill this assessment. The Vendor shall implement any recommendations resulting from the Privacy Impact Assessment process.
- (d) The Vendor shall ensure the security and integrity of any Personal Information collected by the Vendor and shall protect it against loss,

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unauthorized access, destruction, or alteration, in accordance with the following:

- (i) The Vendor shall not directly or indirectly collect, use, disclose, store or destroy any Personal Information, or give, exchange, disclose, provide, or sell Personal Information to any third party, except as expressly permitted, and for a purpose(s) authorized, under this Purchaser Agreement or otherwise agreed to in writing by the Purchaser.
  - (ii) The Vendor shall ensure that access to Personal Information is restricted to those Vendor Personnel who have a need to know or use such information in the performance of the Work and who have been specifically authorized to have such access for the purposes of performing the Work. Access shall be limited to only that Personal Information which is required for the performance of the Work.
  - (iii) All Personal Information shall be kept in a physically secure location and separate from all other records and databases. The Vendor shall not place, input, match, insert or intermingle, nor shall it permit any Person to place, input, match or intermingle, any data or records in any form whatsoever into or with any records or database containing such Personal Information.
- (e) For greater certainty, the Purchaser reserves the right to prescribe the specific manner in which the Vendor shall perform its obligations relating to this Section 9.7 (MFIPPA and Personal Information).
- (f) The provisions of this paragraph shall survive any termination or expiry of this Purchase Agreement and shall prevail over any inconsistent provisions in this Purchase Agreement.

#### 9.8 MFIPPA and Freedom of Information

- (a) The Vendor acknowledges that the Purchaser is a municipal institution subject to MFIPPA, and acknowledges and agrees as follows:
- (i) All MFIPPA Records are subject to, and the collection, use, storage and treatment thereof is governed by MFIPPA. The Vendor agrees to keep all MFIPPA Records secure and available, in accordance with the requirements of MFIPPA. The Vendor acknowledges that all information, data, Records and materials, however recorded, that are held by the Vendor and/or created by the Vendor in the course of performing the Work are considered to be MFIPPA Records and subject to MFIPPA.
  - (ii) Section 9.6 (Return or Destruction of Confidential Information) shall apply to all MFIPPA Records (other than the Contract Records), which shall be returned and/or destroyed in accordance with that Section.
  - (iii) In the event of a conflict between the requirements of this Purchase Agreement and the requirements of MFIPPA, the requirements of MFIPPA shall take precedence.

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- (iv) In the event that a request is made under MFIPPA for the disclosure of any MFIPPA Records, the Purchaser shall provide prompt written notice thereof to the Vendor and the Vendor shall provide any and all relevant MFIPPA Records to the Purchaser on demand for the purposes of responding to an access request under MFIPPA. In these circumstances, the Vendor shall provide all MFIPPA Records requested to the Purchaser's Freedom of Information Coordinator (or equivalent) within seven (7) Business Days of receipt of the request from the Purchaser. Notwithstanding anything to the contrary in this Purchaser Agreement and subject to the Vendor's rights of appeal pursuant to Section 21 of MFIPPA, the Purchaser shall determine what MFIPPA Records will be disclosed in connection with any such request, in accordance with the requirements of MFIPPA (including, without limitation, the requirements with respect to affected persons set out in Section 28 thereof).
- (v) Storage of MFIPPA Records (including the Contract Records) at a location outside Canada shall only be permitted with the Purchaser's express written consent.

#### 9.9 Access

- (a) The Vendor shall provide to the Purchaser the network access requirements and access level that will be required by the Vendor to perform the Work. All requests to access the Purchaser's network will be subject to the Purchaser's written approval.
- (b) The Vendor shall aggregate all access into a central network access point before network access is granted to the Purchaser's information systems. The network controls used to facilitate access between the Vendor and the Purchaser will be subject to the Purchaser's written approval.
- (c) Vendor Personnel shall not attempt to access, or allow access to, any Purchaser data to which they are not permitted access under this Purchase Agreement. If such access is attained, the Vendor shall immediately report such incident to the Purchaser, describe in detail any accessed Purchaser data, and return to the Purchaser any copied or removed Purchaser data.
- (d) The Vendor is responsible for ensuring that Vendor Personnel do not access, or allow access, to any Purchaser data to which they are not permitted access under this Purchase Agreement. The Vendor shall utilize commercially reasonable efforts, including through the use of rigorous systems security measures, to guard against, identify and promptly terminate the unauthorized access, alteration or destruction of software and Purchaser data.

#### 9.10 Audit Rights

- (a) During the Term and for a period of seven (7) years thereafter, the Vendor shall, at its cost and expense, retain and maintain, in an organized, accurate and accessible mode and manner, all financial and other books, Records and documentation relating or pertaining to this Purchase Agreement and the

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performance of the Work, including (i) original invoices and accounts, along with related Records showing costs and expenses incurred, including but not limited to the cost to the Vendor of the Work and of all expenditures or commitments made by the Vendor in connection therewith; (ii) correspondence, e-mails, tenders, minutes of meetings, notes, reports, timesheets, memoranda and other documents associated with this Purchase Agreement; (iii) Records relating to any service level agreements and key performance indicators included in this Purchase Agreement, and (iv) Records related to matters of security and privacy (collectively, the “Contract Records”, as defined in the Master Agreement).

- (b) The Contract Records shall be retained and maintained in accordance with all generally acceptable accounting principles and Applicable Laws and Industry Standards, or as otherwise may be required to substantiate compliance with this Purchase Agreement and/or any payment to be made to the Vendor under this Purchase Agreement.
- (c) During the Term and for a period of seven (7) years thereafter, the Purchaser or any third party acting on behalf of the Purchaser, shall have the right, upon no less than twenty-four (24) hours' notice in writing to the Vendor and during normal office hours, to inspect and audit, and to have access to, all Contract Records whether maintained by the Vendor or a Vendor Personnel, reasonably required to confirm the Vendor's compliance with the terms of this Purchase Agreement and Applicable Laws, and to make copies thereof. The Vendor shall make available or cause to be made available the Corporate Records that are requested by the Purchaser or that may be required given the scope of the audit (provided such scope is disclosed to the Vendor), and shall otherwise reasonably cooperate with the Purchaser and any third party acting on the Purchaser's behalf, including by providing reasonable access to all of the Vendor's premises and to the Vendor's employees. Where access is needed to a Vendor Personnel's employees or to Contract Records that are maintained by a Vendor Personnel, the Vendor shall use reasonable efforts to arrange for such access on a timely basis. Without limiting the generality of the foregoing, the rights set out in this Section 9.10 (Audit Rights) shall extend to any Authority exercising its right to audit pursuant to Applicable Law or any contract with the Purchaser.
- (d) The Vendor shall maintain a competent and independent audit function to assess the internal controls over its environment and its compliance with Applicable Laws and Standards. The Vendor shall provide the Purchaser, upon request, the results of all internal controls and security audits performed by the Vendor's auditors.
- (e) The Vendor shall upon advance written request, provided by e-mail or otherwise, provide the Purchaser with reasonable access to all premises that may reasonably be required to enable the Purchaser and/or the Purchaser's agents to monitor the progress of the Work. Any such monitoring or verifications shall be without prejudice to any other rights of the Purchaser under this Purchase Agreement and shall not relieve the Vendor from any of

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its obligations under this Purchase Agreement nor shall such verification be used by the Vendor as evidence of effective control of quality.

- (f) The Vendor and the Purchaser shall meet to review each audit report promptly after the issuance thereof and to mutually agree upon the appropriate manner, if any, in which to respond to the changes suggested or issued identified by the audit report. Without limiting any remedies which may be available to the Purchaser, the Vendor shall promptly remedy any violations of this Purchase Agreement of which it becomes aware, pursuant to any audit or otherwise.

#### 9.11 Vendor Compliance

- (a) The Vendor shall advise all of its Vendor Personnel, all of its Subvendors, and all of its Subvendor's Vendor Personnel of the requirements of this Article 9 (Confidential Information, Personal Information, Freedom of Information, Access and Audit Rights), and associated requirements set out elsewhere in this Purchase Agreement, and take appropriate action to ensure compliance by such persons with the terms of this Article 9 (Confidential Information, Personal Information, Freedom of Information, Access and Audit Rights). In addition to any other liabilities of the Vendor pursuant to this Purchase Agreement or otherwise at law or in equity, the Vendor shall be liable for all claims arising from any non-compliance with this Article 9 (Confidential Information, Personal Information, Freedom of Information, Access and Audit Rights) by the Vendor, any of its Vendor Personnel, any Subvendor and of its Subvendor's Vendor Personnel.
- (b) The Vendor warrants that each of its Vendor Personnel, each of its Subvendors and each of its Subvendor's Vendor Personnel engaged by the Vendor to provide the Work pursuant to this Purchase Agreement is under a written obligation to the Vendor requiring such Person to comply with the terms of this Article 9 (Confidential Information, Personal Information, Freedom of Information, Access and Audit Rights).

#### 9.12 Publicity

- (a) Any publicity or publications related to this Purchase Agreement shall be at the sole discretion of the Purchaser and Metrolinx. The Purchaser and Metrolinx may, in their sole discretion, acknowledge the Deliverables provided by the Vendor in any such publicity or publication. The Vendor shall not make use of its association with the Purchaser or Metrolinx without the prior written consent of both the Purchaser and Metrolinx as may be applicable in respect of this Purchase Agreement. Without limiting the generality of this paragraph, the Vendor shall not, among other things, at any time directly or indirectly communicate with the media in relation to this Purchase Agreement unless it has first obtained the express written authorization to do so by both the Purchaser and Metrolinx.

#### 9.13 Damages

- (a) The Vendor acknowledges and agrees that any breach or threatened breach of this Article 9 (Confidential Information, Personal Information, Freedom of

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Information, Access and Audit Rights) or the obligations set out in this Purchase Agreement shall cause immediate and irreparable harm to the Purchaser or Metrolinx or to any third party to whom the Purchaser or Metrolinx owes a duty of confidence, for which damages alone are not an adequate remedy. The Vendor acknowledges and agrees that the Purchaser or Metrolinx shall be entitled to seek, in addition to any other legal remedies which may be available to it, such equitable relief as may be necessary and available to protect the Purchaser or Metrolinx against such breach or threatened breach. No failure or delay by a Purchaser or Metrolinx in exercising any right shall operate as a waiver or shall estop the Purchaser from obtaining permanent injunctive relief.

## **10.0 Representations, Warranties and Covenants of the Vendor**

### **10.1 Representations, Warranties and Covenants of the Vendor**

- (a) The Vendor covenants and agrees with and represents and warrants to the Purchaser, and acknowledges and confirms that the Purchaser is relying on such covenants, agreements, representations and warranties, as follows:
  - (i) the Vendor is validly existing under the laws of the location of its head office and the Vendor has all necessary corporate power, authority and capacity to enter into this Purchase Agreement and to perform its obligations;
  - (ii) the Vendor represents and warrants that it has the full right and power to enter into this Purchase Agreement and there is no agreement with any other Person, which would in any way interfere with the rights of the Purchaser under this Purchase Agreement;
  - (iii) the entering into of this Purchase Agreement by the Vendor and the performance of its obligations has been authorized by all necessary corporate action;
  - (iv) the execution and delivery of this Purchase Agreement, the consummation of the transactions contemplated and compliance with and performance of the provisions of this Purchase Agreement does not and shall not:
    - (A) result in a breach of or constitute a default under, or create a state of fact, which after notice or lapse of time or both, or otherwise, would constitute a default under any term or provision of the constating documents of the Vendor, the by-laws or resolutions of the Vendor or any agreement or instrument to which the Vendor is a party or by which it is bound, or
    - (B) require the Vendor to obtain any approval or action of any other Persons and, if required, any such approvals have already been obtained as of the date of this Purchase Agreement;
  - (v) this Purchase Agreement constitutes a legally valid and binding obligation of the Vendor enforceable against it in accordance with its terms, subject only to applicable bankruptcy, insolvency and other

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similar laws affecting the enforceability of the rights of creditors generally, the principles of equity and that equitable remedies such as specific performance and injunction are available only in the discretion of a court of competent jurisdiction;

- (vi) the Vendor has carefully reviewed the whole of this Purchase Agreement, and all other documents made available to the Vendor by the Purchaser and Metrolinx, and, to the Vendor’s knowledge, nothing contained herein or therein inhibits or prevents the Vendor from performing the Work in accordance with the Required Standard of Care so as to achieve and satisfy the requirements of this Purchase Agreement;
- (vii) the Vendor has engaged and shall engage only Vendor Personnel, including Subvendors that are qualified and competent to perform the portions of the Work they are responsible for and possess the requisite Domain Expertise;
- (viii) the Vendor has available the resources and personnel to complete all of its obligations under this Purchase Agreement in a timely, efficient and professional manner in accordance with the Required Standard of Care;
- (ix) the Vendor is not aware of any legal action instituted, threatened or pending against the Vendor that could have a material adverse effect on its ability to perform its obligations under this Purchase Agreement;
- (x) the Vendor, its affiliates and its Subvendors, and any of their Vendor Personnel, are in compliance with all Requirements of Law related to economic and political sanctions. None of the Vendor, its affiliates or its Subvendors, or any of their Vendor Personnel, is, or has ever been, a Sanctioned Person or a Sanction Linked Person, or acts directly or indirectly for any Sanctioned Person or Sanction Linked Person, and no sanctioned Person or Sanction Linked Person has, directly, or indirectly, an Economic Interest in any of the Vendor, its affiliates or its Subvendors, or any of their Vendor Personnel, provided that, without derogating from the foregoing, if any of the Vendor, its affiliates or any Subvendors, or any of their Vendor Personnel, becomes a Sanctioned Person or a Sanction Linked Person, then the Vendor shall immediately notify the Purchaser and Metrolinx and the Purchaser or Metrolinx may, at their discretion (without incurring any liability of any nature whatsoever): (i) require that the Vendor remove such Sanctioned Person or Sanction Linked Person from the performance of the Work, or (ii) take any other action the Purchaser or Metrolinx deems necessary in order for the Purchaser or Metrolinx to comply with Requirements of Law relating to economic or political sanctions, including terminating or suspending all or any part of this Purchase Agreement with immediate effect by notice to the Vendor;
- (xi) except as disclosed in the Submission, the Vendor is free of any actual or potential Proposal Conflict of Interest;

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- (xii) the Vendor is registered as an employer pursuant to the Workplace Safety and Insurance Act (Ontario) and has completed all filings and paid all assessments as required pursuant to that Act and the regulations thereunder;
- (xiii) the Vendor is familiar with the obligations imposed on an “employer” as defined in the OHSA, and that it has in place a health and safety program to ensure that it takes all steps reasonable in the circumstances to ensure the health and safety of all workers for which it has responsibility under that Act; and
- (xiv) the Vendor represents, warrants and covenants to the Purchaser that the Vendor is and shall remain duly registered for the purposes of Part IX of the Excise Tax Act.

#### 10.2 Continuing Effect of Representations, Warranties and Covenants

- (a) The Vendor hereto agrees that its covenants, representations and warranties contained in this Article 10 (Representations, Warranties and Covenants of the Vendor) are continuing covenants, representations and warranties and shall apply and be true and correct at all times during the Term.

#### 10.3 Representatives May Bind the Parties

- (a) The Parties represent that their respective representatives have the authority to legally bind them to the extent permissible by the Applicable Laws.

#### 10.4 Vendor Not a Partner, Agent or Employee

- (a) The Vendor shall have no power or authority to bind the Purchaser or Metrolinx to assume or create any obligation or responsibility, express or implied, on behalf of the Purchaser or Metrolinx. The Vendor shall not hold itself out as an agent, partner or employee of the Purchaser or Metrolinx. Nothing in this Purchase Agreement shall have the effect of creating an employment, partnership or agency relationship between the Purchaser or Metrolinx and the Vendor (or any of Vendor Personnel) or constitute an appointment under the *Public Service of Ontario Act, 2006*, S.O. 2006, c. 35, Schedule A, as amended from time to time.

#### 10.5 Responsibility of Vendor

- (a) The Vendor agrees that it is liable for the acts and omissions of all Vendor Personnel. This paragraph is in addition to any and all of the Vendor liabilities under this Purchase Agreement and under the general application of law. The Vendor shall advise these individuals and entities of its obligations under this Purchase Agreement and, without limiting the generality of the foregoing, shall take appropriate action to ensure compliance with (a) this Purchase Agreement generally and (b) with the requirements of Article 9 (Confidential Information, Personal Information, Freedom of Information, Access and Audit Rights) of this Purchase Agreement. Every contract entered into by the Vendor with a vendor or Subvendor shall adopt all of the terms and conditions of this Purchase Agreement as far as applicable to those parts of the Work

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and Deliverables provided by the Vendor and Subvendor in respect of a Bus, including but not limited to the document retention and audit rights contained in Section 9.10 (Audit Rights) of this Purchase Agreement. In addition to any other liabilities of the Vendor pursuant to this Purchase Agreement or otherwise at law or in equity, the Vendor shall be liable for all damages, costs, expenses, losses, claims or actions arising from any breach of this Purchase Agreement resulting from the actions of the above mentioned individuals and entities.

## 11.0 Indemnity

### 11.1 Indemnification

- (a) The Vendor shall at all times indemnify and save harmless the Purchaser, its officers, directors, employees, members, agents, representatives, Successors and assigns (hereinafter the “Indemnified Parties”), from and against any and all Losses resulting from:
- (i) the death of or bodily injury to any agent, employee, customer, business invitee, business visitor or other person, to the extent caused by the negligence or willful misconduct of the Vendor or any Vendor Personnel;
  - (ii) the damage, loss or destruction of any real or tangible personal property (excluding data), to the extent caused by the negligence or willful misconduct of the Vendor or any Vendor Personnel;
  - (iii) the unauthorized disclosure by the Vendor or any Vendor Personnel of any Confidential Information and/or Personal Information;
  - (iv) any acts performed by or on behalf of the Vendor beyond the authority of the Vendor hereby conferred;
  - (v) any breach of the terms and conditions set out in Article 4 (Health and Safety) or arising as a result of any illness, injury or death of any employee of the Vendor or any Subvendor, including:
    - (A) any resulting expenses incurred by the Purchaser as a result of stoppage of the Work on account of failure by the Vendor to meet its obligations under and/or with respect to the OHSA; and
    - (B) any resulting fine(s) levied against the Purchaser as a result of any breach of the responsibilities of the employer for the Work, to the extent attributable to the Vendor's failure to fulfil its obligations as described in this Purchase Agreement, and/or
  - (vi) any infringement or alleged infringement of any patent, trade secret, service mark, trade name, copyright, official mark, moral right, trade-mark, industrial design or other proprietary rights conferred by contract, common law, statute or otherwise in respect to the Work or any matter provided to the Purchaser or performed by the Vendor, or anyone else for whom at law the Vendor is responsible provided, however, the Vendor shall not be required to indemnify the Indemnified

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Parties pursuant to this sub-section if (i) the infringement or alleged infringement was caused by the modification of a Deliverable or Work product prepared pursuant to this Purchase Agreement by any Person other than the Vendor or a Vendor Personnel, (ii) the deliverable or Work product was based upon designs provided by the Purchaser, or (iii) the Work relating to the infringement or alleged infringement were used in a manner not permitted by this Purchase Agreement.

- (A) If the Vendor is required to indemnify the Purchaser pursuant to this Section 11.1 (Indemnification), or if, in the Vendor's judgment, the Purchaser's use of the Intellectual Property is likely to be infringing, the Vendor may, at its option: (ii) secure the right to continue using such intellectual property, or (iii) replace or modify the such intellectual property to make it non-infringing, provided that any such replacement or modification will not degrade the performance or quality of the affected component of the Work in any material way. If neither course of action described in clauses (i) or (iii) is available to the Vendor, the Vendor will remove such intellectual property from the Work and equitably adjust the Vendor's charges to adequately reflect such removal.
- (b) The Vendor shall pay all reasonable costs, expenses and legal fees that may be incurred or paid by the Indemnified Parties in connection with any demand, claim, execution, action, suit or Proceeding with respect to a matter for which the Vendor is obligated to indemnify the Indemnified Parties pursuant to this Article 11 (Indemnity), provided that the indemnity obligations of the Vendor under this Article 11 (Indemnity) shall not extend to Loss attributable to the negligence or willful misconduct of any Indemnified Parties to the extent that such Indemnified Parties' negligence or willful misconduct caused the Loss.
- (c) In the event any Loss is asserted in respect to which an Indemnified Party is entitled to indemnification under this Article 11 (Indemnity), and without prejudice to any other right or remedy the Purchaser may have, the Purchaser shall be entitled to deduct or withhold a reasonable sum on account of such claim, action, suit, execution or demand, including legal costs, from monies owed or payable by the Purchaser to the Vendor under this Purchase Agreement pending the final determination or settlement of such claim, action, suit, execution or demand. In the event,
- (i) the Vendor is, becomes, or is deemed to be bankrupt or an insolvent Person pursuant to the Bankruptcy and Insolvency Act (Canada);
  - (ii) the Vendor makes a general assignment for the benefit of creditors; or
  - (iii) a receiver or interim-receiver is appointed with respect to some or all of the Vendor's business, assets, or property, then the Purchaser shall be entitled, without prejudice to any other right or remedy the Purchaser may have, to further deduct or withhold a reasonable sum on account of such Loss, from any monies owed or payable by the

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Purchaser to the Vendor under any other agreement or account. The provisions of this Section 11.1(c) (Indemnification) shall not apply in the event that such Loss is otherwise provided for under any insurance provided by the Vendor to or for the benefit of the Purchaser.

- (d) Notwithstanding anything else in the Contract, any express or implied reference to the Purchaser or Metrolinx providing an indemnity or any other form of indebtedness or contingent liability that would directly or indirectly increase the indebtedness, including the Purchaser and Metrolinx, whether at the time of execution of this Purchase Agreement or at any time during the Term, shall be void and of no legal effect.

## 12.0 Limitations on Liability

### 12.1 Limitation on Liability

- (a) Subject to Section 12.1(c) below, in no event shall either Party be liable for indirect, consequential, exemplary, punitive or special damages relating to this Purchase Agreement even if such Party has been advised in advance of the possibility of such damages. The Vendor acknowledges and agrees that any damages awarded by a court of competent jurisdiction against the Purchaser as a result of a third-party claim are to be deemed to be direct damages.
- (b) Subject to Section 12.1(d) below, each Party's aggregate liability to the other under this Purchase Agreement for direct damages for all events giving rise to liability hereunder shall not exceed an amount equal to the sum of the Total Contract Price plus any amount paid or payable under the insurance policies required to be maintained under this Price Agreement.
- (c) The limitations of liability set forth in Section 12.1(a) above shall not apply with respect to:
- (i) damages occasioned by the willful misconduct or gross negligence of the Vendor or any Vendor Personnel;
  - (ii) claims that are the subject of indemnification pursuant to Section 11.1(a)(iii) [*Unauthorized Disclosure*] or Section 11.1(a)(vi) [*IP Infringement*];
  - (iii) the death of or bodily injury to any agent, employee, customer, business invitee, business visitor or other Person, including a member of the general public, to the extent caused by the negligence or willful misconduct of the Vendor or any Vendor Personnel;
  - (iv) damage, loss or destruction of any real or tangible personal property, to the extent caused by the negligence or willful misconduct of the Vendor or any Vendor Personnel;
  - (v) damage or loss arising from Article 9 (Confidential Information, Personal Information, Freedom of Information, Access and Audit Rights) of this Purchase Agreement and/or Article 8 (Confidential

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- (vi) damage or loss incurred by the Purchaser due to a third party alleging that any Deliverable violates, infringes or misappropriates any patent, trademark, copyright, industrial design, trade secret or any other rights in such third party's Intellectual Property.
- (d) The limitations of liability set forth in Section 12.1(b) above shall not apply with respect to:
  - (i) damages occasioned by the willful misconduct or gross negligence of the Vendor or any Vendor Personnel; or
  - (ii) claims that are the subject of indemnification pursuant to Section 11.1(a) (Vendor Indemnity).
- (e) Each party shall have a duty to mitigate damages for which the Vendor is responsible.

#### 12.2 Survival

- (a) This Article 12 (Limitations on Liability) shall survive the termination or expiry of this Purchase Agreement.

### 13.0 Termination

#### 13.1 Termination for Cause by the Purchaser

- (a) The Purchaser may, by ten (10) calendar days' written notice to the Vendor, suspend or terminate the whole or any part of the provision of the Work or of the entirety of this Purchase Agreement, for cause, in the event that the Vendor is in breach of any of its obligations under this Purchase Agreement; and it fails to cure such breach (which breach must be curable) within fifteen (15) calendar days of being notified thereof, and thereupon:
  - (i) The Purchaser may appoint officials of the Purchaser or any other Person or Persons in the place and stead of the Vendor to perform the Work or any portion thereof; and
  - (ii) the Vendor shall immediately discontinue the Work on the date and to the extent specified in the notice, and place no further orders for materials or Deliverables for the terminated portion(s) of the Work.
- (b) Pursuant to Section 13.1(a) above, upon a third reoccurrence of the same kind of breach, which breach had been previously cured, the Purchaser shall have the right to immediately terminate this Purchase Agreement for cause, in whole or in part, by serving a notice of termination upon the Vendor.
- (c) The Vendor acknowledges and agrees that if the Vendor has been found in breach, pursuant to Section 13.1(a) above, the Vendor's Vendor Performance Rating (VPR) score will be revised accordingly.
- (d) Nothing contained herein shall limit the rights of the Purchaser to recover damages from the Vendor arising from the failure of the Vendor to perform

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the Work satisfactorily in accordance with the Terms of this Purchase Agreement.

13.2 Termination for Safety Violation or Non-Curable Breach

- (a) Notwithstanding Section 12.1(a) (Termination for Cause by the Purchaser), the Purchaser shall have the right to immediately terminate this Purchase Agreement effective on written notice to the Vendor upon the occurrence of a safety violation by the Vendor or for any non-curable breach, both of which shall be determined by the Purchaser in its sole and absolute discretion.

13.3 Termination for Convenience by the Purchaser

- (a) The Purchaser may, by thirty (30) days' written notice to the Vendor, terminate this Purchase Agreement for convenience, and thereupon the Purchaser shall be liable for payment to the Vendor for those monies attributable to the part of the Work performed to the satisfaction of the Purchaser to the date of termination stipulated in such notice. The Purchaser shall also be liable for any reasonable demobilization costs and the reasonable cost of cancellation of any contracts, but in no event will the Purchaser be liable for any loss of profits, loss of revenue or other consequential damages.

13.4 Termination and Dispute Resolution

- (a) The Purchaser's right to terminate this Purchase Agreement as provided hereinto shall not be subject to the Dispute resolution provisions of this Purchase Agreement except that the valuation of any damages or payments arising as a result of a default or termination may be referred to the Dispute resolution process set out in Section 13. (Bona Fide Efforts to Resolve Dispute).

13.5 Dispute Resolution by Rectification Notice

- (a) Where the Vendor fails to comply with any of its obligations under this Purchase Agreement, the Purchaser may issue a rectification notice to the Vendor setting out the manner and time frame for rectification. Within seven (7) Business Days of receipt of that notice the Vendor shall either (a) comply with that rectification notice; or (b) provide a rectification plan satisfactory to the Purchaser. If the Vendor fails to either comply with that rectification notice or provide a satisfactory rectification plan, the Purchaser may immediately terminate this Purchase Agreement. Where the Vendor has been given a prior rectification notice, the same subsequent type of non-compliance by the Vendor shall allow the Purchaser to immediately terminate this Purchase Agreement.

13.6 Bona Fide Efforts to Resolve Dispute

- (a) The Parties shall at all times during the Term make bona fide efforts to resolve any and all Disputes arising between them by amicable negotiations.

13.7 Continuance of the Work During Dispute

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- (a) Unless expressly directed otherwise by the Purchaser, the Vendor shall not stop or delay the performance of the Work, in whole or in part, on account of a Dispute between the Vendor and the Purchaser or between the Vendor and any other Person. Without limiting the generality of the foregoing, at all times during the course of a Dispute, the Vendor shall:
  - (i) continue with the Work in a diligent manner and without delay;
  - (ii) conform to the Purchaser's decisions and directions; and
  - (iii) be governed by all applicable provisions of this Purchase Agreement.
- (b) The Parties acknowledge and agree that the Vendor's compliance with this Section 13.7 shall not operate to waive any claim or contention that the Vendor may have in relation to any Dispute.

#### 13.8 Vendor Obligations on Termination

- (a) Upon termination, the Vendor shall, in addition to its other obligations under this Purchase Agreement and at law:
  - (i) provide the Purchaser with a report detailing (i) the current state of the provision of Deliverables by the Vendor Deliverables and performance of this Purchase Agreement;
  - (ii) execute such documentation as may be required by the Purchaser to give effect to the termination of this Purchase Agreement;
  - (iii) comply with any other instructions provided by the Purchaser; and
  - (iv) complete and supply any Deliverables in accordance with instructions from the Purchaser and for such purposes all of the provisions of this Purchase Agreement shall survive to the extent necessary to facilitate the completion and supply of the Deliverables.

#### 13.9 Vendor's Payment Upon Termination

- (a) The Purchaser shall only be responsible for the payments contemplated by this Purchase Agreement up to and including the Effective Date of any termination unless instructions for a later Effective Date have been provided in writing by a Purchaser to the contrary. Termination shall not relieve the Vendor of its warranties and other responsibilities relating to the Deliverables performed or money paid. The Purchaser may hold back payment or set off against any payments owed if the Vendor fails to comply with its obligations on termination.

#### 13.10 Scope of Termination Rights

- (a) The express rights of termination contained in this Article 13 (Termination) are in addition to and shall in no way limit any rights or remedies of the Purchaser under this Purchase Agreement, at law or in equity.

#### 13.11 Expiry of Purchase Agreement

- (a) This Purchase Agreement shall expire at the end of the Term.

#### 13.12 Purchases Only During the Base Year, Option Year, or Extension

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- (a) Vendor acknowledges and agrees that it is only permitted to accept the purchase of a Bus or Buses (or changes to the quantity of Buses in any particular order) during the Base Year, Option Year, if exercised, or a further extension of the Term of this Purchase Agreement.

#### **14.0 Master Agreement**

- 14.1 The terms and conditions of the Master Agreement (other than Section 1.6 (Vendor Acknowledgement) of the Master Agreement and any other provision which when incorporated into this Purchase Agreement would result in this Purchase Agreement not being a binding obligation of the Parties hereto) are incorporated herein unless otherwise specified in this Purchase Agreement and for such purposes, the Purchaser shall be read as Metrolinx, and, without limiting this paragraph, the duties owing to Metrolinx under the Master Agreement shall also be owing to the Purchaser and the rights exercisable by Metrolinx shall also be exercisable by the Purchaser. Notwithstanding the foregoing it is agreed and acknowledged by the Parties to this Purchase Agreement that the contractual relationship between the Vendor and the Purchaser for any Deliverables is exclusively between those Parties.

#### **15.0 Delivery, Acceptance and Title**

##### **15.1 Delivery Procedure**

- (a) Upon satisfactory completion of the test required pursuant to Appendix A – Technical Specifications, Section OR 10.0 (Quality Assurance/Controls), the Buses/Deliverables will be delivered to the Purchaser by the Vendor with:
  - (i) Any Defects or deficiencies from the Vendor corrected;
  - (ii) Any damage that occurred in transit from the Vendor corrected;
  - (iii) Completion of any additional work (such as application of paint/decals/etc., equipment installation, etc.), as jointly agreed to by the Vendor and the Purchaser and documented in Schedule A – Deliverables of this Purchase Agreement.
  - (iv) A completed New Vehicle Information Card issued in accordance with the Requirements of Law.
- (b) The delivery of a Bus shall be determined by the Vendor’s authorization signed by the Purchaser’s designated agent(s), at the point of delivery specified in this Purchase Agreement. A visual inspection by the Purchaser’s agent shall not constitute acceptance.

##### **15.2 Delivery Schedule**

- (a) Unless otherwise specified by the Purchaser, all deliveries of Buses should be made on Business Days during Business Hours. The Vendor shall ensure that all specified delivery schedules provided by the Purchaser are strictly adhered to. The Vendor shall notify the Purchaser delivery contact a minimum of four (4) calendar days in advance of each delivery, unless agreed upon by the Purchaser. No delivery or service charges are permitted.

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- (b) Bus deliveries shall be completed within the expected lead time from the execution of the purchase order as indicated in the Submission, Section OR 1.0 (Bus Delivery) of Appendix A - Technical Specifications. Where, at the time of the execution of the purchase order, the Vendor can reasonably demonstrate that no production slot is available to meet the expected lead time as stipulated in the Submission Section OR 1.0 (Bus Delivery) of Appendix A – Technical Specifications, the Vendor will provide reasonable evidence to support this claim and negotiate with the Purchaser the option of a later delivery date not to exceed in any case fourteen (14) months from the execution date of the purchase order.
- (c) If Bus deliveries need to be established at a per weekly delivery rate, both the Purchaser and Vendor shall agree to the set rate which shall be included in Schedule C - Deliverables or subsequent Schedules.
- (d) In all cases, the agreed to delivery date(s) shall be set out in writing and included in Schedule C - Deliverables, or subsequent Schedules. All delivery schedules as agreed to by the Purchaser, will be communicated to Metrolinx by the Vendor. Deliveries that are made later than the agreed upon time as per Schedule C – Deliverables, or subsequent Schedules, will be subject to liquidated damages as prescribed in Section 17.1 (Liquidated Damages – Delivery and Acceptance).

15.3 Title

- (a) The Vendor warrants that, upon Purchaser’s acceptance of each Bus, as described in this Purchase Agreement, the title shall pass to the Purchaser free and clear of all encumbrances.

15.4 Assumption Of Risk Of Loss

- (a) The Vendor assumes risk of loss while Buses are being manufactured and delivered to the Purchaser. The Purchaser shall assume risk of loss of the Bus upon delivery, as defined above in Section 15.2 (Delivery Schedule). If the Bus is removed from the Purchaser's property by or on behalf of the Vendor for any reason, the Vendor shall assume risk of loss until the Bus is returned to the Purchaser at its delivery location.

15.5 Acceptance Of Bus

- (a) Within twenty-one (21) calendar-days after arrival at the designated point of delivery, each Bus shall undergo the Purchaser’s tests defined in Appendix A - Technical Specifications, Section OR 10.0 (Quality Assurance/Controls). If the Bus passes these tests the Purchaser will notify the Vendor in writing. If the Bus does not pass these tests, the Purchaser will notify the Vendor, in writing, of the specific reasons for non-acceptance or conditional acceptance. If the Purchaser does not notify the Vendor of acceptance or non-acceptance or puts the Bus into revenue service without notification of conditional acceptance, the Vendor may, after twenty-one (21) calendar-days, notify the Purchaser that the Bus is deemed to have been accepted.

15.6 Repairs After Non-Acceptance

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- (a) The Vendor, or its designated representative (which may in some instances be the Purchaser) shall correct any Defects identified by the Purchaser, within seven (7) calendar days after receiving the non-acceptance or conditional acceptance notification of the Bus from the Purchaser.
- (b) The Vendor shall provide, at its own expense, all spare parts, tools, and space required to complete the repairs. At the Purchaser's option, the Vendor may be required to remove the Bus from the Purchaser's property while repairs are being affected. If the Bus is removed from the Purchaser's property, the Vendor's representatives must diligently pursue repair procedures. The Purchaser shall make the Bus available for the purposes of such repair(s).

#### 15.7 Repairs By Purchaser

- (a) If the Purchaser is authorized by the Vendor to correct the Defects that caused the conditional acceptance or non-acceptance of the Bus, it shall use Vendor-specified parts available from its own stock or those supplied by the Vendor specifically for this repair provided only that such Defect does not relate to or arise from Canadian Content for Transit Vehicle Procurement Policy requirements, in which case the Vendor alone shall be responsible for the correction of the Defect.
  - (i) Vendor Supplied Parts: If the Vendor supplies parts for the Work being performed by the Purchaser, these parts shall be shipped prepaid to the Purchaser within twenty-four (24) hours after receipt of the Purchaser's request for said parts.
  - (ii) Reimbursement for Parts: The Vendor shall reimburse the Purchaser for all parts and materials necessary to correct the Defect. The reimbursement shall be at the current replacement cost and shall include applicable taxes. Alternatively, the Vendor may replace the parts at no cost to the Purchaser.
  - (iii) Return of Defective Components: The Vendor may request that defective parts covered by this provision be returned to the manufacturing plant, at the Vendor's cost.
  - (iv) Reimbursement for Labour: The Vendor shall reimburse the Purchaser for labour. The amount shall be determined by multiplying the number of person-hours actually required to correct the Defect by an all-inclusive shop rate as specified in Appendix A – Technical Specifications, Section OR 8.4.5 (Reimbursement for Labour).
  - (v) Reimbursement for Warranty Labour and/or Parts: The Vendor shall reimburse the Purchaser by cheque for warranty labour and/or parts, within 60 (sixty) calendar days of receipt of warranty claim. The Purchaser will have the option of accepting reimbursement through parts credits, if applicable.

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## 16.0 Delays

### 16.1 Vendor's Delay

- (a) If the Vendor is delayed at any time during the progress of the Deliverables by the neglect or failure of the Purchaser or by a cause described below, then the time for completion of the relevant Deliverables and/or affected delivery date(s) may be extended by the Vendor for a commensurate period of time subject to the following conditions:
  - (i) The cause of the delay must arise after the Effective Date of this Purchase Agreement and neither was nor could have been anticipated by the Vendor by reasonable investigation before such date;
  - (ii) The Vendor demonstrates to the Purchaser that the completion of the Deliverables and/or affected delivery(ies) will be actually and necessarily delayed;
  - (iii) The effect of such cause cannot be avoided or mitigated by the exercise of all reasonable precautions, efforts and measures whether before or after the occurrence of the cause of delay; and
  - (iv) The Vendor makes written request and provides other information to the Purchaser as described in Section 16.2 (Notification of Vendor Delay).
- (b) A delay that meets all of the conditions of this Section 16.1 (Vendor's Delay) shall be deemed an excusable delay. Any concurrent delay that does not constitute an excusable delay shall not be the sole basis for denying a request hereunder.
- (c) The Purchaser reserves the right to rescind or shorten any extension previously granted if, subsequently, the Purchaser determines that any information provided by the Vendor in support of a request for an extension of time was erroneous provided that such information or facts, if known, would have resulted in a denial of the request for an excusable delay. Notwithstanding the above, the Purchaser will not rescind or shorten any extension previously granted if the Vendor acted in reliance upon the granting of such extension and such extension was based on information which, although later found to have been erroneous, was submitted in good faith by the Vendor.

### 16.2 Notification Of Vendor Delay

- (a) Notwithstanding any event of force majeure pursuant to Section 13.0 (Force Majeure) of the Master Agreement, no extension or adjustment of time shall be granted by the Purchaser unless the Vendor provides the Purchaser (a) written notice of the delay within one (1) calendar days after the commencement of the delay and (b) a written application stating in reasonable detail the causes, the effect to date and the probable future effect on the performance of the Vendor under this Purchase Agreement, and the portion or portions of the Deliverables affected, within seven (7) calendar days after the commencement of the delay. No such extension or

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adjustment shall be deemed a waiver of the rights of either Party under this Purchase Agreement. The Purchaser shall make its determination within seven (7) calendar days after receipt of the Vendor's application.

## 17.0 Liquidated Damages

### 17.1 Liquidated Damages – Delivery and Acceptance

- (a) It is mutually understood and agreed by and between the Parties that time is of the essence with respect to the completion of the Work and the Deliverables and that in case of any failure on the part of the Vendor to complete the Work or provide the Deliverables within the time specified in Section 15.2 (Delivery Schedule), except for any delay as provided for in this Purchase Agreement, the Master Agreement Section 13.0 (Force Majeure), or any extension thereof, that the Purchaser will be damaged thereby. It being difficult if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of such damages due the Purchaser shall be fixed at one hundred dollars (\$100.00) per Business Day per Bus not delivered in acceptable condition as per Section OR 10.0 (Quality Assurance/Controls) of Appendix A – Technical Specifications.
- (b) The Vendor hereby agrees to pay the afore stated amounts as fixed, agreed and liquidated damages, and not by way of penalty, to the Purchaser and further authorizes the Purchaser to deduct the amount of the damages from money due the Vendor under this Purchase Agreement, computed as aforesaid. If the monies due the Vendor are insufficient or no monies are due the Vendor, the Vendor shall pay the Purchaser the difference or the entire amount, whichever may be the case, within thirty (30) calendar days after receipt of a written demand by the Purchaser.
- (c) The payment of aforesaid fixed, agreed and liquidated damages shall be in lieu of any damages for any loss of profit, loss of revenue, loss of use, or for any other direct, indirect, special or consequential losses or damages of any kind whatsoever that may be suffered by the Purchaser arising at any time from the failure of the Vendor to fulfill the obligations referenced in this clause in a timely manner, but shall not limit the Purchaser's right to seek any other legal or equitable relief (other than damages) for the Vendor's breach of the obligations referenced in this clause and shall not limit the Purchaser's right in respect of any other breach or default by the Vendor.
- (d) Notwithstanding the foregoing, the Purchaser specifically reserves the right, without limitation of any other rights, to terminate this Purchase Agreement in accordance with Article 13 (Termination) in this Purchase Agreement, and seek any rights and remedies available to the Purchaser at law or in equity in the event of termination in accordance with Article 13 (Termination) of this Purchase Agreement.

### 17.2 Liquidated Damages – Warranty Repairs

- (a) It is mutually understood and agreed by and between the Parties to this Purchase Agreement that time is of the essence with respect to the completion of the Work and that in case of any failure on the part of the

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Vendor to complete the Work within the time specified in Appendix A - Technical Specifications Section OR 8.4 (Warranty Repair Procedures), except for any delay as provided for in this Purchase Agreement, the Master Agreement (Section 13.0 (Force Majeure)), or any extension thereof, that the Purchaser will be damaged thereby. It being difficult if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of such damages due the Purchaser shall be fixed at \$100.00 (one hundred dollars) per calendar day per Bus that is out of service for more than fifteen (15) Business Days after notification by the Purchaser of a Defect applicable to the Bus Manufacturer's Warranty (see Appendix A – Technical Specifications, Section OR 8.0 (Basic Warranty Provisions)). The damages will be calculated from the date that the Purchaser notified the Vendor.

- (b) The Vendor hereby agrees to pay the afore stated amounts as fixed, agreed and liquidated damages, and not by way of penalty, to the Purchaser and further authorizes the Purchaser to deduct the amount of the damages from money due the Vendor under this Purchase Agreement, computed as aforesaid. If the monies due the Vendor are insufficient or no monies are due the Vendor, the Vendor shall pay the Purchaser the difference or the entire amount, whichever may be the case, within thirty (30) calendar days after receipt of a written demand by the Purchaser.
- (c) The payment of aforesaid fixed, agreed and liquidated damages shall be in lieu of any damages for any loss of profit, loss of revenue, loss of use, or for any other direct, indirect, special or consequential losses or damages of any kind whatsoever that may be suffered by the Purchaser arising at any time from the failure of the Vendor to fulfill the obligations referenced in this clause in a timely manner, but shall not limit the Purchaser's right to seek any other legal or equitable relief (other than damages) for the Vendor's breach of the obligations referenced in this clause and shall not limit the Purchaser's right in respect of any other breach or default by the Vendor.
- (d) Notwithstanding the foregoing, the Purchaser specifically reserves the right, without limitation of any other rights, to terminate this Purchase Agreement in accordance with Article 13 (Termination) in this Purchase Agreement, and seek any rights and remedies available to the Purchaser at law or in equity in the event of termination in accordance with Article 13 (Termination) of this Purchase Agreement.

17.3 Liquidated Damages - Parts Availability

- (a) It is mutually understood and agreed by and between the Parties to this Purchase Agreement that time is of the essence with respect to the completion of the Work and that in case of any failure on the part of the Vendor to provide replacement parts within the time specified in Appendix A - Technical Specifications Section OR 2.0 (Parts Availability), except for any delay as provided for in this Purchase Agreement, the Master Agreement (Section 13.0 (Force Majeure)), or any extension thereof, that the Purchaser will be damaged thereby. It being difficult if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of such

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damages due the Purchaser shall be fixed at \$100.00 (one hundred dollars) per calendar day per Bus that is out of service for more than fifteen (15) Business Days after notification by the Purchaser of the requirement for a replacement part (see Appendix A – Technical Specifications, Section OR 2.0 (Parts Availability)). The damages will be calculated from the date that the Purchaser notified the Vendor.

- (b) The Vendor hereby agrees to pay the afore stated amounts as fixed, agreed and liquidated damages, and not by way of penalty, to the Purchaser and further authorizes the Purchaser to deduct the amount of the damages from money due the Vendor under this Purchase Agreement, computed as aforesaid. If the monies due the Vendor are insufficient or no monies are due the Vendor, the Vendor shall pay the Purchaser the difference or the entire amount, whichever may be the case, within thirty (30) calendar days after receipt of a written demand by the Purchaser.
- (c) The payment of aforesaid fixed, agreed and liquidated damages shall be in lieu of any damages for any loss of profit, loss of revenue, loss of use, or for any other direct, indirect, special or consequential losses or damages of any kind whatsoever that may be suffered by the Purchaser arising at any time from the failure of the Vendor to fulfill the obligations referenced in this clause in a timely manner, but shall not limit the Purchaser’s right to seek any other legal or equitable relief (other than damages) for the Vendor’s breach of the obligations referenced in this clause and shall not limit the Purchaser’s right in respect of any other breach or default by the Vendor.
- (d) Notwithstanding the foregoing, the Purchaser specifically reserves the right, without limitation of any other rights, to terminate this Purchase Agreement in accordance with Article 13 (Termination) in this Purchase Agreement, and seek any rights and remedies available to the Purchaser at law or in equity in the event of termination in accordance with Article 13 (Termination) of this Purchase Agreement.

## 18.0 Materials and Workmanship

### 18.1 Materials and Workmanship

- (a) All materials and workmanship including but not limited to the Work and Deliverables to be provided by the Vendor to the Purchaser hereunder will comply with the Technical Specifications, including without limitation, the warranty provisions set out in Appendix A - Technical Specifications.

### 18.2 Quality of Materials

- (a) The Vendor shall furnish all materials required to complete the Bus. The materials furnished shall be new and shall be free from impurities, Defects, and imperfections impairing strength, durability and appearance. They shall be of good commercial quality for the purposes specified, with structural properties to withstand the strains and stresses to which they will be subjected in normal service. Notwithstanding any prior inspection or approval, only materials conforming to the requirements of the Technical Specifications shall be incorporated into the item or items to be procured.

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### 18.3 Equivalent Materials and Equipment

- (a) The Vendor shall supply the Bus(es) with the components and materials as proposed and agreed to in the Master Agreement and this Purchase Agreement unless substitutions become necessary. Any substitution of an article or material shall be of at least equal quality and suitable for the purpose intended. Substitutions will be permitted hereunder subject only to the following:
  - (i) Any such substitution shall require prior approval in writing by the Purchaser Representative and the Metrolinx Representative.
  - (ii) Any such substitutions shall not result in any additional cost to the Purchaser.
  - (iii) All requests by the Vendor for approval of substitutions shall be made to the Purchaser in writing and accompanied by supporting information.
  - (iv) The burden of proof of at least equal quality and of suitability for the purpose intended shall be upon the Vendor and all information and tests related to such proof shall be free of cost to the Purchaser.
- (b) Whenever classification, rating or other certification by a body such as the Canadian Standards Association (CSA), the American Society for Testing and Materials (ASTM), or recognized National Standards is a part of the Technical Specifications for any material, any substitution of alternative materials shall be accompanied by certification from the appropriate body of compliance with the requirements of the Technical Specifications.

### 18.4 Defective Material

- (a) Material or equipment intended for use on the Bus(es), or parts thereof, which is found to be not in conformance with the Contract shall be clearly marked and so disposed of as to ensure that it will not be used or offered for use again unless and until proper material or equipment has been substituted or other corrective action taken to the satisfaction of the Purchaser.

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## Schedule A – Definitions

### 1.0 In this Purchase Agreement,

- 1.1 Unless otherwise specified or the context otherwise requires, for the purposes of this Purchase Agreement the following terms have the following meanings and all other capitalized terms used in this Purchase Agreement shall have the meanings ascribed to them in the Master Agreement which are incorporated by reference herein.
- 1.2 **“Effective Date”** means the date set out on the first page of this Purchase Agreement.
- 1.3 **“Intellectual Property”** means all intellectual and industrial property, including: (a) materials, images, reports, Software, applications, audio or video recordings, specifications, performance requirements, software development tools, technologies, content, data (including all information whether or not contained in or on any database or electronic information storage system or media owned by or in the custody or control of the Purchaser), technical information, interfaces, web portals, components, services, information, databases, and documentation; (b) patents, patent application rights, rights to file patents, inventions, trade-marks (whether registered or not), trade-mark applications, rights to file trade-marks, trade names, copyrights (whether registered or not), design registrations, trade secrets, confidential information, industrial and similar designs, rights to file for industrial and similar designs, processes, methodologies, techniques and know-how; and (c) all Intellectual Property Rights therein.
- 1.4 **“Master Agreement”** means the master agreement made as of **January 29, 2024** between the Vendor and Metrolinx including all of the schedules attached thereto, as such master agreement maybe amended from time to time, for the provision of Work.
- 1.5 **“Parties”** means the Purchaser and the Vendor.
- 1.6 **“Purchase Agreement”** means this purchase agreement entered into between Vendor and a Purchaser setting out the exclusive arrangement for supply of specific Deliverables in accordance with the Master Agreement, as required by the Purchaser from Vendor.
- 1.7 **“Purchaser’s Address”** means:  
**The Corporation of the City of Sault Ste. Marie**  
**111 Huron Street**  
**Sault Ste. Marie, ON, P6A 5P9**
- 1.8 **“Purchaser IP”** has the meaning ascribed to it in Section 6.6(a) (Ownership of Purchaser IP).
- 1.9 **“Term”** means, subject to any termination rights set out in the Master Agreement or this Purchase Agreement, the period of time from the Effective Date of this Purchase Agreement up to and including the later of:

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- (a) **January 28, 2025** being the expiry of the Base Year under the Master Agreement;
- (b) provided both Metrolinx and the Purchaser have each exercised the Option Year under the Master Agreement, then **January 28, 2026**, being the expiry of the Option Year under the Master Agreement”); or
- (c) the date on which the last Deliverable, or Deliverables, ordered during either of the Base Year or Option Year, as applicable, pursuant to this Purchase Agreement, are delivered to and accepted by the Purchaser.

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## Schedule B – Financial Terms

### 1.0 Deliverables

- 1.1 The Vendor agrees to provide the Deliverables to the Purchaser in compliance with the Master Agreement and this Purchase Agreement as more particularly specified in Schedule C (Deliverables) to this Purchase Agreement. Subject to the Master Agreement, the Price for the provision of the Deliverables shall be as specified in Schedule D (Price) to this Purchase Agreement. Unless otherwise specified in Schedule D (Price), the Vendor shall invoice the Purchaser for the Deliverables provided under this Purchase Agreement in accordance with the terms set out in this Schedule B - Section 2.1 (Invoicing and Payments).

### 2.0 Payment

#### 2.1 Invoicing and Payments

- (a) The Purchaser shall be invoiced in accordance with the following procedures unless otherwise specified elsewhere in this Purchase Agreement. Payment will be made only in Canadian funds. Terms for payment of invoices shall be net 30 calendar days from the date of acceptance of the Deliverables by the Purchaser in accordance with this Purchase Agreement.
- (b) All invoices covering purchases by the Purchaser must:
- (i) Itemize any applicable taxes owing separate from the basic cost of the Deliverables;
  - (ii) Indicate the number of Deliverables delivered to the Purchaser;
  - (iii) Indicate the unit price for the Deliverables and the total amount payable by Purchaser in respect of items delivered (for the avoidance of doubt, Prices are based on the purchase order date and not the delivery date);
  - (iv) Include the purchase order number (if applicable), complete shipping and invoicing address (shipping costs are the responsibility of the Vendor); Vendor Contract number (i.e. RFP Number), Purchaser contact name, telephone and email address; Vendor name, address, telephone and email address; order date; delivery date; product code number; quantity; product description; unit Price; total dollar value of order/purchase; HST itemized separately; terms of payment: net 30 calendar days and signature of authorized Purchaser;
  - (v) Invoices that are not properly completed and signed, or which are lacking any of the information required in (v) above, or contain a billing error will not be processed and will be returned unpaid to the Vendor with a description of the billing error or missing information; and
  - (vi) Be supported by detailed Records maintained by the Vendor for a period of seven (7) years following completion or termination of the

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Master Agreement and made available to the Purchaser upon request, notwithstanding such completion or termination.

**2.2 Payment According to Contract Prices**

- (a) The Purchaser shall be exclusively responsible for the payment to the Vendor for the Deliverables in accordance with the terms and conditions of this Purchase Agreement. The Parties agree that the OPS including Metrolinx shall not be responsible for any payment or other obligation under this Purchase Agreement.

**2.3 Hold Back or Set Off**

- (a) The Purchaser may hold back or set off against payment twice the estimated cost of any Defect if, in the opinion of the Purchaser acting reasonably, the Vendor has failed to comply with any requirements of the Contract. This amount will be paid immediately by the Purchaser upon rectification of the Defect by the Vendor.

**2.4 No Expenses or Additional Charges**

- (a) There shall be no other charges payable to the Vendor under this Purchase Agreement other than the Prices established under this Purchase Agreement and otherwise payable hereunder in respect of the Vendor's provision of the Deliverables.

**2.5 Payment of Taxes and Duties**

- (a) Unless otherwise stated, the Vendor shall pay all applicable taxes, including excise taxes incurred by or on the Vendor's behalf with respect to the Contract.

**2.6 Withholding Tax**

- (a) The Purchaser shall withhold any applicable withholding tax from amounts due and owing to the Vendor under this Purchase Agreement and shall remit it to the appropriate government in accordance with applicable tax laws.

**2.7 Interest on Late Payment**

- (a) The interest rate for any late payment occurring only through no fault of the Vendor or on account of force majeure will prevail and shall not exceed the general rate of interest on overpayment of provincial taxes in effect on the date that the payment went into arrears.

**3.0 Option Year Price Adjustments**

- 3.1 Prices shall be subject to PPI adjustment for all orders placed in the Option Years as described in Schedule B - Section 4.0 (Option Year Price Adjustments) of the Master Agreement.

**4.0 Manuals and Drawings Hold Back**

- 4.1 Pursuant to this Purchase Agreement and without limitation to any other remedies the Purchaser may have, the Purchaser shall hold back three percent (3%) of the Price of the last Bus to be accepted hereunder until all of the applicable manuals,

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drawings, diagrams, special tools and diagnostic equipment have been delivered as per Appendix A - Technical Specifications (Section OR 4.0 (Manuals, Documents and Drawings), OR 5.0 (Supplied Diagnostic Equipment and Software), and OR 6.0 (Special Tools)), as the case may be, it being understood that the release of any such holdback by a Purchaser to the Vendor shall not operate as a waiver of the Vendor's obligation to provide the Deliverables in accordance with the Contract.

**5.0 Program Cost Recovery Fee**

5.1 All orders made by the Purchaser during the Base Year or Option Year(s), as applicable, are subject to a Program Cost Recovery fee that will be paid to Metrolinx upon issuance of a purchase order.

5.2 The program cost recovery fee structure for this Contract is:

(a) A participation fee is applicable for this joint procurement, as described in section 4.9 of the Multi-Year Governance Agreement, dated April 1, 2019. The actual participation fee is structured as a percentage of the purchased bus price for each transit agency. The participate fee structure is outlined in the table below.

Number of Buses Purchased	Participation Fee Percentage of Bus Price
1 – 2	0.90%
3 – 4	0.65%
5+	0.45%
<b>Maximum Fee</b>	<b>\$40,000</b>

**6.0 Exclusivity and Work Volumes**

6.1 The Vendor acknowledges that it is providing the Deliverables on an exclusive basis for Deliverables ordered during the Base Year, and during the Option Year as applicable. The Purchaser makes no representation regarding the volume of Deliverables and Work to be ordered under this Purchase Agreement in the Base Year or Option Year, if exercised.

**7.0 Survival**

7.1 The obligations contained in this Schedule shall survive the termination or expiry of the Contract.



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**IN WITNESS WHEREOF** the Parties hereto have executed this Purchase Agreement as of the date first above written.

**The Corporation of the City of Sault Ste. Marie**

Signature:

Name: Matthew Shoemaker

Title: Mayor

I have the Authority to bind the Purchaser.

**The Corporation of the City of Sault Ste. Marie**

Signature:

Name: Rachel Tyczinski

Title: City Clerk

I have the Authority to bind the Purchaser.

**New Flyer Industries Canada ULC**

Signature:

Name: Jennifer McNeill

Title: Vice President, Sales & Marketing

I have Authority to bind the Vendor.

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## Schedule C – Deliverables

The following information, as applicable, is to be provided by the Vendor in this Schedule prior to executing this Purchase Agreement or following execution of this Purchase Agreement, as agreed to by the Parties:

- Detailed description of the Deliverables and Options selected identified in detailed Vendor quote and attached to the executed Purchase Agreement
  - **Options:** See Schedule D – Price, Requested Changes chart for a breakdown of options or New Flyer Industries Canada, ULC Proposal for further information.
  - **Deliverables:** Deliverables provided per Metrolinx contract. Please see New Flyer Industries Canada, ULC Proposal for further information.
- Purchaser postal address where Deliverables are to be delivered. Can be included in the header of the detailed Vendor quote.

The Corporation of the City of Sault Ste. Marie  
111 Huron Street  
Sault Ste. Marie, ON, P6A 5P9

- Milestones, dates, timelines

New Flyer of America Inc.  
**MILESTONE PAYMENT OPTIONS**  
City Of Sault Ste. Marie

Bus Price \$ 854,172 CAD  
Annual Discount Rate offered 7.5%

Terms – Payment Net 30 for all Milestones	Percentage	Amount	Discount	Net Payment
<b>Option 1:</b>				
Receipt of Purchase Order	20%	\$170,834	(\$12,813)	\$158,022
Engine Installation	55%	\$469,795	(\$5,309)	\$464,485
Acceptance	25%	\$213,543	-	\$213,543
<b>Total Option 1</b>		<b>\$854,172</b>	<b>(\$18,122)</b>	<b>\$836,050</b>
<b>Option 2:</b>				
Approval for Shipment from Facility	75%	\$640,629	(\$7,240)	\$633,389
Acceptance	25%	\$213,543	-	\$213,543
<b>Total Option 2</b>		<b>\$854,172</b>	<b>(\$7,240)</b>	<b>\$846,932</b>
<b>Option 3:</b>				
Engine Installation	40%	\$341,669	(\$3,861)	\$337,807
Approval for Shipment from Facility	35%	\$298,960	(\$1,843)	\$297,117
Acceptance	25%	\$213,543	-	\$213,543
<b>Total Option 3</b>		<b>\$854,172</b>	<b>(\$5,704)</b>	<b>\$848,468</b>

- Delivery schedule
  - The delivery schedule will be finalized once a PO is received by New Flyer Industries Canada, ULC and will fall within the delivery requirements of the contract.

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## Schedule D - Price

The following information, as applicable, is to be provided by the Vendor in this Schedule prior to executing this Purchase Agreement or following execution of this Purchase Agreement, as agreed to by the Parties:

- Prices as per the Master Agreement, Attachment #1 – RFP-2023-PROC-450 – Contract Prices
  - See below in the *Price Breakdown* table
- Prices for selected Options as per the Master Agreement, Attachment #2 – RFP-2023-PROC-450 – Contract Prices (Options)
  - See below in the *Requested Changes* table
- Invoicing process if different from Schedule B - Section 2.1 (Invoicing and Payments)

### Price Breakdown:

Metrolinx Starting Price	\$853,499.00	Contract Price
Changes	\$673.37	Breakdown in Requested Changes table below
Revised Bus Price	<b>\$854,172.37</b>	
Quantity	2	
Total Contract Price	<b>\$1,708,344.74</b>	

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**Requested Changes:**



Property: City Of Sault Ste. Marie  
 Option Origin: Metrolinx RFP-2023-PROC-450  
 Sales Release No.: 2024-127  
 Quantity: 2  
 Bus Type: XD40

Price Change Type	Reference No.	Option No.	Option Group	SRCR No.	Description	Data	
						Price per coach	Extended Total
Base Bus Price Change	4	260	Battery		2 Odyssey 8D Absorbed Glass Mat (AGM) maintenance free batteries. 1500 CCA	202.15	404.30
	5	410	Compartment		Drop posts: 1/2" positive, 3/8" negative.	16.13	32.25
	6	470	Tapping Plates		Add Advertisement Card retainer strips	38.45	76.90
	7	280	Destination Signs		Add front destination sign LED light with switch.		
	8	280	Passenger Signal		Add passenger signals to match SR2740 ( with two pull cords at the first street and curbside pillars forward of the face of the upper deck.)	(68.22)	(136.44)
	9	286	Passenger Signal		Add six push buttons (3/side) on upper deck seating stanchions, aisle facing	149.16	298.32
	10	284	Elect - Instrument & Switch		Add drivers stop request lamp	76.58	153.16
	14	422	Elect - Side/Console		Add Toggle chime test switch on the side console	5.87	11.74
	17	470	Body A/P After Paint		front sunvisor from black padded to black rollerblined & side sunvisor to black rollerblined	(540.64)	(1,081.28)
	18	526	Destination Signs		Change destination signs to match SR2740	327.24	654.47
	19	526	Seating & Stanchions		Change passenger seats to American Seating to match SR2740	(14,448.50)	(28,897.00)
	21	600	Seating & Stanchions		Change drivers seat to 9110LX3	(854.60)	(1,709.21)
	22	600	Customer Options		Add two dash fans (Two Fans, one 9.14" left of center and one 3.41" right of center. Requires 600-025C provision brackets (P/N 580296))	746.04	1,492.08
	23	600	Customer Options		Add three trays to SDS box	454.52	909.04
	25	600	Customer Options		Add farebox provisions only with power and ground to chassis (ground strap inside pedestal)	0.00	0.00
	26	600	Customer Options		Add SafeFleet (Seon system) per SR2740	11,837.05	23,674.11
	29	203	Customer Options		Add provisions for passenger counters per SR2740	233.68	467.35
30	460	Suspension Front		Delete SmartRider & Add Barksdale mechanical leveling valves with Parker kneeling block (per SR2740)	2,498.47	4,996.94	
30	460	Windows		Add SDS window pushbutton release, update quote for add/delete option item #17	0.00	0.00	
Base Bus Price Change Total						673.37	1,346.74
Grand Total						673.37	1,346.74

**ADDITIONAL SCHEDULES TO SAMPLE PURCHASE AGREEMENT (if applicable)**

- Subsequent Option Year orders and/or new purchase orders are to be added to this Schedule.

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## New Flyer Industries Canada, ULC Proposal

Please refer to the complete New Flyer Industries Canada, ULC proposal as presented to The Corporation of the City of Sault Ste. Marie for more information.