OTTAWA LIGHT RAIL TRANSIT PUBLIC INQUIRY

CLOSING SUBMISSIONS OF INFRASTRUCTURE ONTARIO

McCarthy Tétrault LLP
Suite 5300, 66 Wellington Street W
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Sarit Batner LS# 42797N
Email: sbatner@mccarthy.ca

Julie Parla LS# 45763L
Email: jparla@mccarthy.ca

Solomon McKenzie LS# 79680R
Email: smckenzie@mccarthy.ca

Morgan Watkins LS# 82065W
Email: mlwatkins@mccarthy.ca

Devon Johnson LS# 79553K
Email: dtjohnson@mccarthy.ca

Lawyers for Infrastructure Ontario

TABLE OF CONTENTS

I. Overview

1. The City of Ottawa (the "**City**") retained Ontario Infrastructure and Lands Corporation ("**Infrastructure Ontario**" or **"IO"**) as the Commercial Procurement Lead for Phase 1 of the OLRT Project ("**OLRT1**" or the "**Project**") because of its institutional knowledge, expertise, and successful track record in the procurement and delivery of major P3 projects across the province.

2. The Commission's mandate in this Public Inquiry is to investigate the technical and commercial circumstances that led to the breakdowns and derailments of OLRT1, which includes inquiring into the decisions and actions taken during the procurement.[1]

3. Throughout the Inquiry, the Commission has heard evidence that the City appropriately selected a P3 contracting model with advice from IO and the City's other advisors, and that the procurement for the contract was conducted in accordance with industry best practices. Following a robust Request for Proposal ("**RFP**") process, the highest scoring bid was appropriately selected. The contract between the City and Rideau Transit Group ("**RTG**") (the "**Project Agreement**") was tailored to meet the City's priorities and goals for the project in keeping with applicable laws, safety, and industry standards.

4. There is no evidence before the Commission that decisions or actions taken during the procurement led to OLRT1 breakdowns and derailments.

II. The Commission's Mandate

5. The Commission was established on December 16, 2021 pursuant to Order in Council 1859/2021 issued under the *Public Inquiries Act, 2009*.[2]

6. The Commission's mandate is to investigate "the commercial and technical circumstances that led to OLRT1 breakdowns and derailments".[3] In relation to the procurement, the Commission's mandate includes inquiring into:

(a) The decisions and actions that were taken in determining:

---

[1] Order in Council, 1859/2021, Mandate, p. 2, ss. 3(a)-(c).

[2] Order in Council, 1859/2021, Mandate; Public Inquiries Act, 2009, S.O. 2009, c. 33, Sch. 6.

[3] Order in Council, 1859/2021, Mandate, p. 2, s. 3.

(i) the procurement approach the City selected for OLRT1;

(ii) the selection of the Rideau Transit Group; and

(iii) the award of the alternative financing and procurement contract for OLRT1 to the Concessionaire;

(b) Whether the City-led procurement process had an impact on the technical standards applied for OLRT1 and the design, building, operation, maintenance, repair and rehabilitation of OLRT1; and

(c) Whether the AFP contract between the City and the Concessionaire was adequate to ensure that the design, building, operation, maintenance, repair and rehabilitation of OLRT1 was carried out in accordance with all applicable laws and industry standards, including performance and safety.[4]

7. As demonstrated below, the Commission has heard no evidence that any decisions or actions undertaken in relation to OLRT1 procurement, described above, led to the breakdowns and derailments of the system that later materialized.

III. Infrastructure Ontario

A. Infrastructure Ontario's Approach to Project Delivery

8. IO is a Crown agency of the Province of Ontario[5] that acts as procurement and commercial lead for all major public infrastructure projects in the province.[6] IO's Board of Directors is appointed by the Lieutenant Governor in Council on recommendation of the Minister of Infrastructure.[7] IO reports to the Minister of Infrastructure but operates independently from the Ministry.[8]

9. For some of the province's larger, complex infrastructure projects, IO uses a public-private partnership ("**P3**") model, also referred to as Alternative Financing and Procurement ("**AFP**").[9] IO's project delivery models drive innovation and quality, while transferring the appropriate risks of added costs and schedule delays away from the public purse. These

---

[4] Order in Council 1859/2021, Mandate, p. 2, ss. 3(a)-(c).

[5] Established pursuant to the *Ontario Infrastructure and Lands Corporation Act*, 2011, S.O. 2011, c. 9, Sch. 32, COM0010111.

[6] Ontario Light Rail Public Inquiry [**OLRPI**], Overview Report - Role of IO in the OLRT Project [**OR Role of IO**], ¶ 4.

[7] OR Role of IO, ¶ 4.

[8] OR Role of IO, ¶ 4.

[9] OR Role of IO, ¶ 5; "prior to November 2018, IO's P3 projects were referred to as AFP projects, and the terms may be used interchangeably": Our Public-Private Partnerships (P3) Model, Infrastructure Ontario, COM0010101, p. 2.

approaches are among those used by IO for major projects with costs above $100 million and/or involving significant risk and complexity.[10]

10. IO is recognized internationally for successfully delivering major projects through its made-in-Ontario P3 program, as well as completing thousands of smaller projects using traditional approaches.[11] IO's practices have been emulated globally, with more than 60 international jurisdictions having visited IO's offices to learn about its project delivery approach.[12]

11. For each major infrastructure project, IO considers a range of procurement options and models for delivery.[13] This approach ensures the best contracting option is selected for each project. With this approach, IO's models have been successfully applied to deliver projects including hospitals, transit systems, highways, courthouses and high-performance sporting venues—all publicly owned and for the betterment of communities across the province.[14]

12. IO's approach to P3 delivery has evolved over time to incorporate, adapt, and refine the fundamental principles of public infrastructure delivery: adjusting the amount of private sector financing, "improving health and safety standards, enhancing conflict of interest and ethical standards, introducing local knowledge requirements for construction standards and practices, and updating … value for money ["**VFM**"] methodologies".[15] IO adapts and expands on its approaches to suit the realities of a changing marketplace and the government's current infrastructure needs.

13. IO's guiding principles in all projects are transparency, accountability, VFM, public ownership and control, and protecting the public interest.[16]

---

[10] OR Role of IO, ¶ 5.

[11] Our Public-Private Partnerships (P3) Model, Infrastructure Ontario, COM0010101, p. 1.

[12] Our Public-Private Partnerships (P3) Model, Infrastructure Ontario, COM0010101, p. 1.

[13] Choosing the Right Model for Each Project—IO's Procurement and Project Delivery Approach, Infrastructure Ontario.

[14] Robert Pattison, Formal Interview, TRN00000107, p. 69, ln. 16-25.

[15] Our Public-Private Partnerships (P3) Model, Infrastructure Ontario, COM0010101, p. 1.

[16] OR Role of IO, ¶¶ 6-7; FAQs—Public Private Partnerships (P3s), Infrastructure Ontario, COM0010099, p. 1; John Traianopoulos, Commission Examination, TRN00000185, p. 9, ln. 18-27.

B. Infrastructure Ontario's Role in OLRT1

14. The City engaged IO in 2009 during its early consideration of delivery models for the Downtown Ottawa Transit Tunnel project ("**DOTT**"). The scope of IO's services to the City at the time were defined in a letter to City Manager Kent Kirkpatrick dated April 20, 2009.[17]

15. In the early stages of the Project, IO's Project Assessment and Initiation Division presented to the City on IO's P3 project delivery models, provided preliminary VFM analyses, and assisted the City with applying those analyses using the information about the DOTT that was then available.[18]

16. Following IO's early work, Deloitte, the City's principal financial advisor, conducted a year and a half long comparative analysis of several project delivery models, culminating in a 109-page report dated February 28, 2011[19] and a supplementary report dated June 29, 2011.[20] IO's Project Finance team provided diligence in relation to these VFM analyses, including reviewing the inputs and assumptions Deloitte used for its analysis of VFM and possible financing structures for the Project. IO did not provide diligence or advice related to the initial cost estimates for construction, maintenance, and lifecycle for the purpose of the City's budget.[21]

17. IO was retained by the City pursuant to a Memorandum of Understanding ("**MOU**") on October 26, 2011. The MOU provided, among other things, that:

(a) IO was not acting as a Crown Agent;[22]
(b) IO was retained as OLRT1 Commercial Procurement Lead;[23] and
(c) the City had "final approval on all decision making.[24]

18. IO provided advice to the City throughout OLRT1 procurement, and later on an ad hoc basis in relation to the administration of the Project Agreement. IO's advice was passed up

---

[17] Letter from Infrastructure Ontario to City of Ottawa, 20 April 2009, Exhibit 017, IFO0001175.

[18] John Traianopoulos, Commission Examination, TRN00000185, p. 4, ln. 6-14.

[19] Deloitte Project Delivery and Procurement Options Report, 28 February 2011, Exhibit 037, COW0543596.

[20] Letter from Deloitte to City of Ottawa, 29 June 2011, Exhibit 083, DEL0109898.

[21] John Traianopoulos, Commission Examination, TRN00000185, pp. 5-6, ln. 19-12; Draft Alternative Financing and Procurement Preliminary Assessment of Downtown Ottawa Transit Tunnel (East-West LRT Project), Exhibit 031, IFO0001174, p. 5, s. 1.0.

[22] OR Role of IO, ¶¶ 10, 28; Memorandum of Understanding between Ontario Infrastructure and Lands Corporation and City of Ottawa [**MOU**], Exhibit 019, COM0000234, p. 12, s. 4.4; IO and the City also entered an Amending Agreement to the MOU on 26 September 2013, COM0000233.

[23] OR Role of IO, ¶¶ 2, 8, 13, 23; MOU, Exhibit 019, COM0000234, p. 3, s. 2.1(b).

[24] OR Role of IO, ¶ 12; MOU, Exhibit 019, COM0000234, p. 3, s. 2.1.

through a vertical approvals process, with decisions ultimately made by the appropriate City staff member, committee or Council.[25] The City retained final decision making authority in relation to all aspects of the Project such that the City's position would prevail in the case of a disagreement between the City and IO.[26]

19. IO worked closely with the City and its other consultants to develop and implement the procurement and draft the Project Agreement.[27] IO retained Bank of Montreal, Capital Markets ("**BMO**") as a procurement consultant to provide expertise from the financial sector perspective.[28] The City retained Borden Ladner Gervais to lead the drafting of the Project Agreement. The City also retained the engineering consortium Capital Transit Partners ("**CTP**") as technical advisors, as well as Deloitte and Boxfish to advise on various aspects of the procurement, project financing, and drafting the Project Agreement.[29]

20. The MOU between the City and IO contemplated that IO's role would change after financial close.[30] After financial close on February 12, 2013, during project implementation, IO had a limited role. IO Project Delivery staff visited Ottawa for monthly meetings and site visits.[31] Toward the end of the implementation phase, IO's only remaining involvement was to have a representative attend Executive Steering Committee meetings, and to assist the City with ad hoc interpretation of the Project Agreement upon request.[32] IO's involvement on OLRT1 ended before Substantial Completion.[33]

IV. Evidence Responsive to the Commission's Mandate

A. The City Appropriately Selected a P3 Delivery Model for OLRT1

21. The City considered and compared several options for the procurement and delivery of OLRT1. While the City initially considered a traditional delivery model, it recognized that outside

---

[25] OR Role of IO, ¶ 18; MOU, Exhibit 019, COM0000234, p. 5, s. 2.5 and schedules; Project Management Plan dated 30 March 2012, Exhibit 002, IFO0004372.

[26] Kent Kirkpatrick, Formal Interview, TRN00000163, p. 56, lines 6-21; MOU, Exhibit 019, COM0000234, pp. 6-7, s. 2.6(d).

[27] See OLRT Project Charter, Exhibit 001, COM0000235; Project Management Plan dated 30 March 2012, Exhibit 002, IFO0004372.

[28] John Traianopoulos, Commission Examination, TRN00000185, p. 39, ln. 5-10.

[29] John Jensen, Commission Examination, TRN00000178, pp. 8-9, ln. 2-12.

[30] MOU, Exhibit 019, COM0000234, p. 9, ss. 3.1(i)(c)-(d).

[31] Robert Pattison, Formal Interview, TRN00000107, p. 60, ln. 10-22.

[32] Robert Pattison, Formal Interview, TRN00000107, pp. 60-61, ln. 23-4; Email from Robert Pattison (IO) to Lisa DiMenna (IO) dated March 5, 2019, IFO0043694.

[33] The last record of IO attendance at an Executive Steering Committee is dated June 3, 2019, see Confederation Line Executive Steering Committee Meeting scheduling confirmation for June 3, 2019, IFO0043719.

expertise would be required to manage the design, construction, and maintenance of a project with OLRT1's scope, cost, and complexity.[34] OLRT1 represented the largest infrastructure project in the City's history.[35]

22. Accordingly, the City engaged IO for its expertise and market-tested P3/AFP contracting models.[36] Under a P3 model, the City would establish the scope and purpose of OLRT1, and at the same time rely on global, industry-leading talent to design, build, finance, and maintain the system.[37] Moreover, the contractor would be selected through a competitive bidding process which would drive innovation and efficiencies from the private sector.[38]

23. IO's delivery models had been successfully used on several major projects across a variety of asset classes, and were well-known to the private sector.[39] This allowed the City to attract private sector companies with global expertise in the delivery of P3 projects, LRTs, and tunneling.[40]

24. The City understood that no contracting model can be evaluated in isolation, as no model is optimal in every respect. All models have advantages and drawbacks. The goal is "to select a model that is going to tend to give you the best outcome for the particular project in the particular circumstances."[41] As Ms. Schepers testified:

> MR. PETER WARDLE: And is it also fair to say, Ms. Schepers, that when thinking about the P3 model, the DBFM, and you know, considering its risks and benefits, you have to evaluate it in the context of the other alternatives that were available at the time; is that not correct?
>
> MS. NANCY SCHEPERS: That is correct. You have to look at [the model] in -- along the spectrum and understand what value it brings to the table in comparison to the others.[42]

---

[34] Councillor Allan Hubley, Transport Action Examination, TRN00000202, p. 183, ln. 10-20; Marian Simulik, ATU 279 Examination, TRN00000184, p. 168, ln. 20-23.

[35] John Jensen, Commission Examination, TRN00000178, p. 29, ln. 14-16; Nancy Schepers, RTG Parties' Examination, TRN00000185, p. 151, ln. 11-16.

[36] Nancy Schepers, City of Ottawa Examination, TRN00000185, p. 187, ln. 3-12.

[37] John Jensen, Commission Examination, TRN00000178, p. 54, ln. 25-28; OLRPI, Overview Report - City of Ottawa - Rideau Transit Group Contractual Structures [**OR Contracts**], ¶ 6.

[38] FAQs—Public Private Partnerships (P3s), Infrastructure Ontario, COM0010099, p. 1.

[39] Robert Pattison, RTG Parties' Examination, TRN00000184, p. 71, ln. 18-26; Nancy Schepers, Formal Interview, TRN00000084, pp. 48-49; Riccardo Cosentino, Commission Examination, TRN00000178, p. 131, ln. 1-4.

[40] Opening Statement of the RTG Parties, pp. 9-11, ¶ 23.

[41] Robert Pattison, Infrastructure Ontario Examination, TRN00000184, p. 81, ln. 1-11.

[42] Nancy Schepers, City of Ottawa Examination, TRN00000185, pp. 188-189, ln. 27-5.

25. Whether a P3 model will be an effective approach to deliver public infrastructure depends on various factors, such as: "the structure of the [P3] deal; the type of asset being procured"; the market conditions at the time of procurement;[43] "the strength of the regulations and institutions in the country where the projects are being delivered; the skill of the professionals involved; and the criteria used to evaluate success."[44]

26. In Canada there had been challenges with the traditional Design Bid Build ("**DBB**") model, particularly in relation to cost overruns,[45] so that by the mid-2000s—when OLRT1 was procured and contracted for—P3s had "emerged as a response to challenges with both traditional government procurement models and outright privatization efforts."[46] The City recognized some of the challenges with the DBB model based on its own experience with traditional project delivery.[47]

27. Additionally, the market conditions in 2009-2011 were well suited to an AFP model. Interest rates were low, and the market's interest in bidding for P3 megaprojects was high. Accordingly, for the low cost of financing, owners could obtain high risk transfer for the public's benefit.

28. Accordingly, the City engaged its consultants, Deloitte, IO, and BMO, to conduct a comparative analysis of different contract models and recommend the model that best aligned with its priorities for the Project.

i. The City's selection of the DBFM model was informed by rigorous analysis led by Deloitte

29. Deloitte considered eleven different contracting models, including both traditional and P3/AFP models, before ultimately recommending a Design-Build-Finance-Maintain ("**DBFM**") on June 29, 2011. In a DBFM, the selected project company designs, builds, and maintains OLRT1, and also provides private financing to fund their construction work.[48] The City did not procure operations services for OLRT1. In the process of Deloitte's comparative analysis, the

---

[43] Dr. Stafford, OLRPI Expert Panel on Public-Private Partnerships, p. 63, ln. 3-24.

[44] Reeves, E., Placic, D. and Siemiatycki, M. (2019). "Performance: The Missing 'P' in PPP Research?", Annals of Public and Cooperative Economics, 90(2), p. 225; Siemiatycki, M. (2012). "The Global Experience with Public-Private Partnerships. Planning and Environmental Law", 64(9), p. 6.

[45] Robert Pattison, Commission Examination, TRN00000184, p 38, ln 17-26.

[46] Dr. Siemiatycki, OLRPI Expert Panel on Public-Private Partnerships, pp. 20-21, ln. 26-20; See also Siemiatycki, M. (2012). "The Global Experience with Public-Private Partnerships", Planning and Environmental Law, 64 (9), p. 10.

[47] Nancy Schepers, City of Ottawa Examination, TRN00000185, p. 187, ln. 3-12.

[48] OR Contracts, p. 2, ¶¶ 5-6.

City decided that OC Transpo would operate OLRT1 to facilitate integration with Ottawa's existing transit system.[49]

30. Over the year and a half long process, Deloitte and IO conducted the following analyses related to delivery options for OLRT1:

> (a) On February 28, 2011, Deloitte delivered a comprehensive 109-page report to the City—the product of over a year's work[50]—assessing eleven delivery options, their advantages, disadvantages, and value.[51] Deloitte considered, on qualitative and quantitative grounds, an exhaustive list of eleven different delivery models, both traditional and P3.[52] Based on these factors, Deloitte's comprehensive study produced a shortlist of four preferred models.[53]
>
> (b) In May 2011, IO prepared a comparison of the DBM and DBFM models for the City.[54] IO cautioned against the inclusion of maintenance obligations without the existence of long-term financing from the private sector, as that arrangement would not provide the City with an effective mechanism to enforce its performance expectations.[55]
>
> (c) At the end of June 2011, Deloitte supplemented its report. Deloitte's supplementary analysis considered the four shortlisted options from the February report against the City's objectives of: budgetary considerations; maximizing operational flexibility for long-term operations, including system expansion; and value maximization based on an updated VFM assessment.[56]

31. IO also retained BMO as a consultant on behalf of the City to supplement IO's and Deloitte's assessments.[57] As an active lender in the global and Canadian P3 space, BMO's

---

[49] Deloitte Project Delivery and Procurement Options Report, 28 February 2011, Exhibit 037, COW0543596; Nancy Schepers, RTG Parties' Examination, TRN00000185, pp. 151-152, ln. 21-4; John Jensen, Commission Examination, TRN00000178, p. 17, ln. 2-5; John Jensen, Formal Interview, TRN00000115, pp. 51-52, ln. 4-6.

[50] John Traianopoulos, Infrastructure Ontario Examination, TRN00000185, p. 93, ln. 9-23; Deloitte Project Delivery and Procurement Options Report, 28 February 2011, Exhibit 037, COW0543596, p. iv.

[51] John Traianopoulos, Infrastructure Ontario Examination, TRN00000185, p. 93, ln. 6-8; Deloitte Project Delivery and Procurement Options Report, 28 February 2011, Exhibit 037, COW0543596.

[52] John Traianopoulos, Infrastructure Ontario Examination, TRN00000185, pp. 93-94, ln. 24-1; Deloitte Project Delivery and Procurement Options Report, 28 February 2011, Exhibit 037, COW0543596, p. v: design-bid-build; design-build; build-finance with short-term private financing; design-build-finance with short-term private financing; design-build-maintain with short-term private financing; design-build-operate-maintain (public financing); design-build-operate-maintain with short-term private financing; design-build-finance-maintain; design-build-finance-operate-maintain; build-own-operate-transfer; and build-own-operate.

[53] Deloitte Project Delivery and Procurement Options Report, 28 February 2011, Exhibit 037, COW0543596, pp. ix-x.

[54] Draft Memorandum from Infrastructure Ontario to the City of Ottawa, Exhibit 018, IFO0043843.

[55] Draft Memorandum from Infrastructure Ontario to the City of Ottawa, Exhibit 018, IFO0043843, pp. 2-3.

[56] Letter from Deloitte to City of Ottawa, 29 June 2011, Exhibit 083, DEL0109898, pp. 1-2.

[57] John Traianopoulos, Infrastructure Ontario Examination, TRN00000185, p. 95, ln. 11-15.

perspective allowed the City, Deloitte, and IO's Project Finance teams to evaluate lender reaction to the proposed project structure.[58]

32. The City's selection of the DBFM contract was the result of "rigorous analysis."[59] Deloitte's analysis confirmed that a DBFM was best aligned with the City's priorities for a safe, reliable LRT that was on-budget and delivered to schedule, considering the City's desire to retain operations.[60] The report highlighted that the financing ("**F**") component would provide the City with additional leverage to recover costs should delays or other issues materialize during implementation or maintenance.[61]

ii. Considering the City's goals, DBFM was appropriate and in the public interest

33. When selecting a delivery model, IO's approach is to "tailor the model to the project rather than the project to the model".[62] IO applied this approach when assisting the City and its advisors to recommend a model that was aligned with the City's priorities for OLRT1.

34. IO agreed with Deloitte's recommended choice of the DBFM model[63] because it reflected the City's priorities and goals for the Project, including:

(a) the bundling of design, construction, and maintenance to incentivize efficient maintenance of a safe, durable, high-quality asset for the duration of the long-term contract;[64]

(b) allocation of risk to the party best able to bear it;[65]

(c) price certainty;[66] and

(d) third-party oversight by way of lenders.[67]

---

[58] John Traianopoulos, Infrastructure Ontario Examination, TRN00000185, p. 95, ln. 18-25.

[59] John Jensen, ATU 279 Examination, TRN00000178, p. 75, ln. 15-17.

[60] Letter from Deloitte to City of Ottawa, 29 June 2011, Exhibit 083, DEL0109898, p. 4; See also: John Jensen, Formal Interview, TRN00000115, pp. 51-52, ln. 4-6.

[61] Remo Bucci, Commission Examination, TRN00000190, p. 25, ln. 1-11; Letter from Deloitte to City of Ottawa, 29 June 2011, Exhibit 083, DEL0109898, p. 4.

[62] Robert Pattison, Commission Examination, TRN00000184, p. 10, ln. 14-20; Robert Pattison, Infrastructure Ontario Examination, TRN00000184, pp. 80-81, ln. 25-11.

[63] John Traianopoulos, Infrastructure Ontario Examination, TRN00000185, p. 96, ln. 2-10.

[64] John Jensen, Commission Examination, TRN00000178, pp. 53-54, ln. 20-16; Nancy Schepers, Commission Examination, TRN00000185, p. 108, ln. 8-27 ; Robert Pattison, Commission Examination, TRN00000184, p. 18, ln. 13-15.

[65] John Jensen, Commission Examination, TRN00000178, p. 55, ln. 1-6.

[66] Marian Simulik, City of Ottawa Examination, TRN00000184, p. 181, ln. 3-5; John Traianopoulos, City of Ottawa Examination, TRN00000185, p. 57, ln. 11-17.

[67] John Jensen, RTG Parties' Examination, TRN00000178, p. 70, ln. 16-27; Marian Simulik, Commission Examination, TRN00000184, p. 112, ln. 7-23.

35. **Bundling** the design, construction, and maintenance work allowed the City to benefit from retaining entities with experience managing a project of OLRT1's scale, and provided the arrangement where one project company is accountable for on-time and on-budget completion of the project.[68]

36. Where one project company is responsible for construction, financing, and maintenance, there is a long-term incentive to ensure optimal performance of each phase of the contract for its duration. [69] By comparison, for example, the engineering team involved in the design-build phases of a traditional procurement has no "skin in the game", and therefore less incentive to engage in long-term thinking.[70] The intent of the DBFM structure, properly implemented, is to provide a safe, consistent, and high-quality asset for the lifecycle of the contract, in this case for 30 years.[71]

37. **Risk transfer** is a core feature of the DBFM model. A cornerstone of the P3/AFP approach is the on-time delivery of the project, which includes the transfer of all activities associated with the construction schedule to the party best able to manage the risk, in this case the private sector project company.[72]

38. The model effectively transfers this risk by placing all financial consequences of the risk materializing on the private sector. If the project company does not effectively manage its construction program resulting in a delay to the completion date, the contractor absorbs the associated costs that arise from the delay, ultimately potentially eroding profit. The project company is well placed to bear this risk, as it bids on projects on a portfolio basis, and is consequently able to defray the risk of any particular project across its multiple projects. The project company bids with the expectation that some projects in their portfolio may require additional cash injections during implementation, and the portfolio approach reduces the financial pressure on the project company caused by any particular project.[73]

39. P3/AFP contracts like DBFMs enforce this risk through the use of a guaranteed price, without substantial payment until the asset has been substantially completed. In contrast, in a

---

[68] Nancy Schepers, Commission Examination, TRN00000185, p. 108, ln. 13-17.

[69] John Traianopoulos, City of Ottawa Examination, TRN00000185, pp. 61-62, ln. 27-11; Riccardo Cosentino, City of Ottawa Examination, TRN00000178, pp. 157, ln. 7-10.

[70] Dr. Siemiatycki, OLRPI Expert Panel on Public-Private Partnerships, p. 21, ln. 4-17. Robert Pattison, Commission Examination, TRN00000184, p. 13, ln. 4-13.

[71] Robert Pattison, Commission Examination, TRN00000184, p. 18, ln. 13-20.

[72] John Traianopoulos, City of Ottawa Examination, TRN00000185, p. 55, ln. 12-20; Dr. Siemiatycki, OLRPI Expert Panel on Public-Private Partnerships, p. 32, ln. 13-19.

[73] Rupert Holloway, Commission Examination, TRN00000189, p. 128-129, ln. 18-7.

traditional or Alliance delivery model, when project risks come to fruition, including cost overruns, the owner, and therefore the public, would share in those risks and expenses.[74]

40. Risk transfer was important to the City because of the tunneling activity required for the Project. In this case, after considering the geotechnical risk ladder and costing the risk into their bids, all three proponents elected to take on 100% of the geotechnical risk in the project.[75] Moreover, the Project Agreement included robust insurance requirements covering for transferred risk.[76] The model therefore allowed the City to shield the taxpayer from the costs of a risk that the Proponent private companies were better positioned than the City to manage and to mitigate. RTG was a highly sophisticated consortium of companies, with experience on megaprojects and the capacity to mobilize resources to move the Project forward if risks materialized.[77]

41. Indeed, when the geotechnical risk materialized in the sinkhole event in 2016, the RTG parties were better positioned to manage the risk than the City would have been under a traditional procurement model. As Ms. Schepers testified:

> MR. PETER WARDLE: And I know you weren't around at the time, which you weren't Deputy City Manager at the time of the second sink hole, but do you have a view on what likely would have happened had the project been procured under a traditional model, once the sink hole took place, the second sink hole?
>
> MS. NANCY SCHEPERS: Well, it certainly – I think what would have happened is the project would have come to a stop; so you've got all your contractors, everybody there pointing fingers to say, "What's -- who's the cause?" and try to resolve that before work is done.
>
> Sometimes in those situations, the owner will direct that the work proceed under a cost plus basis so that you can continue to see the work and understand that this is all going to court, there's going to be claims, and this is all going to have to be resolved after the fact.
>
> So it would have been, in my experience, a significant challenge for the City of Ottawa to work with that.[78]

---

[74] Dr. Siemiatycki, OLRPI Expert Panel on Public-Private Partnerships, pp. 37-38, ln. 21-2.

[75] John Traianopoulos, City of Ottawa Examination, TRN00000185, p. 57, ln. 8-10.

[76] Robert Pattison, City of Ottawa Examination, TRN00000184, pp. 59-60, ln. 13-4; Project Agreement, Schedule 25 Insurance and Performance Security Requirements, COM0000275.

[77] Riccardo Cosentino, Commission Examination, TRN00000178, p. 128, ln. 25-27; Riccardo Cosentino, City of Ottawa Examination, TRN00000178, p. 158, ln. 13-20; Steve Cripps, Formal Interview, TRN00000007, pp. 91-92, ln. 13-24.

[78] Nancy Schepers, City of Ottawa Examination, TRN00000185, p. 188, ln. 13-26.

42. **Price certainty** is another benefit of the DBFM model.[79] The bundling of services and incorporation of risk into the bid price provided the City with a clear price from the beginning.

43. In a traditional procurement, the owner funds and is responsible for additional costs and delays as they arise.[80] The DBFM model instead requires the proponent to consider "enough float" to mitigate the risk and price their bid accordingly.[81] The owner pays for performance of the agreed terms.[82]

44. Price certainty was important to the City in this case, as Federal and Provincial funding contributions had been capped, and the City did not have an unlimited budget for this project.[83]

45. **Third-party lender financing** and oversight in the DBFM model ensures that proponents' bids are financially feasible. In agreeing to finance a project, proponents' lenders function as a third party check on the financial viability of the bid.[84] The proponents' lenders conduct additional review of the bid, relying on their own technical advisors and rating agencies to test the proposed financing, including the possible impact of common issues, like delays.[85]

46. In the event of a default by RTG, the Lenders provide continued oversight under the Lenders' Direct Agreement, a schedule to the Project Agreement.[86] Additionally:

> …[P]rivate financing could result in more realistic risk assessment, a possible reduction of risk and a shift in risk from ordinary citizens to groups better able to protect themselves against risk. The pressure on performance would be higher as lenders and possible shareholders and stock market analysts monitor the project… [The participation of risk capital] means that government can more effectively play the role it should be playing, namely as the ordinary citizen's guarantor for ensuring concerns are met about safety, environment, economics and distribution of risk.[87]

---

[79] John Traianopoulos, City of Ottawa Examination, TRN00000185, p. 57, ln. 11-17.

[80] See, for example, the City's experience with the airport parkway pedestrian bridge project: Nancy Schepers, City of Ottawa Examination, TRN00000185, pp. 187-188, ln. 16-6.

[81] Antonio Estrada, Infrastructure Ontario Examination, TRN00000189, p. 78, ln. 11-20.

[82] Remo Bucci, Commission Examination, TRN00000190, pp. 8-9, ln. 25-10.

[83] John Traianopoulos, City of Ottawa Examination, TRN00000185, p. 57, ln. 11-26.

[84] John Traianopoulos, City of Ottawa Examination, TRN00000185, p. 60, ln. 7-15.

[85] See, for example, John Traianopoulos, Formal Interview, TRN00000114, pp. 95-97, ln. 21-16.

[86] Project Agreement, Schedule 4 Lenders' Direct Agreement, COW0000284.

[87] Flyvbjerg, B. and Budzier, A. (2018). "Report for the Commission of Inquiry Respecting the Muskrat Falls Project", pp. 32-33. See also: Chantarelli, C. and Flyvbjerg, B. (2015). "Decision-Making and Major Transport Infrastructure Projects: The Role of Project Ownership.", Handbook on Transport and Development, Cheltenham: Edward Elgar, p. 391.

47. For a megaproject of this size and complexity, IO's view was, and remains,[88] that a P3/AFP model was appropriate and in the public interest.[89] The DBFM contract model, in particular, was and is a tested model with a successful track record in Canada and Ontario.[90] It is being used today for provincial LRT projects, including the Finch LRT and the Eglinton Crosstown. The Hurontario LRT and the Ontario Line are both DBFOM projects.[91] IO continues to use a similar contract structure for the delivery of light rail and transit projects across the province.[92]

48. In sum, the evidence before the Commission demonstrates that the City had the benefit of thorough expert review of the available contracting models, and selected an option that was aligned with its priorities for the Project. Each model has strengths and weaknesses. There is no evidence before the Commission that any other model offered a better solution for the procurement and delivery of OLRT1.

B. OLRT1 Procurement was conducted in accordance with industry best practices

49. In its advisory role, IO brought expertise and experience managing robust procurements and complex project contracts to OLRT1 procurement. As the Commission has heard, OLRT1's RFP process was executed successfully in accordance with procurement best practices.

50. Throughout the procurement, IO worked closely with the City and its other consultants to develop and implement the RFP process and draft the Project Agreement.[93] IO retained BMO to provide project finance expertise from the lender perspective.[94] The City retained CTP as technical subject matter experts, and Deloitte and Boxfish to advise on various aspects of the procurement and development of the Project Agreement.[95]

---

[88] John Traianopoulos, Infrastructure Ontario Examination, TRN00000185, p. 96, ln. 5-10.

[89] Remo Bucci, Commission Examination, TRN00000190, pp. 8-9, ln. 25-10; John Traianopoulos, Infrastructure Ontario Examination, TRN00000185, p. 96, ln. 5-16.

[90] John Traianopoulos, Commission Interview, TRN00000185, p. 31, ln. 16-17, 23-25. See also: Track record report - 2013: Examples in procurement / construction or complete by 2011: Bridgepoint, CAMH (phase 1B), Durham Region Courthouse, Forensic Services and Coroner's Complex. GO RMF was started a bit later in 2012.

[91] John Traianopoulos, Infrastructure Ontario Examination, TRN00000185, p. 96, ln 11-16.

[92] Robert Pattison, Commission Examination, TRN00000184, p. 55, ln. 15-25.

[93] See OLRT Project Charter, Exhibit 001, COM0000235; Project Management Plan dated 30 March 2012, Exhibit 002, IFO0004372.

[94] John Traianopoulos, Infrastructure Ontario Examination, TRN00000185, p. 95, ln. 9-25.

[95] John Jensen, Commission Examination, TRN00000178, pp. 14-15, ln. 10-10.

51. The participants to the Inquiry agree that this process was conducted according to best practices.[96] RTG is a highly experienced private sector proponent. RTG's Bid Director testified that he would have conducted the process in the same fashion if he were in IO's place.[97]

52. Both the City and the RTG parties agree the length of the RFP open period was appropriate and consistent with similar projects.[98] The City and the proponents engaged in ongoing discussions throughout RFP open period, including by way of requests for information ("**RFI**"), commercially confidential meetings ("**CCM**"), and design presentation meetings ("**DPM**").[99] Proponents were invited to submit White Papers—commercially confidential reports on various aspects of the RFP—including on the milestone payments structure and the Project Specific Output Specifications.[100]

53. There was ample opportunity for the proponents – themselves highly qualified and experienced leading infrastructure experts – to provide input on OLRT1; no one has suggested otherwise. The proponents provided extensive input, which was carefully considered and incorporated into the Project Agreement where appropriate.[101] The goal of the RFP process was to ensure that all of the proponents' concerns about technical issues, design, and specifications were considered.[102]

54. Mr. Cosentino testified before the Commission that this extensive dialogue allowed for the development of proposals and contractual documentation according with best practices.[103] The City agrees that the process improved the design of OLRT1 for the public's benefit and

---

[96] OLRPI, Overview Report - Request for Proposals Process and Requirements from the City of Ottawa for OLRT Project- Stage 1 [**OR RFP Process**], p. 3 ¶ 5; Marian Simulik, City of Ottawa Examination, TRN00000184, p. 177, ln. 9-20; Remo Bucci, City of Ottawa Examination, TRN00000190, pp. 57-58, ln. 22-2; Riccardo Cosentino, Commission Examination, TRN00000178, p. 105, ln. 12-21; Robert Pattison, City of Ottawa Examination, TRN00000184, pp. 55-56, ln. 26-9, p. 66, ln. 6-17; Robert Pattison, Formal Interview, TRN00000107, p. 56, ln. 15-24, p. 68, ln. 3-17; John Traianopoulos, Formal Interview, TRN00000114, p. 71, ln. 3-5; Stan McGillis, Formal Interview, TRN00000021, p. 49, ln. 3-24; Monica Sechiari, Formal Interview, TRN00000119, pp. 83-84, ln. 22-9.

[97] Riccardo Cosentino, Commission Examination, TRN00000178, p. 105, ln. 12-21.

[98] John Jensen, Commission Examination, TRN00000178, p. 52, ln. 26-28; Manuel Rivaya, City of Ottawa Examination, TRN00000186, p. 166, ln. 2-8; Riccardo Cosentino, Commission Examination, TRN00000178, pp. 105-106, ln. 26-4. For a timeline of the procurement, see OR RFP Process, p. 2. ¶ 2.

[99] OR, RFP Process, p. 2, ¶ 3-4; John Jensen, City of Ottawa Examination, TRN00000178, pp. 85-86, ln. 28-8; John Traianopoulos, City of Ottawa Examination, TRN00000185, p. 56, ln. 5-8, p. 66, ln. 7-12; Ricardo Cosentino, City of Ottawa Examination, TRN00000178, p. 157, ln. 11-17; Nancy Schepers, Commission Examination, TRN00000185, p. 140, ln. 12-22.

[100] OR, RFP Process, p. 2, ¶ 4; Robert Pattison, City of Ottawa Examination, TRN00000184, pp. 65-66, ln. 11-2;

[101] Robert Pattison, City of Ottawa Examination, TRN00000184, p. 66, ln. 11-17; Riccardo Cosentino, Commission and City of Ottawa Examinations, TRN00000178, p. 117, ln. 14-28; Riccardo Cosentino, City of Ottawa Examination, TRN00000178 p. 156, ln. 11-18.

[102] Robert Pattison, City of Ottawa Examination, TRN00000184, p. 66, ln. 6-10.

[103] Riccardo Cosentino, Commission Examination, TRN00000178, p. 118, ln. 12-15.

provided proponents the opportunity to form a comprehensive understanding of the requirements of the Project Agreement.[104]

55. All consultation was conducted with a high regard for fairness of the process, ensuring that no bias was shown in favour of one proponent over others. All interactions with the proponents were monitored by an Independent Fairness Commissioner, appointed by the City, who certified that the final selection of the preferred Proponent was fair.[105] The Fairness Commissioner attended the consensus meeting where the bids were scored.[106] RTG also agrees that the procurement process was fair.[107]

i. IO lead the procurement within the parameters set by the City

56. The City set the terms of the Project, and IO brought its experience, template project agreements and procurement processes, and reputation with market players to bring the City's vision to fruition.[108] OLRT1's budget provides a useful illustration of this dynamic.

57. IO provided financial analysis to assist the City in developing the business case for alternative delivery models, but it did not diligence the budget or set the affordability criteria.[109] Rather, IO led a procurement process that tested the budget against the market.[110] Leading up to the release of the RFQ to market, Deloitte conducted market soundings to ensure the City's proposed budget could be scrutinized by the marketplace.[111]

58. With the OLRT1 budget in the market, multiple sophisticated proponent teams put forward proposals meeting the affordability criteria, providing strong indication that the budget was reasonable:

> MS. KATE McGRANN: And when you think you about what you said earlier about IO's experience being that proponents generally came in materially under budget, and that being a good indicator that you got the numbers right, did you

---

[104] Marian Simulik, City of Ottawa Examination, TRN00000184, p. 176, ln. 8-19.

[105] OR RFP Process, p. 5, ¶ 13.

[106] John Traianopoulos, Commission Examination, TRN00000185, p. 29, ln. 6-11.

[107] Manuel Rivaya, City of Ottawa Examination, TRN00000186, p. 166, ln. 6-8; Riccardo Cosentino, Commission Examination, TRN00000178, p. 105, ln. 22-25.

[108] Nancy Schepers, Commission Examination, TRN00000185, p. 125, ln. 20-23.

[109] Rob Pattison, Commission Examination, TRN00000184, p. 37, ln. 14-15; note that OLRT1 did not have an "affordability cap", the RFP gave preference to bids below the criteria, but, if all proponents were unable to meet the proposed budget, the City could still consider bids over this threshold – see Rob Pattison, City of Ottawa Examination, TRN00000184, p. 64, ln. 15-23.

[110] Rob Pattison, City of Ottawa Examination, TRN00000184, p. 64, ln. 2-14; John Traianopoulos, Commission Examination, TRN00000185, p. 26, ln. 12-14.

[111] Remo Bucci, City of Ottawa Examination, TRN00000190, p. 56, ln. 23-26.

> see the results in this particular process as raising any concerns that the budget may not be sufficient for the project that the City was hoping to accomplish?
>
> MR. JOHN TRAIANOPOULOS: Not really, no. We took a lot of confidence that, you know, these sophisticated bidders, three of them multiple design build partners, multiple lenders, advisors, lender's technical advisors were all looking at the numbers and scrutinizing them. So, I would say, even if it was a dollar under, we would still take comfort that those bidders took the time and effort to price their bid with proper governance, and submitted to us that they can do the project for that cost.[112]

59. IO assisted the City in developing "off ramp" mechanisms to ensure the Project could proceed if the proponents were not able to the meet the City's budget.[113] These mechanisms allowed Project Specific Output Specifications to be de-scoped to reduce costs. The City also had the option to return to Council to seek approval for an adjusted budget and proceed with a higher figure.[114]

60. The consensus among the participants in the Inquiry is that IO's guidance was valuable to the OLRT1 procurement. Ms. Simulik agreed that IO was "instrumental in the structuring of the financial and commercial relationship" between the parties.[115] City consultant Brian Guest likewise agreed that IO brought expertise that other advisors to the City lacked.[116] In their Opening Statement, the RTG parties also referred to the benefits of IO's involvement on OLRT1.[117]

ii. RTG was selected with the highest scoring bid

61. RTG was awarded OLRT1 contract based on the highest scoring bid, both technically and financially. In other words, RTG proposed the best technical solution for the best price.[118]

62. Proposals were scored on technical and financial grounds, with 500 points available in each category for a combined maximum of 1000.[119] Evaluation of the technical submission included, but was not limited to, project management planning, project sustainability, design

---

[112] John Traianopoulos, Commission Examination, TRN00000185, pp. 29-30, ln. 23-5; See also: Rob Pattison, City of Ottawa Examination, TRN00000184, p. 64, ln. 2-14; Marian Simulik, City of Ottawa Examination, TRN00000184, p. 178, ln. 2-9; Remo Bucci, City of Ottawa Examination, TRN00000190, pp. 56-57, ln. 26-6.

[113] Rob Pattison, City of Ottawa Examination, TRN00000184, p. 64, ln. 15-23.

[114] Marian Simulik, City of Ottawa Examination, TRN00000184, p. 178, ln. 13-26; Rob Pattison, City of Ottawa Examination, TRN00000184, pp. 64-65, ln. 24-4.

[115] Marian Simulik, Commission Examination, TRN00000184, pp. 130-131, ln. 28-6.

[116] Brian Guest, Commission Examination, TRN00000200, p. 124, ln. 1-11.

[117] Opening Statement of the RTG Parties, p. 17, fn. 13.

[118] John Traianopoulos, Infrastructure Ontario Examination, TRN00000185, p. 87, ln. 10-14.

[119] OR RFP Process, p. 10, ¶ 29.

plans (e.g., of the OLRT1 tunnels, systems and vehicles, stations), and energy efficiency.[120] Evaluation of the financial submissions concerned analysis of the financial model, net-present-value calculation provided by the Proponent, and the achievability and stability of the proposed financing plan.[121]

63. The financial and technical evaluation teams were siloed to ensure that the bids were independently assessed and that no favourable result on one side would improperly influence the other.[122] In practice, this meant that the affordability of a proposal could not impact its technical evaluation, nor vice versa.[123]

64. RTG received the highest score from both evaluation teams:[124]

Proponent	Technical Weighted Scores (out of 500)	Financial Weighted Score (out of 500)	Overall	Rank
Rideau Transit Group	399.15	492.50	891.65	1
Ottawa Transit Partners	394.88	231.72	626.60	2
Rideau Transit Partners	391.40	(95.42)	295.98	3

65. Evaluators performed broad compliance checks to ensure that the proposal met the parameters and requirements set out in the RFP.[125] No material issues of non-compliance were identified with RTG's proposal.[126]

iii. RTG was experienced and performed significant due diligence

66. A multi-stage process of competitive proponent selection and screening ensured that the Project benefited from engagement with the most sophisticated contractors.[127] The successful consortium, RTG, is composed of principal partners ACS Infrastructure Canada Inc. ("**ACS**"), Dragados Canada, Inc. ("**Dragados**"), EllisDon and SNC-Lavalin.

[120] OR RFP Process, p. 10, ¶ 29.
[121] OR RFP Process, p. 10, ¶ 29.
[122] OR RFP Process, p. 10, ¶ 29; John Traianopoulos, Commission Examination, TRN00000185, pp. 28-29, ln. 23-5.
[123] John Traianopoulos, Commission Examination, TRN00000185, p. 28-29, ln. 27-5.
[124] Summary of Scores, Exhibit 035, IFO0030870, p. 2.
[125] John Traianopoulos, City of Ottawa Examination, TRN00000185, p. 64, ln. 12-22.
[126] John Traianopoulos, City of Ottawa Examination, TRN00000185, p. 64, ln. 23-27.
[127] Robert Pattison, STV Examination, TRN00000184, pp. 79-80, ln. 23-11.

67. Individually and collectively, ACS, Dragados, EllisDon and SNC-Lavalin were "frequent flyers" in the world of complex public infrastructure projects.[128] They are sophisticated, financially astute, "industry-leading experts from across the globe" that came together to make OLRT1 "one of the safest, most innovative, and technologically advanced light rail systems in the world."[129]

68. IO followed best practices by starting the contract drafting process from a project agreement based on market-tested commercial terms and frameworks.[130] This allowed the terms of the contract to be well understood by all parties. As Mr. Pattison noted in his examination by Counsel for the RTG Parties:

> MR. ROBERT PATTISON:…One of the things that we endeavor to do on these P3 projects, and one of the reasons that we take so long in the in-market period, and one of the reasons that we start with a template with a well-understood risk allocation and adapt it for that asset class is because, in my view and in my experience, and I think this reflects the IO view, the best way to ensure that people properly plan and provision for the unexpected is with a clear allocation of responsibility. And so, you know, I know that if this happens, I am going to have some budget over here…[131]

69. According to RTG's Bid Director, RTG had all the legal, technical, and financial advisors necessary to perform a comprehensive and realistic bid assessment.[132] RTG knew to perform due diligence with regard to schedule, including specific deadlines such as Revenue Service Availability,[133] cost,[134] and design.[135]

---

[128] Robert Pattison, Commission Examination, TRN00000184, p. 23, ln. 3-7; Robert Pattison, City of Ottawa Examination, TRN00000184, p. 57, ln. 16-28.

[129] Opening Statement of the RTG Parties, p. 9, ¶ 23; Robert Pattison, City of Ottawa Examination, TRN00000184, p. 58, ln. 1-5; John Traianopoulos, City of Ottawa Examination, TRN00000185, pp. 66-67, ln. 28-2; Manuel Rivaya, City of Ottawa Examination, TRN00000186, p. 165, ln. 7-14; Riccardo Cosentino, City of Ottawa Examination, TRN00000178, p. 153, ln. 7-10, p. 158, ln. 2-8; Peter Lauch, City of Ottawa Examination, TRN00000202, p. 68, ln. 9-19.

[130] Robert Pattison, RTG Parties' Examination, TRN00000184, p. 71, ln. 18-26; Nancy Schepers, Formal Interview, TRN00000084, pp. 48-49; Riccardo Cosentino, Commission Examination, TRN00000178, p. 131, ln. 1-4.

[131] Robert Pattison, RTG Parties' Examination, TRN00000184, p. 71, ln. 18-26.

[132] Riccardo Cosentino, City of Ottawa Examination, TRN00000178, p. 153, ln. 2-14; Antonio Estrada, Infrastructure Ontario Examination, TRN00000189, pp. 76-77, ln. 27-11.

[133] Riccardo Cosentino, Commission Examination, TRN00000178, pp. 108-109, ln. 26-5; Riccardo Cosentino, City of Ottawa, TRN00000178, p. 153, ln. 18-22; Nancy Schepers, Commission Examination, TRN00000185, p. 140, ln. 12-20.

[134] Riccardo Cosentino, Commission Examination, TRN00000178, p. 113, ln. 1-16

[135] Riccardo Cosentino, City of Ottawa Examination, TRN00000178, p. 156, ln. 23-28;

70. Former RTG CEO Antonio Estrada identified common risks on all transit systems that RTG knew to consider, evaluate, and factor into their understanding of OLRT1[136], including delay, tunneling (i.e., geotechnical risk), vehicle supply, and systems integration.[137] RTG used all the tools available in the industry to understand these risks, including simulation based modelling.[138] In Mr. Estrada's view, doing the bidding "job properly" involved accounting for these common issues and building "float" into the proposal to mitigate their risks, including within the bid price.[139]

71. In relation to geotechnical risk, IO conducted an extensive consultation process. This included market-sounding and review by consultants[140] and engagement with the proponents,[141] including the introduction of the ability for proponents to select a level of risk transfer in their bids.[142] A "huge amount of attention [was] paid to [geotechnical risk] long before the contract was ever signed."[143] RTG continues to agree that it was best positioned to take on the risk associated with the "means and methods" of tunneling and excavation.[144]

72. Additional scrutiny was provided by RTG's Lenders, who brought their own independent technical and financial advisors to bear on the entire contractual framework.[145] Lenders, who are outsiders to the deal, perform important external scrutiny and diligence to ensure that a proposal is financially viable and that the team has the expertise to actually deliver the Project.[146]

---

[136] Antonio Estrada, Infrastructure Ontario Examination, TRN00000189, pp. 77-78, ln. 16-19; See also: Rupert Holloway, Commission Examination, TRN00000189, p. 128, ln. 21-26.

[137] Antonio Estrada, Commission Examination, TRN00000189, p. 6, ln. 18-28.

[138] Riccardo Cosentino, City of Ottawa Examination, TRN00000178, pp. 153-154, ln. 20-1.

[139] Antonio Estrada, Infrastructure Ontario Examination, TRN00000189, p. 78, ln. 11-20.

[140] John Traianopoulous, Formal Interview, TRN00000114, p. 81, ln. 3-14, p. 83, ln. 3-18.

[141] See, e.g., Robert Pattison, Formal Interview, TRN00000107, pp. 21-22, ln. 17-6.

[142] John Traianopoulous, City of Ottawa Examination, TRN00000185, pp. 55-56, ln. 25-17.

[143] Robert Pattison, Infrastructure Ontario Examination, TRN00000184, p. 83, ln. 4-19; also see Nancy Schepers, Formal Interview, TRN00000084, pp. 54-56.

[144] Riccardo Cosentino, Commission Examination, TRN00000178, p. 128, ln. 25-27; Riccardo Cosentino, City of Ottawa Examination, TRN00000178, p. 158, ln. 13-20.

[145] Robert Pattison, Commission Examination, TRN00000184, p. 15, ln. 1-4; Nancy Schepers, Commission Examination, TRN00000185, p. 138, ln. 8-18; Remo Bucci, Formal Interview, TRN00000134, p. 94, ln. 15-24; Remo Bucci, RTG Parties' Examination, TRN00000190, pp. 63-64, ln. 21-4.

[146] Dr. Siemiatycki, OLRPI Expert Panel on Public-Private Partnerships, p. 25, ln. 1-20; John Traianopoulos, City of Ottawa Examination, TRN00000185, p. 60, ln. 1-6.

73. The significant due diligence of the proponents, advisors to the proponents, Lenders and advisors to the Lenders, provided assurance to the City and its advisors that the terms of OLRT1 were realistic and attainable.[147]

A. The Project Agreement was tailored to OLRT1

74. At the time of the procurement of OLRT1, the majority of IO's projects consisted of major civil and social infrastructure, such as hospitals, jails, and courthouses. Before the procurement of OLRT1, IO had executed a procurement for a rail project, and had drafted project agreements for other linear infrastructure, such as highways.[148] OLRT1 was IO's first LRT project; and it drew on its experience and the input of many others to ensure the Project Agreement met the needs of the Project.

75. IO stands by the contracting model implemented on OLRT1. IO continues to implement the same contract structure on many LRTs across the province of Ontario.[149] Currently, by dollar value, the majority of IO's P3 portfolio consists of rail projects.[150]

76. The Project Agreement is modelled on aspects of IO's precedent DBFM and other P3/AFP project agreement templates. These precedent agreements were adapted to the City's requirements for OLRT1, including having regard to the Project's scope, design, technical requirements, financing requirements, preferred risk allocation, and budget.[151]

77. The main body and schedules of IO's project agreements are thousands of pages long, and canvas an exhaustive set of technical, financial, and/or legal issues that may arise on a construction project.[152] Before OLRT1, IO's templates had been implemented on complex, major infrastructure project, including linear projects.[153] Many of the terms in the template project agreements address common issues that may arise on any construction project, regardless of the specific asset being built.[154]

---

[147] John Traianopoulos, Commission Examination, TRN00000185, pp. 29-30, ln. 28-5, John Traianopoulos, City of Ottawa Examination, TRN00000185, p. 59, lines 15-21; Riccardo Cosentino, City of Ottawa Examination, TRN00000178, p. 153, ln. 2-22.

[148] Robert Pattison, Formal Interview, TRN00000107, p. 69, ln. 16-25.

[149] Robert Pattison, City of Ottawa Examination, TRN00000184, p. 55, ln. 18-25.

[150] Robert Pattison, Commission Examination, TRN00000184, p. 6, ln. 7-9.

[151] OR Contracts, p. 3, ¶ 8.

[152] Robert Pattison, City Examination, TRN00000184, p. 60, ln. 13-23; OLRT - Project Agreement, Executed Version [**Project Agreement**], Exhibit 079, IFO0000375; also see OR Contracts, Appendix B, p. 17.

[153] Robert Pattison, Formal Interview, TRN00000107, pp. 69-70, ln. 13-12.

[154] Robert Pattison, City of Ottawa Examination, TRN00000184, p. 55, ln. 18-25.

78. In every project, IO adapts its project agreements to the specific project.[155] This approach is evident from the Project Agreement itself; comparing the Project Agreement to any of IO's precedent template project agreements demonstrates substantial project specific calibrations.[156]

79. IO worked closely with the City and its consultants to develop a Project Agreement that reflected the particular scope, technical requirements, and financing requirements of OLRT1, as well as the City's goals for risk allocation and budget.[157] A short list of examples includes that IO:

(a) integrated into the Project Agreement contract schedules developed for a previous attempt by the City to procure a rail transit system;[158]

(b) worked with CTP as it developed the technical requirements of the Project Agreement, including facilitating proponents providing feedback on Project Specific Output Specifications;[159]

(c) worked closely with CTP to develop tailored terms in the Project Agreement, such as the proposed milestones;[160] and

(d) worked with the City,[161] Deloitte and Boxfish[162] to develop financing requirements that were calibrated to the City's and the Project's needs.

80. IO also tailored the Project Agreement to the particular interests of the proponents. IO consulted with all the proponents during the in-market period,[163] and conducted additional consultations with RTG during the contracting and implementation phase of OLRT1.[164]

81. Where appropriate, IO and the City used this input to amend the Project Agreement. As Riccardo Cosentino, RTG Bid Director and former RTG CEO, noted, the proponents "provided a

---

[155] Robert Pattison, Commission Examination, TRN00000184, p. 10, ln. 19-20; Nancy Schepers, Formal Interview, TRN00000084, pp. 54-57; Marian Simulik, Commission Interview, TRN00000184, p. 130, ln. 4-8.

[156] Robert Pattison, Infrastructure Ontario Examination, TRN00000184, p. 94, ln. 9-23; Riccardo Cosentino, Commission Examination, TRN00000178, pp. 130-131, ln. 25-4.

[157] Robert Pattison Commission Examination, TRN00000184, p. 39, ln. 17-19; John Traianopoulos, City of Ottawa Examination, TRN00000185, p. 55, ln. 14-24; OR Contracts, p. 3, ¶ 8.

[158] Kent Kirkpatrick, Formal Interview, TRN00000163, p. 46-47.

[159] Robert Pattison, Formal Interview, TRN00000107, pp. 107-108, ln. 8-6, pp. 109-110, ln. 22-10; OR RFP Process, p. 2, ¶ 3-4; Nancy Schepers, Formal Interview, TRN00000084, p. 69, ln. 13-24.

[160] Robert Pattison, Commission Examination, TRN00000184, p. 46, ln. 7-10; Remo Bucci, City of Ottawa Examination, TRN00000190, pp. 58-59, ln. 3-1.

[161] Marian Simulik, Formal Interview, TRN00000042, pp. 11, 67; Mona Monkman, Formal Interview, TRN00000149, p. 32.

[162] John Traianopoulos, Infrastructure Ontario Examination, TRN00000185, pp. 90-91.

[163] Riccardo Cosentino, Commission Examination, TRN00000178, pp. 130-131, ln. 27-21; Riccardo Cosentino , Formal Interview, TRN00000193, pp. 16-19, ln. 21-15.

[164] See, e.g., John Jensen, Formal Interview, TRN00000115, pp. 100-101, ln. 13-11; OLRPI, Overview Report – Independent Certifier [**OR IC**], ¶ 23; Antonio Estrada, Commission Examination, TRN00000189, p. 16, ln. 4-22.

significant amount of commentary to the project agreement."[165] The proponents were consortiums of global, leading construction, engineering, and tunneling companies with decades of experience executing P3 projects, particularly in constructing and maintaining LRTs.[166] In providing their input, these proponents leveraged their significant expertise in implementing P3 projects and building LRTs.[167]

82. The Project Agreement was the end product of a multi-year consultation and drafting process, and was carefully developed in consultation with subject matter experts and key stakeholders. This process generated a Project Agreement that was tailored to the specific context and requirements of OLRT1.

i. The Project Agreement built in mechanisms to ensure performance, reliability, and safety

83. The Project Agreement contained commissioning and certification terms that required satisfaction before OLRT1 system could be handed over to the City for operation. As Mr. Holloway of OLRTC noted:

> MR: RUPERT HOLLOWAY: I suppose the end milestone, which is the critical one of completion, you can't fake it; you've got to get the assurance argument in the way that it needs to be done; right?...[168]

84. The Project Agreement's commissioning and certification regime meant that RTG[169] and OLRTC,[170] could not reach the final major construction milestone without completing all the work required to advance its construction to completion (the "**Critical Path**") in a complete and safe manner. RTG's and OLRTC's work had to be substantially complete in accordance with Project Specific Output Specifications, construction requirements, maintenance, and rehabilitation

---

[165] Riccardo Cosentino, Commission Examination, TRN00000178, pp. 130-131, ln. 27-21; also see Robert Pattison, Infrastructure Ontario Examination, TRN00000184, pp. 84-85, ln. 27-11.

[166] Opening Statement of the RTG Parties, p. 9, ¶¶ 23-24; John Jensen, Commission Examination, TRN00000178, p. 54, ln. 25-28.

[167] Riccardo Cosentino , Commission Examination, TRN00000178, pp. 130-131, ln. 27-21.

[168] Rupert Holloway, Commission, Examination, TRN00000189, pp. 122-123, ln. 23-11.

[169] Nancy Schepers, Infrastructure Ontario Examination, TRN00000185, p. 164, ln. 8-28; Nancy Schepers, Commission Re-Examination, TRN00000185, p. 195, ln. 3-7; Manuel Rivaya, Commission Examination, TRN00000186, pp. 123-124, ln. 28-4; Project Agreement, Schedule 1 Definitions and Interpretation, Exhibit 039, COM0000641, p. 51, s. 1.559; Project Agreement, Exhibit 079, IFO0000375, p. 84, s. 26.

[170] Ottawa Light Rail Transit Project Construction Contract, ALS0006570; also see OR Contracts, p. 4, ¶ 13; Project Agreement, Exhibit 079, IFO0000375, pp. 23-24, s. 9.3.

requirements and various other contractual terms, all of which had to be certified by independent third party experts, the Independent Certifier and the Safety Auditor.[171]

85. Neither the Independent Certifier nor the Safety Auditor could certify completion unless RTG could demonstrate that its construction was substantially complete, in accordance with the terms of the Project Agreement. In her testimony, the Independent Certifier was clear that RTG's delay in achieving a milestone was expressly not a factor in her decision whether to certify construction work as complete and in accordance with the Project Agreement.[172]

86. In combination with the right of the Lenders to step-in to fulfill RTG's performance obligations,[173] the commissioning and certification regime provided assurance that the system handed over to the City met the requirements of the Project Agreement.

V. Comment on the Expert Panel on Public-Private Partnerships

A. The P3 Model did not cause the breakdowns and derailments of OLRT1

87. The Expert Panel on Public-Private Partnerships held on July 28, 2022 (the "**Expert Panel**") did not provide an opinion or draw any conclusions regarding OLRT1.[174] In relation to the discussion of megaprojects and P3s generally, none of the experts' views suggest that OLRT1 breakdowns and derailments were related to City's choice of P3 model or the procurement.

88. To the contrary, when reviewed in the context of the Expert Panel discussion, the evidence before the Commission is that OLRT1 procurement was within the range of cost and schedule outcomes consistent with similar projects, and met industry standards from the point of view of the delivery model adopted. The experts recommended several practices, described below, that IO applies in its procurement and project delivery approach, and that were in fact adopted in OLRT1 procurement and in the Project Agreement.

89. **Central procurement agency expertise.** The Expert Panel discussion supports the rationale for engaging IO and leveraging its expertise in delivering megaprojects like the

---

[171] Nancy Schepers, Infrastructure Ontario Examination, TRN00000185, pp. 164-165, ln. 19-22; Project Agreement, Exhibit 079, IFO0000375, p. 163, s. 52; Project Agreement, Schedule 15-3 Maintenance and Rehabilitation Requirements, Exhibit 170, IFO0000878.

[172] Monica Sechiari, Formal Interview, TRN00000119, pp. 77-78, ln. 16-8.

[173] Project Agreement, Schedule 4 Lenders' Direct Agreement, Exhibit 038, IFO0000907, pp. 11-12, s. 8; Nancy Schepers, Infrastructure Ontario Examination, TRN00000185, p. 160, ln. 3-10, pp. 161-162, ln. 10-10, p. 163, ln. 1-4.

[174] OLRPI, Terms of Reference for Expert Panel on Public-Private Partnerships, July 28, 2022, #5-6.

OLRT1. Professor Flyvbjerg proposed that megaprojects should be led by world class project leaders with specialized expertise and training;[175] Professor Siemiatycki concluded that "[e]xpertise of the contracting authorities is critical – governments must build up competency to structure, manage, monitor, and enforce contracts and relationships, regardless of the procurement model."[176] In Ontario, IO fulfills this role in the procurement and delivery of public projects in the province. IO's expertise is supplemented by ethical and fairness requirements including the involvement of a Fairness Monitor in every IO procurement and project.[177] As noted above, there is consensus between the City, its consultants, and the RTG parties in this Inquiry that IO's guidance was "instrumental"[178] and brought expertise that other advisors did not have.[179]

90. **Plan slow; act fast.**[180] Lengthy planning is a fundamental feature of P3 project delivery, compared to traditional delivery. IO advocates for this approach in all projects in accordance with the agency's Procurement Policy.[181] At the same time, IO endeavors to plan smart, developing and building projects from positive learning, starting from templates that draw on previous project experience. De-biasing in planning, as Professor Flyvbjerg suggests, is essential. But while project planners can approach eliminating bias in planning, it cannot be eliminated completely by any delivery model.

91. In any event, there is no evidence in this Inquiry, and the Expert Panel did not suggest, that planning was a problem in OLRT1. To the contrary, the Project had appropriately long, multi-year planning and procurement phases. Furthermore, the City adopted IO's advice on the RFP launch date and an industry standard RFP open period.[182]

92. **Modularization.** The City's goal and intention for OLRT1 was to deliver a service-proven vehicle to the public. To achieve the City's vision for the system, IO advocated for performance-based Project Specific Output Specifications in the Project Agreement. IO's approach and

---

[175] Dr. Flyvbjerg, Expert Panel on Public-Private Partnerships, pp. 15-16, ln. 7-2.

[176] Dr. Siemiatycki, The Theory and Practice of Public-Private Partnerships in Canada, OLRPI Expert Panel on Public-Private Partnerships, June 28, 2022, p. 17; Dr. Siemiatycki, Expert Panel on Public-Private Partnerships, p. 38, ln. 18-23.

[177] Procurement Policy, Infrastructure Ontario dated 6 April 2021, Ethics and Integrity in Procurement Conduct, Fairness Monitors, p. 32, ss. 5.7.

[178] Marian Simulik, Commission Examination, TRN00000184, pp. 130-131, ln. 28-6.

[179] Opening Statement of the RTG Parties, p. 9, ¶¶ 23-24; Brian Guest, Commission Examination, TRN00000200, p. 124, ln. 1-11.

[180] Dr. Flyvbjerg, Expert Panel on Public-Private Partnerships, pp. 59-60, ln. 21-27.

[181] Procurement Policy, Infrastructure Ontario dated 6 April 2021, Procurement Approvals and Methods, Procurement Planning, pp. 10-17, ss. 4.1-4.5.

[182] Ontario Subway Program – Procurement Update, Infrastructure Ontario.

advice to owners in every project is that outcome-oriented technical specifications permit innovative and efficient solutions, including modularity.[183] Accordingly, IO's current practice is aligned with the recommendations of the Expert Panel.[184]

93. **Black swans.** The "black swan theory", as Professor Flyvbjerg described it,[185] is at the core of IO's approach to risk transfer and the Project Agreement template, particularly for OLRT1.[186] While project planners cannot predict the details of every possible event that may occur on a project (in this Project, for example, the sinkhole in the particular location that it occurred), owners can transfer risk and insure for certain categories of events that range along a spectrum of possibilities (in this Project, geotechnical related risks associated with tunneling).

94. The Project Agreement appropriately transferred risk to the private sector for such an event. Indeed, as noted above, when the geotechnical risk materialized in this case, the RTG parties were in a better position to manage the risk than the City would have been under a traditional model. Whereas the City would have had to stop the Project, issue change orders, consider resourcing and accountability; the RTG parties and their contractors had the expertise and tools to safely mobilize resources and plan a solution to get the project back on track.[187]

95. The Project Agreement also required RTG to have insurance for this kind of event,[188] and RTG was remunerated $114 million under the policy after the sinkhole occurred.[189]

96. **Optimism bias.** There is no evidence that optimism bias by the public sector caused any of the problems that developed in OLRT1. There is no doubt that optimism bias is a consideration in megaprojects globally, and that de-biasing is necessary for a successful procurement and project.

97. IO has taken optimism bias into account in its VFM and risk assessment since the agency was established in 2005.[190] In IO's P3 contract models, the "F" component of the DBFM

---

[183] IO is familiar with modular approaches which have been applied on IO projects including the Eglington Crosstown LRT, the Toronto South Detention Centre, and its long-term care rapid build projects.

[184] See, e.g., Dr. Flyvbjerg, Expert Panel on Public-Private Partnerships, pp. 13, ln. 17-22

[185] In this Project, while the specific sinkhole in the particular location that it occurred may have been unforeseeable, geotechnical risk was not unforeseeable due to the tunneling activity that would be involved.

[186] Dr. Flyvbjerg, Expert Panel on Public-Private Partnerships, p. 58, ln. 11-27.

[187] Nancy Schepers, City of Ottawa Examination, TRN00000185, p. 188, ln. 13-26.

[188] Robert Pattison, City of Ottawa Examination, TRN00000184, pp. 59-60, ln. 13-4; Project Agreement, Schedule 25 Insurance and Performance Security Requirements, COM0000275.

[189] Riccardo Cosentino, City of Ottawa Examination, TRN00000178, pp. 158-159, ln. 15-16

[190] Assessing Value for Money: A Guide to Infrastructure Ontario's Methodology, Infrastructure Ontario, 22 February 2007, pp. 16-17.

acts as a protection from bias or strategic misrepresentation in the planning and procurement phases of a project by involving sophisticated consortia, particularly at the lenders level, as an "outside view" on the project's viability.[191] Both the bidding project companies and lenders act as a check of optimism bias in a P3 procurement: if a project is financially unrealistic, the result will be that no consortium will bid or ascertain financing for the project. This is an objective, built-in, check that the P3 model provides.

98. As Professor Siemiatycki explained in the Expert Panel:[192]

> …[T]here's also debt and equity investors. These are very important because the "finance" in the public private partnership is really considered the glue that holds the deal together. This is where the incentives come in. Especially the debt investors…are outsiders to the deal. They provide a really important external scrutiny role. **When Professor Flyvbjerg talks about an "outside view" in his research, or taking a "reference class" and look at trying to manage optimism biases; these are investors who take an "outside view". They are not necessarily internal to they consortia team; they are scrutinizing the deal to see if this really make sense and if the team has the expertise to actually deliver the project. So, they play an important role to try to provide a counterweight to some of the optimism that may come in when it's just an internal team, or just the government, which may have its own optimism biases or strategic rationales for moving the project forward**.

99. In any event, optimism in the City's budget for this Project was not a problem. Two of the three proponents submitted bids within the budget envelope. The very risks that the proponents priced into their bids were the risks that materialized. Moreover, the Project was completed within the City's budget and contingency fund set during the procurement.

100. **Transparency and Accountability.** As a matter of policy, IO's position and one of the agency's core values is that public sector entities should publish procurement and project information.[193] IO prioritizes transparency by publishing to its website all contract documents (with some redactions), VFMs and RFPs for every project,[194] as well as track record reports prepared by independent third parties.[195] Additionally, IO builds transparency into every public project contract, including the Project Agreement.[196] Accountability is built in to the Project Agreement through mandatory reporting requirements and works committees that exist to

---

[191] Dr. Siemiatycki, Expert Panel on Public-Private Partnerships, p. 25, ln. 6-17.

[192] Dr. Siemiatycki, Expert Panel on Public-Private Partnerships, p. 25, ln. 1-14.

[193] Procurement Policy, Infrastructure Ontario 6 April 2021, Principles, Openness, Transparency and Fairness p. 7, s. 2, ss. 2.2; IO Approach to Transparency, Infrastructure Ontario, COMH0000006.

[194] See, e.g., Eglinton Crosstown LRT, Infrastructure Ontario, COMH0000007.

[195] Third Party Reports, Infrastructure Ontario.

[196] Project Agreement, Schedule 18 Communications and Public Consultation Protocol, IFO0033365.

facilitate a working relationship between RTG and the City, and give the City oversight over construction progress and maintenance.[197]

101. In relation to Professor Stafford's comments about transparency of private sector profit, while IO discloses a great deal of information, there are legitimate countervailing factors that need to be balanced against complete transparency, to allow for reasonable protection of vendors' confidential information. The context for all megaprojects and infrastructure delivery, under any model, is a competitive marketplace where vendors protect their own intellectual property to stay competitive. Balanced with transparency in public spending, confidentiality ensures the integrity of the bidding process is maintained by protecting the commercially sensitive information of vendor companies.[198]

102. **Alliance model.** Based on all of the information before the Commission, there is no factual basis to conclude that an Alliance approach would have been a better model when compared with P3 models for this Project. As with any contracting model, historically, projects delivered under the Alliance model have had mixed success. For example, in Australia, which was an early adopter of the Alliance model, in addition to recent successes, there have been major failures, including ballooning costs and other serious issues.[199]

103. As explained above, IO adopts a project delivery approach of "Choosing the Right Model for Each Project."[200] IO's approach continues to evolve as it learns from its experiences and those of others. Professor Siemiatycki recommended piloting the Alliance model. IO has recently done so with Toronto's Union Station Enhancement Project.[201]

---

[197] E.g., The Works Committee and Maintenance Committee established under the Project Agreement are regular meetings with the City and RTG representatives and exist to facilitate a working relationship between RTG and the City during the construction and maintenance phases, respectively. Project Agreement, Works Committee, Exhibit 079, IFO0000375, pp. 35-38, s. 11; Project Agreement, Maintenance Committee, Exhibit 079, IFO0000375, pp. 39-41, s. 12.

[198] Procurement Policy, Infrastructure Ontario, 6 April 2021, Confidentiality of Vendor Submissions, p. 45, s. 6.13.

[199] E.g., The de-commissioning of BHP's hot briquetted iron plant in Port Hedland, Australia after an explosion caused a fatality and injuries, and the project suffered significant cost overruns: Rupert Holloway, Infrastructure Ontario Examination, TRN00000189, p. 185, ln. 23-28; Final Report of the Royal Commission into the Building and Construction Industry, Western Australia, Volume 20 – Part 1, February 2003, "Chapter 2, BHP Hot Briquetted Iron Plant", p. 9; Poor Safety last straw for HBI, The Sydney Morning Herald, July 26, 2004; see also: In Pursuit of Additional Value: A Benchmarking Study into Alliancing in the Australian Public Sector, Evans & Peck, October 2009.

[200] Choosing the Right Model for Each Project – IO's Procurement and Project Delivery Approach, Infrastructure Ontario.

[201] Union Station Enhancement Project, Infrastructure Ontario; also see, IO is building in "job interviews" or "collaborative behavioural assessments" to better get to know the individuals on the bid teams, even in P3 projects, Ontario Subway Projects – Procurement Update, Infrastructure Ontario.

104. At the time of the procurement of OLRT1, the Alliance model was untested on public megaprojects like OLRT1 in Canada.[202] The information before the Commission, including from the experts, is that Alliance is new in the Canadian and Ontario context, requires specialized training, significant financial and other dedicated resources, and will have to be piloted in order to measure its success.[203]

105. No megaproject delivery model is optimal in every respect, and no model guarantees success in a complex megaproject.[204] Professor Stafford's view that Alliance is way of the future is a live discussion for policymakers, but not in the setting of this Inquiry on the heels of OLRT1.[205] Indeed, none of the expert panelists have research expertise or other experience with the Alliance model. Additionally, none of the questions that IO proposed for the Expert Panel related to use of the Alliance model and comparative strengths and weaknesses of different models were explored with the experts.

106. Finally, IO notes that some comments during the Expert Panel were not entirely accurate, or were based on opinion unsupported with data and evidence.[206] Given the limited purpose of the Expert Panel in this Inquiry, IO does not intend to point out every disagreement.

107. In this Inquiry, the evidence has been that Project Agreement appropriately allocated risk to the party best positioned to manage it, created a dispute resolution framework for the parties, and provided remedies for the City to protect its objectives to meet RSA and deliver a safe and reliable light rail system.

---

[202] Dr. Siemiatycki, The Theory and Practice of Public-Private Partnerships in Canada, OLRPI Expert Panel on Public-Private Partnerships, June 28, 2022, p. 16; Nicolas Truchon, Commission Examination, TRN00000208, p. 153, ln. 2-5; Nicolas Truchon, City of Ottawa Examination, TRN00000208, p. 222, ln. 12-17.

[203] Dr. Siemiatycki, OLRPI Expert Panel on Public-Private Partnerships, pp. 38-39, ln. 1-4, p. 67, ln. 19-25.

[204] Dr. Flyvberg, OLRPI Expert Panel on Public-Private Partnerships, p. 5, ln. 11-22; Rupert Holloway, Infrastructure Ontario Examination, TRN00000189, pp 183-185.

[205] Dr. Stafford noted that she does not have as much experience as her fellow panelists on megaprojects. Her experience is on much smaller projects in the United Kingdom: Dr. Stafford, OLRPI Expert Panel on Public-Private Partnerships, p. 68, ln. 18-25.

[206] For example, Professor Stafford, who's experience and research focus has been on smaller projects in the UK, suggested that the price Infrastructure Ontario pays for risk transfer in P3 projects is "not worth it". Professor Stafford quoted from the 2014 Auditor General Report when stating that IO spent $8 billion over the traditional model on risk transfer, but she did not add that the $8 billion allowed IO to transfer an estimated $14.6B billion in risk. The full quote from the Auditor General's 2014 Report was as follows:

> However, this $8-billion difference was more than offset by Infrastructure Ontario's estimate of the cost of the risks associated with the public sector directly contracting out and managing the construction and, in some cases, the maintenance of these 74 facilities. In essence, Infrastructure Ontario estimated that the risk of having the projects not being delivered on time and on budget were about five times higher if the public sector directly managed these projects versus having the private sector manage the projects. It valued the cost of the risks under public sector delivery to be $18.6 billion and the risks under AFP delivery to be $4 billion.
>
> Annual Report 2014, Office of the Auditor General, pp. 197-198.

108. To the extent there were problems with the product and the system (e.g., with doors, wheels, winterization, tracks), there is no evidence that the P3 model generally, or this tailored Project Agreement, as intended and drafted, are the root of the problems. No model will prevent problems from arising during design, construction, and operation of a megaproject. Contracts set expectations, assign responsibility between parties, incentivize conduct, and provide financial remedies for any failure to comply with those obligations. The relevant question is whether the model provides a framework and recourse for the parties to manage problems efficiently and fairly when they arise. The Project Agreement, as intended and as drafted, provided the appropriate framework in this case.

109. In sum, in light of the Expert Panel discussion, there is no information before the Commission that the P3 model led to the problems that materialized in this Project, or that the problems that materialized, or other problems, would have been avoided with a different model. There is no information before the Commission that the P3 model should be abandoned as a project delivery model in favour of another. In fact, many of the panelists' proposals and recommendations are addressed by the P3 model, as demonstrated above.

VI. Conclusion

110. The Commission's mandate is to inquire into the commercial and technical circumstances that led to OLRT1 breakdowns and derailments. This mandate includes inquiring into the procurement and the structure of the P3 contract.

111. There is ample evidence that the decisions and actions of the City and its advisors in relation to the procurement were carefully considered and appropriate. For a megaproject of the OLRT's size and complexity, IO's view was, and remains,[207] that a P3/AFP model was appropriate and in the public interest.[208] No contract model for megaprojects—traditional DBB, P3, or Alliance—is a panacea; the most appropriate model depends on the market conditions and the problems the owner is trying to solve for. The City weighed the pros and cons of the available market-tested models, and selected the model with the characteristics that best lined up with the particular needs and goals they had identified for OLRT1. This was the appropriate and reasonable action in the circumstances.

---

[207] John Traianopoulos, Infrastructure Ontario Examination, TRN00000185, p. 96, ln. 5-10.

[208] Remo Bucci, Commission Examination, TRN00000190, pp. 8-9, ln. 25-10; John Traianopoulos, Infrastructure Ontario Examination, TRN00000185, p. 96, ln. 5-16.

112. Further, viewed in light of the Expert Panel discussion, there is no evidence before the Commission that the City's choice of P3/AFP model was a problem in this Project or that P3s should be abandoned as an option where appropriate to the needs of a project, in favour of any other market-tested and available project delivery model. As demonstrated above, the experts' recommendations for an optimal procurement and project delivery approach are addressed by the P3 model and the approach that IO uses in Ontario.

113. There is no dispute among the participants in this Inquiry that the procurement was undertaken in accordance with industry best practices. The Project Agreement was tailored to the needs of OLRT1 and drafted to ensure the delivery of a safe and reliable system. In sum, there is no factual basis for the Commission to conclude that any actions taken during the procurement led to OLRT1 breakdowns and derailments.