

Kanellakos, Steve

To: Leiper, Jeff; Nussbaum, Tobi
Subject: December 19, 2017 Inquiry regarding the Confederation Line

Councillors Leiper and Nussbaum,

As discussed and having reviewed the questions outlined in your December 19, 2017 letter with staff, I am writing to provide the follow up responses.

Detailed responses to all of the questions contained in your letter are provided. For convenience, the questions are restated with the answers set out immediately thereafter. There are however, some overarching statements contained in your letter that I will address first.

The December 19, 2017 letter expresses some conclusions, which are at odds with the facts. The attached memo provides clarification on these facts.

Steve Kanellakos
City Manager



MEMO / NOTE DE SERVICE

To / Destinataire	Councillors Leiper and Nussbaum	File/N° de fichier:
From / Expéditeur	City Manager	
Subject / Objet	December 19, 2017 Inquiry regarding the Confederation Line	Date: January 11, 2018

This memorandum is to provide clarification on points that have been raised with staff pertaining to the confederation Line and the Revenue Service Availability Date.

As you are aware a critical component to staff's role in serving Council is to provide Members of Council with staff's best professional advice based on the information available. Staff are responsible for analyzing information and obtaining clear facts prior to briefing Council to ensure the information provided is factual and thorough. This has and will continue to be a primary focus of the City's management team.

There appears to be an assumption that staff have agreed to allow the Rideau Transit Group (RTG) to miss the planned Revenue Service Availability (RSA) date set out in the Project Agreement. This assumption is incorrect.

On November 24th, 2017, RTG was required, under the Project Agreement, to give notice to the City as to whether they would meet the RSA date. RTG's Notice indicated that they would meet the RSA date, and that date might be adjusted due to such things as Delay Events, as contemplated by the Project Agreement. Essentially, RTG was indicating that they might not meet the May 24th, 2018, date. Based on our own review, staff "concur" that RTG may not meet the May 24, 2018 RSA date. This does not mean that staff approve or waive any rights the City has under the Project Agreement.

The transcripts from the budget deliberations at the Transit Commission, the Finance and Economic Development Committee (FEDCO) and Council confirms that staff was forthcoming in advising Commission, Committee and Council Members regarding the assumptions that informed the development of the Transit budget estimates. The discussions at Committee and Council included the confirmation that the 2018 draft budget estimates for Transit were premised on six months of operation. However, staff was clear that should there be a delay in revenue service for LRT that the City's and taxpayers' interests are protected and that there would not be a resultant budgetary pressure created.

The Technical Briefing was set for December 15, 2017 to allow for sufficient time for staff to connect with RTG representatives, to secure the necessary information to inform the process going forward and to develop the presentation materials.

The City has requested an updated detailed schedule from RTG, and both the City and RTG project team members have developed an agreed upon process to work through that schedule

to confirm the RSA date. The final project schedule will include steps to reduce potential delays to the RSA, ensure sufficient time for mandatory commissioning, compliance, training and trial of the system and will continue to make safety a priority.

As committed at the Technical Briefing, staff will provide another update in the first quarter of 2018 to the Finance and Economic Development Committee (FEDCO) and Council for consideration based on what the facts are, subsequent to completing the prerequisite due diligence necessary to inform this update.

The responses to the specific questions that have been posed in your letter dated December 19, 2017 are as follows:

1. (a) What is the legal significance of city staff having “concurred” with the extension of the Revenue Service Availability date beyond May 24th, 2018?
2. Does that concurrence affect in any way the City’s ability to exercise financial tools, including, but not limited to, the contractual compensation penalty of one million dollars and the withholding of monthly payments?
3. In light of the concurrence, what remain [sic] the compensation tools of which the City can avail itself in the case of a delay to revenue service availability past May 24th, 2018?
6. When did City staff concur that the revenue service availability date could extend past May 24th, 2018?

On reading questions 1(a), 2, 3, and 6, it is clear that there is an assumption that staff have agreed to allow RTG to miss the planned Revenue Service Availability (“RSA”) date set out in the Project Agreement, which is May 24th, 2018. This assumption is incorrect

On November 24th, 2017, RTG was required, under the Project Agreement, to give notice to the City as to whether they would meet the RSA date. RTG's Notice indicated that they would meet the RSA date, and that this date might be adjusted due to such things as Delay Events, as contemplated by the Project Agreement. In simple terms, RTG was indicating that they might not meet the May 24th, 2018, date.

In the PowerPoint slide deck presented at the Technical Briefing, staff’s assessment of RTG’s progress echoed RTG’s concerns about May 24th. As such, City staff concur with RTG’s assessment that they may not meet the RSA date set out in the Project Agreement. However, at no time have staff agreed to revise the RSA date, nor have they agreed to relieve RTG from any of the financial consequences that can flow should RTG fail to meet the RSA date set out in the Project Agreement.

As noted above, the Project Agreement itself contains mechanisms to account for unforeseen events that might impact the project schedule. If the conditions set out in the Project Agreement are met, one of the possible results is the setting of a new RSA date. That said, staff have repeatedly advised RTG that the City will be looking to enforce its rights under the Project Agreement and that RTG will be accountable for any failure to meet its obligations under that Agreement.

Should RTG fail to meet the RSA date, as that date may be adjusted under the terms of the Project Agreement, it is liable for \$1M in liquidated damages payable to the City. The 30-year fixed concession period for the Maintenance Agreement is also reduced, with the result that RTG loses payments of millions of dollars per month.

Lastly, RTG is not entitled to the approximately \$200M substantial completion payment under the Project Agreement until the system is handed over to the City, with the result that RTG continues to incur the servicing charges associated with that debt. It is through these various mechanisms - that were essential elements of the Public-Private Partnership procurement model used - that RTG is incentivized to ensure that it meets its obligations under the Project Agreement. Staff have done nothing to change or weaken the City's position in the Project Agreement.

With respect to **Question No. 1(b) What was the delegation mechanism that empowered staff to communicate that concurrence?** As noted earlier, staff did not communicate concurrence. I can also confirm that, for the reasons set out below in greater detail, the OLRT Executive Steering Committee was delegated the relevant authority from City Council with respect to the "overall implementation" of this Project Agreement.

In the aftermath of City Council's cancellation of the original North-South LRT Project in December 2006, there followed a number of actions which sought to move the City closer to a further LRT initiative, including reports to various Committees and Council on the Downtown Ottawa Transit Tunnel as well as Environmental Assessments for other rail corridors (for example, see the "Rapid Transit Environmental Assessments - Response to 2 Motions of Council" in June of 2007: ACS2007-PTE-POL-0048). In order to respond to a number of Council directions related to LRT issues, staff established the OLRT Executive Steering Committee, which was originally approved by City Council on July 14th, 2011: ACS2011-ICS-RIO-0002. In a report entitled, "Implementation of the Ottawa Light Rail Transit Project", the following commentary is made with respect to involving Infrastructure Ontario (IO) in the pending procurement process for the City's new OLRT Project:

"In this role, IO representatives would lead the procurement phase of the OLRT project up to financial close and would report to the Director, Rail Implementation. The City will retain final approval authority on all decision-making. The OLRT project's procurement and overall implementation is overseen by the City's OLRT Executive Steering Committee, which is made of senior City staff: Kent Kirkpatrick, City Manager, Nancy Schepers, Deputy City Manager, Infrastructure Services and Community Sustainability, Rick O'Connor, City Clerk & Solicitor, Marian Simulik, City Treasurer, Alain Mercier, General Manager, Transit Services, and John Jensen, Director, Rail Implementation. Given IO's role in procurement, it is recommended that Rob Pattison, Vice President, Transit, and Mathew Kattapuram, Senior Vice President, Civil Infrastructure, Infrastructure Ontario (IO) join the OLRT Executive Steering Committee. This reporting arrangement will ensure the City benefits from the advantages of IO involvement during the procurement process while ensuring the City's objectives are met.

The OLRT Executive Steering Committee will confirm and recommend the preferred proponent to Council at the close of the RFP."

Thereafter, the OLRT Executive Steering Committee is referenced in various public reports to Committees and Council. Most significantly, this includes City Council's approval, at a Special Meeting on December 12, 2012, of the seminal report entitled, "Design, Build, Finance and Maintenance of Ottawa's Light Rail Transit (OLRT) Project": ACS2012-ICS-RIO-0004. In addition to the broad authority, Council delegated to the City Manager to action matters related to the OLRT Project Agreement in **Recommendation No. 3**, that report also provides as follows with respect to the OLRT Executive Steering Committee:

"RIO and CTP staff, along with staff from IO, evaluated every aspect of each RFP submission against the performance and quality requirements set out in the procurement documents. The project's procurement and overall implementation was overseen by the City's OLRT Executive Steering Committee, which is made up of senior City staff: Kent Kirkpatrick, City Manager; Nancy Schepers, Deputy City Manager, Planning and Infrastructure; Rick O'Connor, City Clerk & Solicitor; Marian Simulik, City Treasurer; John Manconi, General Manager, Transit Services; and, John Jensen, Director, Rail Implementation. Rob Pattison, Vice President, Transit, and Derrick Toigo, Senior Vice President, Civil Infrastructure, represented IO on the Committee."

Most recently, the September 13, 2017, Council report entitled, the "Stage 2 Light Rail Transit Project and Procurement Update" set out, once again, the OLRT Executive Steering Committee's continuation as the key governance body related to matters for Stage 2 of OLRT (ACS2017-TSD-OTP-0002):

"Part 3: Supporting the implementation of the Stage 2 project – Stage 2 Governance

As indicated in the *Stage 2 Light Rail Transit Implementation – Project Definition and Procurement Plan* (ACS2017-TSD-OTP-0001) approved by Council 8 March 2017, a number of related activities and actions must be undertaken to prepare for the implementation of the Stage 2 LRT project in preparation of and following the contract award. This includes a continued focus on Stage 1 governance and integration with governance for Stage 2 LRT.

The Finance and Economic Development Committee has primary carriage over the project for items such as contracts and procurement, property acquisition and real estate, budget, economic development and partnership arrangements. The Transportation Committee will retain governance for the Statements of Work for the Environmental Assessments, and the Transit Commission will oversee matters that are directly related to transit operations, such as wayfinding, branding, advertising standards, etc. The Transit Commission will have oversight over the Stage 2 extensions once they have been built and become part of the City's O-Train transit network.

In July 2011, as part of the *Implementation of Ottawa's Light Rail Transit Project* report to Council (ACS2011-ICS-RIO-0002), the Executive Steering Committee (ESC) was formed to oversee project procurement and implementation of the Confederation Line. Subsequently, the role of ESC was included in the Confederation Line Project Charter. To date, ESC has provided strategic direction on project issues.

ESC will be maintained and as approved by Council has expanded its scope to include the procurement and implementation of the Stage 2 expansion project, including the authority to confirm and recommend the preferred proponent for Stage 2 to Council at the close of the Request for Proposals. Further to the March 8 Implementation Report, the City assembled industry leading procurement experts, legal and finance advisors and an Owner's Engineer team.

Staff have consulted with Infrastructure Ontario (IO) and both parties have confirmed that the City does not require IO services as part of Stage 2. IO has been highly effective and supported the City throughout Stage 1 and their work will cease once Stage 1 is in revenue service.

As we are currently in a transition between Stage 1 and Stage 2, the City Manager, under delegated authority, may invite Stage 2 staff to be consulted as required. Once Stage 1 is complete, the following changes will be implemented:

1. ESC's mandate will include the role of the former Contingency Management Committee and ESC's terms of reference will be amended to include the following functions formally associated with the Committee: reviewing and approving expenditures against the Confederation Line's \$100 Million Contingency Fund; ensuring that variations and risks are properly accounted for as potential draws against the account; and approving requests for:
 - Increased project funding outside of approved funds (including project contingency); and,
 - Design changes requiring funding outside of the existing delegated authority (substantial design changes).
2. The composition of ESC includes:
 - City Manager (Chair);
 - General Manager, Transportation Services Department;
 - Director, Rail Construction Program;
 - City Clerk and Solicitor; and,
 - General Manager, Corporate Services and City Treasurer.

An Executive Advisor to ESC may be appointed at the discretion of the City Manager and other City General Managers/Directors and other City staff may be invited to participate as required. The City Manager is delegated the authority to add or remove members of the Executive Steering Committee to reflect any new organizational changes or if a need to add specific expertise is identified."

In light of these previous Council-approved reports, it is clear that the OLRT Executive Steering Committee has the delegated authority with regard to the "overall implementation" of the City's LRT initiative and the Project Agreement regarding same.

4. What are the expected financial impacts of any potential delay to the start of LRT revenue service?

The Project Agreement contains provisions that allow the City to impose \$1M in liquidated damages if the RSA date is not met. This applies every time an RSA date is provided but not achieved by RTG. For example, if RTG misses the original RSA date of May 24, 2018 (unless that date is adjusted in accordance with the mechanisms contained in the Project Agreement), they would be subject to \$1M in liquidated damages. If they provide a notice giving the City a revised RSA date, and then do not achieve that date, RTG will be subject to an additional \$1M liquidated damages. This will continue every time RTG provides an RSA date and subsequently misses it. In addition, milestone payments will be deferred until RSA is achieved.

One of the most substantial financial incentives for RTG to meet RSA is the Monthly Service Payments. The payments, in the millions of dollars each month, occur during the 30-year maintenance term. For example, if RTG is late for one month, that month's payment will never be recovered by RTG. In such a case, the City would only make Monthly Service Payments for 29 years and 11 months. This would continue each month until RSA is achieved. A delay by RTG of several months would result in lost payments to them in the tens of millions of dollars, funds which, in turn, would be used by the City for the additional costs on OC Transpo's operations, thereby neutralizing any budget impacts.

5. On what date did RTG provide a "recent" schedule that indicates the revenue service availability date will likely be extended?

A PDF version of the schedule was received on December 7, 2017. The electronic version or "source file" was received on December 9, 2017. The source file is required under the Project Agreement and allows the City to conduct detailed analysis on the schedule.

7. Prior to December 15th, which Council members did staff inform, and when, that RTG had submitted a schedule indicating that revenue service availability would likely be extended?

On December 13, 2017, the Chairs of Transit Commission and Transportation Committee were briefed. The Mayor's Office was also informed that RSA may be extended.

8. When was the decision made on the timing of disclosure to Council members and by whom?

Once the schedule was received by the City on December 9, 2017 City staff and industry experts immediately assembled to establish the process for a thorough review of the schedule. Receipt of the schedule started discussions with RTG to bring together the two project teams to look at the assumptions and establish a meeting schedule early in the New Year to complete the work necessary to ensure a schedule is developed which does not compromise the required testing and commissioning prior to commencing revenue service. The decision to proceed with the appropriate briefings took place on December 4, 2017 subsequent to this activity as evidenced by the PSA that was issued for the Technical Briefing on December 5th, 2017. Given the technical nature of the Project Agreement, the decision to hold a Technical Briefing was made to ensure all Members of Council, their staff and the media could receive the information in an open forum and were provided an opportunity to ask questions.

Finally you have posed the last question as follows: **9. Why, during the budget deliberations, was information that the revenue service availability date would likely be extended was**

not shared in response to specific questions about the expected start of revenue service at either the December 5th Transit Commission meeting or the December 13th Council meeting?

In response to this question, the Clerk's Office has reviewed the relevant transcripts from both the Commission and Committee budget meetings and the December 13th Council meeting that you referenced. This review verifies that all questions related to the budget implications on the start of the LRT in mid-2018 were answered in a candid and straightforward manner by the General Manager or his staff. Of interest is the fact that although the Chair of the Commission specifically noted that budget questions related to the OLRT "can be raised at FEDCO, as Mr. Manconi has mentioned", very few questions on this item were raised at that subsequent meeting.

Staff were working right up to the technical briefing to define the process and obtain the necessary information to confirm the facts. As mentioned, it is staff's role to ensure it equips Councillors with thorough and accurate information. Analyzing the facts and defining the process prior to the technical briefing was critical in order to brief Councillors in a manner that was comprehensive and informative. Moreover, this work remains ongoing. Throughout the budget deliberations, the information available remained incomplete and did not change the 2018 draft transit budget estimates.

In conclusion, I am of the view that in their totality, the above-noted documents and discussions, which were all published and considered at various public meetings, clearly demonstrate that City Council was properly informed on all matters relevant to the 2018 Budget. In addition, I firmly believe that staff's approach on these various matters has, indeed met the high level of transparency, honesty and fairness that the City of Ottawa is well known for.

Should you have any questions, please do not hesitate to contact either myself or John Manconi at extension 52111.

*Original signed by
Steve Kanellakos*

c.c. Senior Leadership Team
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