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BUSINESS ARRANGEMENTS WITH YC2002 AND AWARD OF CONTRACT FOR PHASE 2 - Y2 AND H3

The Rapid Transit Public/Private Partnership Steering Committee recommends the following:

1. **The presentation and communication from Mary-Frances Turner, Vice-President, York Region Rapid Transit Corporation, September 19, 2007, regarding an amendment to Clause 5, Business Arrangements with YC2002 and Award of Contract for Phase 2 – Y2 and H3, relating to office costs, be received;**

2. **The recommendations contained in the following report, September 12, 2007, from the Vice-President, York Region Rapid Transit Corporation be adopted; and**

3. **The following additional recommendation be adopted:**

    5. **Council authorize an expenditure of $815,725 for office costs.**

1. RECOMMENDATIONS

It is recommended that:

1. Council authorize the award of contract for the Viva Phase 2- Y2 (Yonge Street - from the Richmond Hill Centre to Bernard) and H3 (Highway 7 - from the Richmond Hill Centre to Kennedy Road) preliminary engineering to York Consortium 2002.

2. Council authorize the Regional Chair and Clerk to execute a contract with York Consortium 2002 for the amount of $10,750,000, on a lump sum basis, for the Y2/H3 work in a form acceptable to staff and legal counsel.

3. Council authorize staff to commence work immediately with the Owner's Engineer to develop a scope of work for H2 (Highway 7 - from Richmond Hill Centre to Vaughan Corporate Centre), and to seek a business proposal from York Consortium 2002 to undertake this work and, that staff report back to Committee and Council on the outcome of those negotiations and funding sources.

4. The Region's Owner's Engineer, McCormick Rankin, provide owners engineer services to the Region for oversight of the Y2/H3 work and for preparation of the H2 preliminary engineering scope of work on a cost plus basis to an upset limit of $1,550,000.

2. PURPOSE

The purpose of this report is to summarize the terms of the two Agreements (the Master Agreement and Going Forward Business Arrangements Framework Agreement) between York Region, York Region Rapid Transit Corporation (YRRTC) and York Consortium 2002 (YC2002). This report also advises Committee and Council that the price and scope of work for the next stage of preliminary engineering (PE), being Y2 (Yonge Street from Richmond Hill Centre to Bernard) and H3 (Highway 7 from Richmond Hill Centre to Kennedy), has been successfully negotiated with YC2002, is subject to Council approval, and this report seeks authority for staff to finalize the terms of the contracts with YC2002 for these works and for the Regional Chair and Clerk to sign the necessary contracts for these works. Finally, this report identifies the need to move forward progressively with the next segment of the centers to centers preliminary engineering work from Richmond Hill Centre (RHC) to Vaughan Corporate Centre (Weston Road).

3. BACKGROUND

In June 2002, following a global public procurement search, York Region entered into a public-private business arrangement with YC2002 to plan, design, construct and possibly operate a regional rapid transit system.

The member companies of YC2002 are:

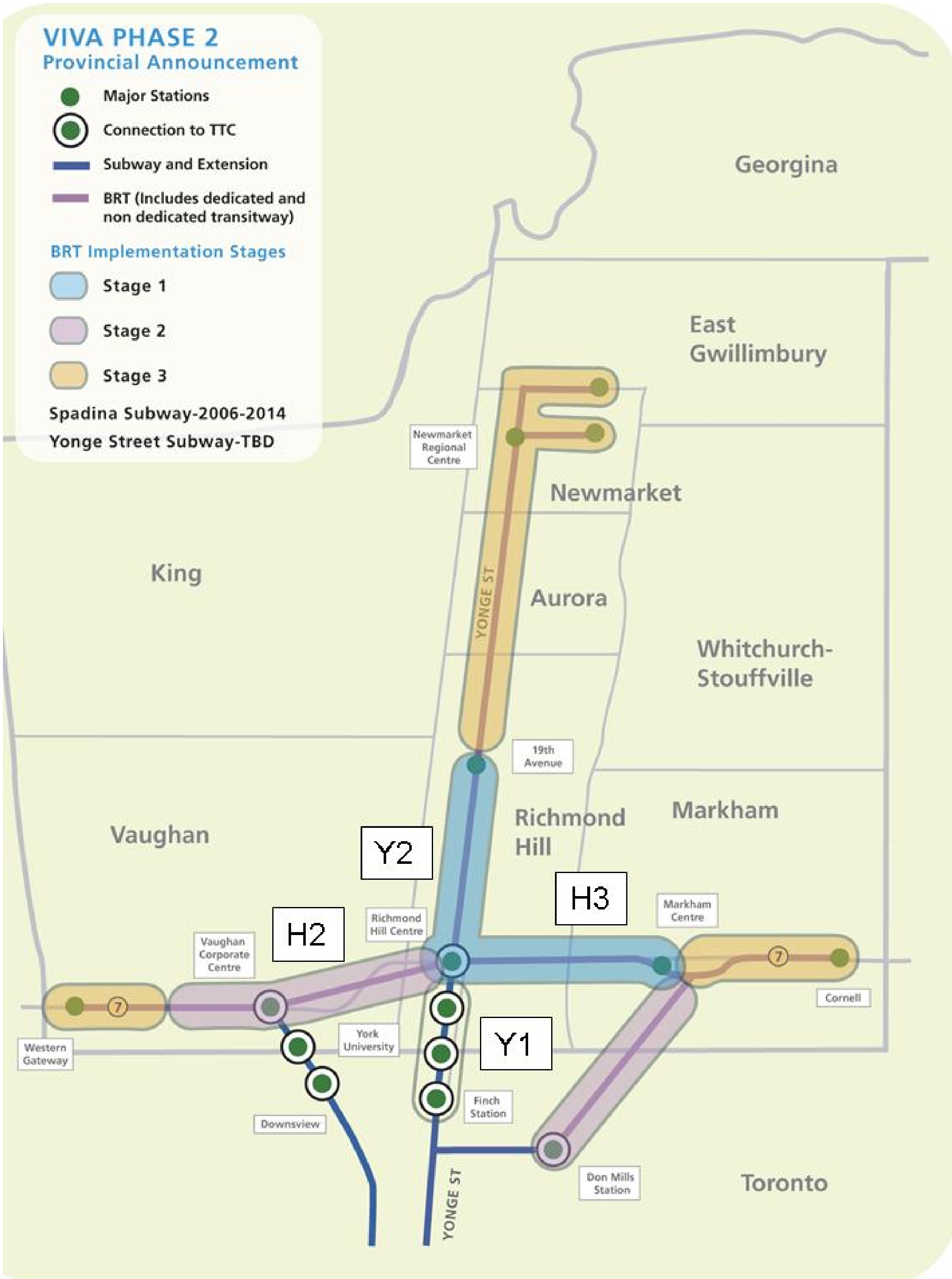
- AECOM Enterprises (DMJM Harris) - project management, transportation planning and engineering.
- IBI Group - intelligent transportation systems, transportation planning and services.
- Delcan - planning and engineering services.
- Peter Kiewit Sons Company – constructor.
- EllisDon Corporation - constructor.
- Siemens Transportation Systems - vehicles and intelligent transportation systems.
- Norddeutsche Landesbank Girozentrale (Nord Bank) - financial advisory services, commercial lending and lease financing.

With the first phase of the project underway and business arrangements secured in the Stage One Agreement, negotiation of a refreshed set of business arrangements commenced in November 2003. The existing Stage One Agreement, as amended from time to time, did not represent the optimal go-forward business arrangement between the Region and the Consortium. This was largely due, at that time, to the lack of long-term funding commitments by other levels of government making it difficult to enter into long-term business arrangements as had been contemplated in the initial Stage One Agreement.

On December 16, 2004, Council directed staff to negotiate a Master Agreement and Go-Forward Business Arrangements Agreement for Phase 2 and provided guidance and direction on certain points to be addressed specifically with YC2002. Staff reported their findings to Council on April 20, 2006 and Council authorized staff to proceed to finalize Go-Forward Business Arrangements with YC2002. On June 22, 2006 Council authorized the execution of the Master Agreement and Go Forward Business Arrangements Agreement once they were successfully negotiated. These arrangements included retention of an Owner's Engineer who would work with the Region to develop a scope of work and an independent cost estimate for each subsequent scope of work to be undertaken on the Project. In September 2006, staff advised Council that negotiations had been successfully concluded and staff proceeded, in conjunction with legal counsel, to finalize the wording of the Master Agreement and Go Forward Business Arrangements for execution by York Region, YRRTC, and YC2002. These documents were finalized in the Spring of 2007 and became fully executed in August 2007.

Staff were also authorized by Committee and Council in September 2006 to enter into negotiations with YC2002 to undertake a limited scope of work for the next two segments of Phase 2 (Y2 and H3) as illustrated in Figure 1, using the residual funding available under the initial funding program of $14.6 million dollars.

Figure 1


VIVA PHASE 2
Provincial Announcement
Major Stations
Connection to TTC
Subway and Extension
BRT (Includes dedicated and non dedicated transitway)
BRT Implementation Stages
Stage 1
Stage 2
Stage 3
Spadina Subway-2006-2014
Yonge Street Subway-TBD
Georgina
East Gwillimbury
Newmarket Regional Centre
Newmarket
King
Aurora
YONGE ST
Whitchurch-Stouffville
19th Avenue
Richmond Hill
Markham
Vaughan
Y2
H3
H2
Markham Centre
Richmond Hill Centre
Vaughan Corporate Centre
7
Cornell
Western Gateway
York University
Y1
Finch Station
Downsview
Don Mills Station
Toronto
YONGE ST

In March 2007, subsequent funding of $255 million was announced by the Federal and Provincial governments to undertake the complete PE effort for the Y2 and H3 segments. Staff undertook, with the Owner's Engineer (OE), to develop a complete work program for the PE of these two segments and followed the process outlined in the Master Agreement and Going Forward Business Arrangements Framework Agreement to determine if YC2002 would be successful in securing this work. This report outlines the outcome of those negotiations.

4. ANALYSIS AND OPTIONS

Five major principles govern the relationship between the Region and the Consortium in the Master Agreement and Go Forward Business Arrangements Agreement

The following five major principles and their individual features are outlined in the Master Agreement.

a. Risk Allocation
- Early identification of risks and possible consequences
- Allocation of responsibility and authority for risk
- Risk Reduction
- Monitoring

b. Best Value
- Alternative options and best value analysis
- Competitive price and cost effectiveness
- Delivery of a high quality product
- Measurable performance deliverables
- Sharing of reward
- Transparent procurement processes
- Total life cycle cost approach

c. Innovation and Delivery of Work Services
- Encourage State of the Art
- Employ best practices
- Completion within established timelines
- Work to obtain senior government funding
- Work to obtain private sector financing where practicable

d. Equity and Other Contributions
- Provision of cash equity or equivalent contribution by YC2002
- Potential for YC2002 ownership interest commensurate with contribution

- Potential for Equivalent Consideration ownership interest in YRRTC or an alternate Region-formed corporation
- Other risk contributions by YC2002
- Shareholders Agreement to specify contributions and interest in corporation ownership

e. Governance

- Business to be conducted in a manner that ensures transparency and accountability
- Seamless and cost-effective coordination between conventional and rapid transit systems

Flexibility for the Region has been optimized

The executed Master Agreement and Go Forward Business Arrangements Agreement replace the former business arrangements with YC2002. The new Agreements provide for a five year term, commencing June 30, 2006, unless the Agreements are renewed by the Parties on terms mutually agreeable to them on or before the date of expiry.

The Master and Go Forward Business Arrangements Agreements also have made provisions for off-ramps should they be needed. The Region's termination rights allow the Region to terminate the Agreement, prior to the expiry of the five year term, if:

- The Regional Corporation is not satisfied that sufficient Provincial Funding or Federal Funding will be available to permit the Regional Corporation to develop and implement the Project.
- YC2002 persistently fails to submit proposals under the Go Forward Agreement when it receives documentation and information from the Region.
- YC2002 persistently and materially fails to satisfy the principles of the Master Agreement.
- The Regional Corporation and/or YRRTC have to persistently conduct public tenders or release requests for proposals.

The new arrangements also contemplate that a Concession Agreement or alternative form of Agreement may be entered into between York Region and YRRTC.

The Master Agreement includes a risk transfer matrix

The issue of risk transfer between the Region and YC2002 was raised as an element in need of more clearly defined parameters under the new Agreements. Public-Private Partnerships have taken varied approaches with regard to risk transfer, in most cases dependent upon the owner's objectives and needs. There are several risk transfer issues for the Region to consider, including, but not limited to such things as environmental issues, revenue, and land acquisition, and each of these items will require greater understanding in terms of the risk allocation. A risk transfer matrix has been added to the Master Agreement and forms a baseline for risk allocation under Project documentation.

Best value for work to be done will be measured at all stages of each work programme

Best value is a guiding principle throughout all stages of each work programme. The concept of an OE has been added to the new agreements and will help the Region and YRRTC in this regard.

Innovation is a hallmark of the public private partnership between York Region and YC2002

Viva Phase One was awarded North American wide recognition as the most innovative transit project of 2006. Cited for having been delivered as a public private partnership, the award also recognized the tremendous strength of the partnership to deliver the project from a concept to on the ground reality in a little over two years. The continuation of this hallmark of our partnership is specifically called for in the Master Agreement.

Opportunities for equity contributions from the private sector have been identified clearly in the Master Agreement and Go-Forward Business Arrangements Agreement

Viva Phase 2 offers the best opportunity to seek out private sector equity investment in the rapid transit project. While the funding regime for rapid transit projects has changed substantially over the past five months, staff is of the view that the new Agreements provide the Region with continued flexibility to achieve equity contributions from the private sector. The Master Agreement specifically addresses the opportunity for equity contribution by YC2002.

In particular, the new business arrangements make provision for opportunities among the Region, YRRTC and YC2002 to enter into a longer term concession type arrangement. These longer term arrangements, often referred to as DBOM’s (Design, Build, Operate, Maintain) or DBFOM’s (Design, Build, Finance, Operate and Maintain) are common arrangements in public private partnerships and provide some of the best opportunities for equity investment and risk transfer from and to the private sector. There are many successful examples of long term concession arrangements throughout the world that would be examined in more detail should this opportunity arise.

The strengthening of the governance model has been identified in the new business arrangements

It is important that as the Project moves forward in complexity and scale that both the governance model of YRRTC and the Project also mature. The new business arrangements identify the need to formalize the concession agreement, or alternative form of agreement, between the Region and YRRTC.

The Master Agreement and Go-Forward Business Arrangements Agreement include the roles and responsibilities of an Owner’s Engineer who will be involved in the subsequent stages of work

The primary role of the OE is to provide independent advice to the Region and YRRTC on the definition of the work programme to be undertaken by the private sector. The OE helps to ensure that when the private sector partner provides their fee proposal to undertake the particular segments of work that it holds up as being cost competitive. To make this determination, a shadow price is prepared by the OE and is compared to the fee proposal provided by YC2002.

An OE typically has a prominent role in any large construction contract, such as Rapid Transit. Included in their mandate, an OE:

- Works with the Owner to ensure coherence between business strategy and technical aspects of the work
- Develops the scope of work and specifications for the project
- Certifies work completed in accordance with the specifications for progress payments
- Helps to resolve disputes
- Represents the interests of the Owner in the most cost efficient execution strategy
- Compiles benchmarking materials for use in proposal review and comparisons

This process is quite different from that undertaken in the Stage One Agreement arrangements with YC2002. Following a competitive process for the first segment of work subsequent work programs were supplied by YC2002, along with a fee proposal to undertake that work based largely on their negotiated fee rates and a cost of work to undertake the work program. While this arrangement was quite acceptable for Stage One, in that the initial fees and work scope were determined through a competitive RFP process, and a cost confidence process, the new business arrangements ensure that subsequent segments of work give the Region assurance that competitive proposals are being obtained from YC2002. *Attachment 1* provides a summary of the process to be followed by the partners in making a determination if they will be working together on an identified scope of work.

Negotiations have concluded for the next phase of work

A Regional negotiation team consisting of Supplies and Services - Tom Appleby and Stan Gal, Neil Garbe from the CAO's office, Paul May from Infrastructure Planning, and Mary-Frances Turner, and David Clark from the Rapid Transit Corporation, and McCormick Rankin as the OE, have led the process identified in the Go Forward Agreement for award of subsequent phases of work for the rapid transit project.

Following the process outlined in *Attachment 1*, YC2002 prepared a cost estimate to undertake the scope of work developed by the Owner's Engineer for Y2 and H3. At the same time, the OE prepared an independent cost estimate for this work.

Following opening of the two prices to undertake the work, both parties entered into a period of discussion and were provided an opportunity to revise their cost estimates based on the final scope of work.

In each instance YC2002's proposal was outside of the 8.5% threshold for award of the work. In light of the need for the Region to be able to deliver on "early wins" rapid transit projects, as identified by the GTAA, the negotiation team, on a without prejudice basis, outside of the framework of the Agreements, put a final cost figure to YC2002 to undertake the work. YC2002 has agreed to undertake the work programme on a lump sum basis for the amount of $10,750,000 and the negotiation team recommends the fee proposal to committee and council for award.

The Owner's Engineer will be retained to oversee the work program based on a time and materials basis

McCormick Rankin was hired through a competitive process to act as the Region's OE and a three year contract has been established to retain the OE for each subsequent phase of work. It is recommended that the OE continue to be retained on a time and materials basis based on the rates negotiated in the initial contract to an upset limit of $1,550,000.

The Highway 7 "centers to centers" preliminary engineering is considered a new priority

Highway 7 from Markham Centre to Vaughan Corporate Centre is the next logical work programme for PE based on approved environmental assessments. This report seeks authority to begin the process of having the OE develop the H2 work programme and enter into the process to commence negotiations with YC2002 to undertake this work in accordance with the terms of the Master Agreement and Go Forward Business Arrangements Agreement. It should be noted that funding for this PE effort would expect to be secured from the $17.5 billion transit funding source and therefore award of work will be tied to the availability of that funding source.

5. FINANCIAL IMPLICATIONS

Staff is in dialogue with the Provincial Government to enter into the formal Agreements for the funding of the PE work for Y2 and H3 and subsequently H2.

The awarded work is to be funded from the initial Provincial/Regional (50/50) $14.6 million dollar agreement in combination with the subsequent $255 million dollar funding announcement. While the subsequent funding Agreement (Regional/Provincial/Federal - one-third share each) is in the early stages of negotiation, staff has been advised by the Province that PE is an eligible funding item, while the Federal government has indicated that they will not fund the PE unless it is tied to a Federally funded capital project. The resulting funding sources are identified in Table 1.

Table 1
Phase 2 – Preliminary Engineering for Y2, H3, and H2

FUNDING AGREEMENT	**Funding Available for Y2/H3** ($ million)	**Provincial Share** ($ million)	**Regional Share** ($ million)
1. Regional/Provincial - $14.6 million dollar agreement	approximately $4.0	$2.0	$2.0
2. Regional/Provincial/Federal - $255 million dollar agreement	$15.0	$5.0-$7.5*	$5.0-$7.5*
TOTAL AVAILABLE FUNDING PER PARTNER	**$14.0 - $19.0**	**$7.0-$9.5**	**$7.0-$9.5**

*Note: funding varies depending on the amount of works ultimately funded by the federal government.

The OE will provide oversight services to the Region with regard to this work program. The costs for their services are recoverable from the provincial funding partner. Fees for the OE have been benchmarked against services provided in Y1 and has been recommended to an upset cost of $1,550,000.

Total project costs for Y2/H3 are $12,300,000 ($10,750,000 -YC2002 and $1,550,000 – McCormick Rankin). Staff will keep Council appraised of the outcome of discussions with the funding partners should a funding shortfall based on eligible claims be confirmed.

Staff is also in discussion with Infrastructure Ontario regarding opportunities to bring a private finance arrangement, referred to by the Province as alternative financing and procurement, into the Project, and staff will report back to Council on these discussions in future reports to Committee.

6. LOCAL MUNICIPAL IMPACT

The benefits of a Region-wide Rapid Transit system for all of the local municipalities cannot be overstated. Regional focus on the basic business elements guiding the Project will ensure Regional ratepayers receive the best value for their money.

7. CONCLUSION

The Master Agreement and Go Forward Business Arrangements Agreement between York Region, YRRTC, and YC2002 were finalized in the spring of 2007 and have been signed by YC2002, the Region and YRRTC. This report describes the guiding principles within the Agreements and the benefits that York Region will enjoy under these new arrangements. Negotiations have concluded for the next phase of work. YC2002 has agreed to undertake the Y2/H3 work programme on a lump sum basis for $10,750,000. Fees for the OE have been benchmarked against services provided in Y1 and has been recommended to an upset cost of $1,550,000. Total project costs for Y2/H3 are $12,300,000.

The Senior Management Group has reviewed this report.

(The attachment referred to in this clause was included in the agenda for the September 20, 2007 Committee meeting.)