



Sit down, take a deep breath, sip a beverage, open your mind and stay awhile while we chat with:



**David Swift, B.A. Hons. CPP (ip)**  
 Founder and Managing Director, RFP Solutions



**Frank Richter, A/Commr. (Ret.), CGA**  
 Senior Advisor, Fairness Issues, RFP Solutions



**Howard Grant, BSc. Hons. (Economics)**  
 Fairness Commissioner, President, Partnering and Procurement Inc.



**Ron Boothby, B.A., M.A., MBA, CMC, PMP**  
 President, AaVista Management Services Corp.

**What's goin' on?**

**Swift:** As people who offer fairness process services, we have developed and published the services we provide – and, in a sense, set our own criteria and standards, so when we are engaged, everyone involved in the process knows exactly what they are getting. We take into account the practices of various jurisdictions when we offer our services. The fairness monitor provides the public purchaser with an independent assurance that they have fulfilled their obligations, as well as assistance and advice on the process of meeting those obligations. That is also where the difference lies from mediation or arbitration. The fairness monitor does not have a role in

# chat Fairness monitoring

directly influencing the outcome other than to ensure the process is fair, but a bid evaluation committee may often turn to a fairness monitor to provide them with advice to make sure they respect evaluation criteria and apply them consistently. Sometimes the monitor is not simply a passive observer but rather an active participant in the process.

**Grant:** A fairness person has a role beyond simple observation. As an industry professional, a fairness commissioner can provide key advice. For example, a buyer may decide in today's public safety atmosphere that a certain degree of security clearance is needed. A fairness commissioner can provide advice on whether the desired level of security is fair to potential bidders and to what extent a certain level of designation is reasonable. That is well beyond simple attestation. A fairness process is an active one and a fairness commissioner looks at the relevance of the criteria. If a buyer wants to engage company "A" for a contract, the fairness person has to establish that if company "B" is also demonstrated to be able to provide the same service, they will be considered. If the answer is "no," the fairness monitor must withdraw since the process cannot be demonstrated to be fair. A fairness commissioner also provides the service of ensuring the reasonableness of the overall process. Say it is estimated to cost a bidder \$200,000 to bid on a \$500,000 contract. A process monitor won't care about that, but a fairness commissioner will say, "That doesn't make sense." A fairness monitor takes more of a holistic view.

**Richter:** My first fairness assignment was in the spring of 2000. At that time, Public Works [federal] was just starting to encourage the use of fairness monitors and they wanted someone independent sitting in – an observer who had nothing to gain or lose and who had not played a

role in the outcome – to help demonstrate that the deliberations were fair and equitable to all of the participants. In public purchasing or contracting, it is important to demonstrate that independently. It also helps the discipline of the bid evaluation committee to have someone there to remind them and keep them aware. People doing government contract evaluation are often program people who don't do these evaluations frequently and they appreciate having someone there to ensure the process is fair and consistently evaluated. The fairness monitor is there to give them options to respect the evaluation criteria and make it the same for everybody. The fairness monitor must also document and demonstrate that the process was fair.

**Boothby:** This is clearly a public sector issue. [The private sector] can go with who they want for what they want to a much greater degree. In government, the shareholders – the Canadian public and their elected representatives – demand that degree of fairness and transparency. As long as a fairness process ensures that it is also in the interest of the supplier. It is also clearly an issue for huge dollar contracts only. Small businesses can't expect a fairness monitoring process for smaller dollar-value contracts, and that in itself may not be fair to them. Though it may be a sign of the times in big government, big business and big money, it seems a shame from many points of view that fairness processes are seen to be necessary at all.

**Comin' from somewhere!**

**Grant:** The genesis of the profession is interesting. I probably did one of the first [fairness monitoring assignments] in Ontario in 1997. The fairness industry has emerged because senior bureaucrats and politicians do not believe that the people who are in the public procurement process are going to do it in an open, fair and

transparent manner. It is symptomatic of a crisis of confidence in the public procurement process. The other factor that has emerged comes from the private sector. Through CITT, NAFTA and other mechanisms, suppliers have realized that government can be legitimately challenged through a process if [the government] doesn't behave appropriately – and it has been demonstrated in some high profile cases that government has been an abusive buyer. Companies invest very substantial amounts of money in government contracts and many want a fairness process to be in place as an assurance that they are not wasting their money and efforts. It gives them confidence in the system. There is no question that fairness monitoring will become an industry, and it is an industry that to some degree is based on a lack of confidence in the public contracting process.

**Richter:** One of the reasons for fairness monitoring is the increasing exposure of governments to judicial or semi-judicial processes. The fact that contracts can be more frequently referred to the courts provides room for governments to be able to prove, on an independent basis, that the rules were followed as an overt defense against possible lengthy and expensive challenges. The court or tribunal does not see fairness monitoring as a guarantor, but they will review the fairness documentation and take it into serious consideration as coming from a disinterested third party to the complaint or concern raised. A fairness monitor is more of an expert witness, who can demonstrate that the process was followed, than a guarantor in the eyes of a court. There is also a value for all concerned in getting it right the first time. A challenge or a do-over caused by a CITT ruling or court judgement is a considerable added expense for everyone, buyer and bidders alike. Avoiding that risk can be valuable from a financial perspective alone.

**Boothby:** In my experience, government procurement and program people general-

ly work very hard to be fair, but I suppose that fairness requirements have come along in part due to some very visible exceptions to that rule. One of the most extreme examples is a program I was involved in until it was cancelled some 10 years ago and that is the federal Sea King Helicopter Replacement program. Not only did it suffer administrative delay, it then became a poli-

tical football that cost incredible amounts of money and time for all concerned – for the government, the bidders, the contractor and especially for our armed forces. In recent years, industry has spent a ton of money ramping up to do it all again.

**Swift:** The fairness process is clearly there to provide greater confidence in → pg 16

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public procurement processes, but that is not its only attribute. The fairness monitor brings solid experience and wisdom to the process and reinforces the rules and commitments public procurement is all about. The outcome of fairness involvement in a contracting process also means that there is a very detailed account and report of the process followed in contracting and in the outcome. This is part of the evidence that would be submitted for a tribunal or court proceeding, but it is also a useful management tool.

## Various and sundry

**Richter:** The fairness monitor is employed by the contracting department. So, the question arises “can you be fair if you are selected or engaged by the department?” The department or the purchaser has the obligation of fairness. The supplier does not have that duty and also has avenues of redress if there is any suspicion that the process wasn’t fair. It makes sense that the fairness monitor be paid by the party who has the duty and responsibility to ensure fairness. It also makes sense that a fairness professional must clearly demonstrate their own credibility, professionalism, value and ethics. The fairness monitor is there to ensure that the rules or undertakings of the contracting process are followed and to do so in a proactive way as decisions are made. I’ve always made a point of making sure that I review criteria in advance so everybody is working from the same assumptions.

**Grant:** The danger for government is that there is no real understanding of what a fairness person is going to do. What [government] wants is a process that demonstrates fairness and defends the [procurement] process, but there is no assurance that will protect them in the courts in the instance of an ill-conceived or flawed [procurement] process that may or may not have involved the fairness person. It is not blanket deni-

ability or acceptability. In auditing, you are looking in a rearview mirror – at an event already past. The fairness process doesn’t identify problems that have already occurred. It is there to avoid a problem, yet the result is still ambiguous in an official context. A fairness commissioner is not giving a legal opinion.

**Boothby:** In an ideal world a fairness function would not be necessary, but you don’t have to be involved in government contracting for long to realize how much less than ideal that world is. It is highly complex and highly competitive. There are rules for the development of rules, but those things are in place to protect the public interest. Suppliers understand and welcome anything that adds to a level playing field so long as it doesn’t get in the way of doing business.

**Swift:** In a sense, the term independent is not entirely accurate for a fairness monitor. The fairness person is hired by the buyer to ensure and attest to a fair process. Though that means they must be arms length, they are not an arbiter or judge. They are an agent of the buyer, and any future service they offer in certifying that the process was fair serves the interests of the buyer in meeting any challenges. It is a service to the buyer, not the bidder.

## What to do about it

**Boothby:** Suppliers aren’t looking for an unfair advantage – they’re looking for a fair advantage. That could be a superior product or service, a greater familiarity with the client’s requirements or situation, a better price or more value added. As long as the process is fair, you win some and you lose some. If a fairness process adds to that element of fair contracting, the only objections I can see coming from suppliers is if it is somehow corrupted – if it adds more bureaucracy and delay in the contracting process or if it increases the already considerable expense of bidding and competing for both sides.

**Swift:** I would support the development of standards for qualification, though I am not sure about how appropriate certification would be. I would also support the development of a professional association, especially to share best practices, keep up to date with court decisions and for professional development.

**Richter:** In the interest of public purchasers, we have to be moving towards industry-wide standards and processes, particularly in regards to higher-value, higher-risk purchases. Fairness monitors are normally paid a per diem as a professional service. For a contract of millions of dollars, which is the range in which fairness monitoring usually comes into play, the amount paid a fairness monitor is very modest, especially in relation to the overall cost and value.

**Grant:** The description of the fairness process is found in the RFP for each individual proposal, and they vary. Though there tend to be common themes there is no standard approach or process for fairness – or the terminology, which may be used interchangeably even when requesting the same service. My firm has our own definitions, but there is no common understanding. A number of us are considering starting up the Canadian Association of Fairness Commissioners because many people really don’t understand what the role is about. There is also a need for the creation of some sort of recognized designation. You can engage a high profile auditor, accountant, lawyer or judge in a fairness process, but that doesn’t mean they know anything about procurement or public policy issues. *mm*

## Next chatroom

The reasons for and against P3 procurements