Paying the piper
Ensuring fairness in fairness monitoring

by Gerry Stobo

THE USE OF FAIRNESS monitors (or fairness commissioners, process monitors) has become more frequent in recent years, and will be an ever-increasing feature in government procurements in the future. Yet, the role of a fairness monitor has developed absent any of the protocols or procedural safeguards one might expect when the goal is to ensure the unquestioned impartiality and integrity of a public procurement process.

Eighteen months ago, the federal Department of Public Works and Government Services Canada (PWGSC) issued a *Policy Notification* (*PN-65*) in which they committed to the development and implementation of a framework and guidelines for the use of fairness monitors. These procedures dictate, in part, that whenever a procurement plan proposes the use of a fairness monitor, measures must be included to ensure that there is no potential or perceived conflict of interest.

The reason these measures are so critical is that, at least notionally, the position of fairness monitor is intended to be an independent third party who can objectively attest to the fairness of a procurement process.

In that sense, to some extent, the position itself may import an inherent conflict of interest that may raise concerns about the objectivity and impartiality of the monitor themselves.

Consider that in a typical process the fairness monitor is chosen and paid for by the government. Moreover, when a dispute over a procurement process is undertaken to the Canadian International Trade Tribunal (CITT) or the courts in a case where a fairness monitor oversaw the procurement, the imprimatur of that monitor will be brandished by the government as a sign of the fairness of the solicitation.

In the March 2004 edition of *Summit,* "Chatroom" participant David Swift addressed this broader issue. "[Fairness monitors] 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."

Now, if it can be said that this institutional weakness exists when a fairness monitor oversees a procurement, consider the impact in particularly contentious and highly visible procurements where the government is believed to have a vested interest in the outcome.

The need to ensure that the impartiality and objectivity of the individual chosen to fill the role is very high – particularly as the government and its impartiality will already be in question.

Arguably the most contentious government procurement project of the past decade was the Maritime Helicopter Project (MHP) to replace Canada's fleet of aging Sea Kings.

Opposition critics and outside observers repeatedly charged that the federal government had created a procurement process that was detrimental to one of the potential bidders, E.H. Industries (now AgustaWestland).

The considerable delays involved in the project only fuelled the fears that the selection of the Cormorant – an EH-101 variant – would not be tolerated because, as one military stakeholder famously mused, it would be "political suicide." This procurement was monitored by a government selected fairness monitor.

When AugustaWestland's helicopter was not selected, it challenged the government's decision to award the contract to Sikorsky International Operations Inc. One of the grounds raised by AugustaWestland relates to the fairness monitor (whose identity has been revealed) selected by the government to oversee the procurement process.

In the court document filed, AugustaWestland argues that "the Minister selected and employed a 'fairness monitor' in the evaluation of bids who was a registered and paid lobbyist targeting PWGSC and the Department of National Defence during the term of the procurement on behalf of General Dynamics Corporation, one of the principal partners in the Sikorsky bid."

At the time of this article, the court case is still underway. Whatever the outcome of this case, one thing is certain: the role of fairness monitors will be subject to an increasing level of scrutiny by unsuccessful proponents.

The federal government seems to have learned that lesson.[1] In a recent RFP in which the federal government is looking to retain a fairness monitor for a study that will review the government's very substantial real estate holdings and needs, only individuals who are members of international accounting firms, national law firms and management firms are eligible to apply. No lobbyists are allowed to apply and former lobbyists must have a one-year "cooling off" period to be eligible. The RFP includes stringent lobbying/conflict provisions that are designed to ensure that the fairness monitor is beyond any suspicion of having a vested interest in the outcome.

The use of fairness monitors can be an integral part of a government's procurement process, particularly in highly visible and potentially contentious solicitations. However, the lack of a formal policy framework only undermines their effectiveness.

In order to ensure that contracting parties have confidence in fairness monitors, it is crucial that governments that use them develop and follow procedural safeguards that will eliminate all suspicions.

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Editor's note: Perhaps the complaint before the courts mentioned above will stimulate other governments that use fairness monitors (or whatever terminology is used to designate their function), to establish

[1] Solicitation EP310-050030/A issued July 6, 2005.

parameters for when and how to use them, and also some guidelines as to the qualifications that should be required of the people contracted to act in this capacity. I did a bit of an *ad hoc* survey, which is by no means complete or exhaustive, and called some procurement professionals in other government jurisdictions in Canada and here is what they had to say.

Manager, Supply, Glen Ford, at the City of Ottawa says the city uses fairness commissioners mostly for P3s (public-private partnerships) and the decision to use this professional service is made on a project-by-project basis. When Ottawa issues an RFP for this professional service, some very stringent requirements are outlined. However, the city does not have formal guidelines in place as to when and how fairness commissioners should be used or what their qualifications should be.

Director of Procurement, David Ash, from the Government of Manitoba says they have never used a fairness monitor and would have to start at "square one" should they decide it was necessary. In Manitoba, he says that fairness is built into the entire procurement process. Often a "balanced" team of internal people, at times assigned from other branches, is used to evaluate the RFP process from start to finish. However, when to use an evaluation team is a discretionary choice by the contracting officer for the procurement. Another option the province uses is an internal business consultant, who while they may know nothing about what is being procured, can participate in the entire RFP process to ensure that the procurement is fair, open and transparent.

Director of Procurement, Rick Draper from the Government of Nova Scotia indicated that the province is not familiar with the practice of using fairness monitors.

Acting Assistant Deputy Minister, Richard Poutney, from the BC government's Ministry of Common Business Services says fairness monitors, or process monitors as they call them, are used on major, complex procurements where warranted. The qualifications asked of the process monitor are dependant on the need and role they will be asked to play. The government does not have an established policy for process monitors. Also, BC's Partnerships BC (the agency responsible for public-private partnership arrangements) uses the services of process monitors.