

# The role of “fairness” commissioner needs a boost

by Denis Chamberland



**T**HE RECENT SPAT between consultant Michael Asner and BC Hydro raises serious questions about the role of a fairness commissioner in Canada. Not that these questions are new, but the firing of Michael Asner highlights the vulnerability of the parties involved in a relationship where the rules of the game have not been defined.

Asner, who is a highly-regarded consultant on requests for proposals, was hired to advise BC Hydro on a project called Procure To Pay, a three-stage evaluation of the utility's business processes for procuring and awarding contracts for a wide range of goods and services. Deloitte Touche developed the first two phases of Procure To Pay and wrote the requirements for the third phase. The request for proposals (RFP) for the project specifically acknowledged Deloitte's involvement in drafting the RFP and stated that Deloitte was eligible to bid on the final phase.

According to BC Hydro's communications director (quoted in the *Vancouver Sun*, January 28, "Fairness commissioner questions BC Hydro's contract system"), 22 companies asked for copies of the RFP; two submitted proposals.

The quarrel between the consultant and BC Hydro was sparked when Asner proposed to flag in his report Deloitte's preferred position in the competition. In a letter to BC Hydro, Asner said his responsibility was to ensure "fair and open competition." The utility took the view that disclosing Deloitte's role in developing the request for proposal dealt with the issue of conflict of interest, thus there was no unfairness. So the parties were at loggerheads.

What happened between BC Hydro and Asner is unique only in the sense that the squabble attracted a great deal of media

attention. The ambiguity in the parties' expectations of the role of the fairness commissioner is nothing new. What normally happens is that the fairness commissioner prompts the organization that issued the request for proposals to take steps to remedy or mitigate any perceived deficiency in the procurement process. While both sides may not be completely comfortable with the result, it is not often that a public body fires its fairness commissioner to avoid having his report become public. In that sense, BC Hydro may have done something exceptional.

While Asner and other procurement experts routinely assume the role of fairness commissioner, others stay away from it. They understand there is no consensus on what fairness means, so it is better to take a pass (and forego a financial gain) than risk losing a client forever.

What the fairness role needs is clarity. It needs clarity in regards to when a fairness commissioner should be appointed, who should be appointed, and what the role should be, if the role should exist at all. Many take for granted it is here to stay.

In her 2005 report on the Toronto Computer Leasing and Toronto External Contracts Inquiries (also known as the MFP Inquiry), Madame Justice Bellamy said a fairness commissioner should be appointed in 'complex procurements' – those that are high-value and/or high-profile and that can be counted on to attract some attention. To the extent that organizations use fairness commissioners, they would be well advised to adopt policies that set clear criteria to help identify those high-risk projects.

Madame Justice Bellamy also said that fairness commissioners might be found in the ranks of retired business executives, re-

tired senior civil servants, or retired academics. Why the emphasis on retired folks? In our opinion, the ideal fairness commissioner should have a substantive knowledge of the law and practice of public procurement. The fairness commissioner needs to be able to balance the fairness principles that grow out of the court decisions with the commercial realities of trying to get the best business deal possible for the organization. That comes from experience working in procurement.

What the role should entail is more complicated, and raises fundamental questions about the purpose of appointing fairness commissioners. Are fairness commissioners mandated to ensure that the competition is open, fair and transparent, and that the vendors are treated the same? Is the fairness commissioner somewhat like an auditor, whose report and findings can be dismissed by the public body? If the public body can direct what goes (or not) into the fairness commissioner's report, will bidders and the public have confidence in the fairness commissioner's report, and the public body's commitment to achieving optimal value for the taxpayer?

Beyond the details and the merits, the clash between Asner and BC Hydro casts a shadow on the role of fairness commissioner in Canada, and it highlights the need for organizations to review their policies and procedures relative to fairness commissioners. It may also emphasize the urgency of setting up a professional organization that sets standards of conduct and accreditation for fairness commissioners in Canada. *MC*

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