

# **Toronto** STAFF REPORT

---

June 22, 2004

To: Administration Committee

From: Chief Administrative Officer

Subject: Feasibility of Using Fairness Consultants for Certain Procurements

## Purpose:

To respond to the Auditor General's recommendation contained in the Procurement Processes Review that the CAO investigate the merits of using external fairness consultants for certain procurements.

## Financial Implications and Impact Statement:

The cost of using an external fairness consultant on a very complex procurement will average at \$25,000.00 with the (rare) possibility of a maximum of \$50,000.00. The source of funds will be the approved budget of the Department having responsibility for issuing the competitive call and managing the procurement process consistent with the Municipal Code Chapter 195, Purchasing. The Chief Financial Officer and Treasurer has reviewed this report and concurs with the financial impact statement.

## Recommendations:

It is recommended that:

- (1) Council endorse the approach of using external fairness consultants (detailed in Appendix 2) in certain limited circumstances defined by call complexity and the likelihood of intense scrutiny such as high-profile projects;
- (2) Departments review procurement initiatives at the planning and pre-call development stage for level of complexity as defined in Appendix 3, and the likelihood of intense scrutiny that may require the use of an external fairness consultant;

- (3) Departments intending to issue very complex competitive calls consult with a CAO-established Advisory Panel of City representatives (legal, finance, purchasing, and CAO) early in the call development stage to assess whether use of an external fairness consultant is warranted and which of the models described in this report is appropriate;
- (4) the CAO in consultation with the CFO, Solicitor and Commissioners, develop Terms of Reference and procedures for the Advisory Panel;
- (5) the reporting procedures for fairness consultants in Appendix 4, be approved to ensure appropriate Council and senior management involvement in complex procurements;
- (6) the CFO in consultation with the CAO, Solicitor and Commissioners, continue to establish best practices in procurement (examples are outlined in Appendix 5); and
- (7) the appropriate City Officials be authorized and directed to take the necessary action to give effect thereto.

#### Background:

At its meeting held on April 14, 15 and 16, 2003, Council adopted Clause 8, Procurement Processes Review - City of Toronto, embodied in Report No. 1 of the Audit Committee. The report from the Auditor General made a range of recommendations including that the Chief Administrative Officer (CAO), in consultation with the Chief Financial Officer and Treasurer, report to the Administration Committee on:

- (i) the costs and benefits of using an external consultant (Fairness Commissioner) on certain City projects, to shadow and attest to the fairness and appropriateness of the procurement process;
- (ii) the criteria to be used to determine when an external consultant (Fairness Commissioner) should be engaged; and
- (iii) the reporting relationship for this role.”

Accordingly, this report addresses whether and under what circumstances, the City may benefit from using external consulting assistance to assess certain of its procurement processes.

#### Comments:

##### 1. General Findings from Other Jurisdictions:

The primary purpose of a fairness consultant (Fairness ‘Commissioners’, Fairness ‘Monitors’ or Process ‘Monitors/Auditors’) is to assess and provide assurance on the process, not the decision. Specifically, the consultant does not address whether the right product or vendor was selected. Rather, it is the process of the selection itself that is assessed in terms of whether all participants were evaluated objectively according to approved and required processes.

To ascertain the benefit of using external fairness consultants for certain City procurements, research was undertaken on the nature and incidence of use in other jurisdictions. It was found that there is increasing awareness of the role in all government sectors. Of the thirty governments contacted, however, the use of external fairness consultants was found to be low (two had used the role once, and five had used it occasionally).

In contrast, a procurement/fairness monitor role was often reported as being undertaken by in-house staff. The persons fulfilling this role are selected for their expertise and perceived independence from the line department issuing the competitive call. In these situations, business cases and decision-making criteria to support management accountability was emphasized, as were linkages among program planning, financial planning, and accounting functions.

Appendix 1 summarizes the findings from federal, provincial, and municipal jurisdictions.

(a) The Changing Procurement Environment:

Coupled with new forms of collaboration, partnering, contracting, and funding arrangements, complex procurements often receive intense scrutiny. There are increasing expectations and demands for evidence of government accountability in procurement activities from vendors, the general public, elected representatives, and government staff themselves. As found by the Executive Resource Group, when reporting to the Toronto Computer Leasing Inquiry, such demands and developments have led to new:

- Demands for specialized knowledge of procurement management practices on large-scale, complex procurement initiatives;
- Precedents for procurement management processes based on common law decisions;
- Forms of arbitration/rulings based on challenges to public procurement undertakings;
- Statutory and regulatory directions requiring reform of administrative practice/procedures and standards, as part of new accountability frameworks; and
- Developments of methods and techniques for evaluation and selection processes.

(b) Purpose of Fairness Consultants:

Due to the increasingly complex public sector procurement environment, the use of external fairness consultants is also expected to increase. This is because their role is to provide oversight on procurement processes for the purpose of ensuring adherence to high standards, objectivity of evaluation, and transparency. This role can be particularly important for Request for Proposal (RFP) procurements where several solutions may be equally viable and need to be evaluated in a manner that ensures equability for all the proponents. Fairness consultants may be perceived by both internal and external parties, as providing more neutrality and independence than that provided by staff. Assurance from an arms-length party that procurement was consistent with best practices may reduce controversy, complaints and liability. This perceived objectivity, in turn, enhances the defensibility of procurement decisions.

It should be understood that when used properly, the role of fairness consultants will be neither a replacement for, nor a duplication of, staff responsibilities for managing a procurement process, inclusive of due diligence. Fairness consultant activities and advice should supplement in-house due diligence, except that internal parties will not be preparing an attest statement or report specifically on the extent of integrity and appropriateness of process.

(c) Summary of Roles and Responsibilities of Fairness Models:

External firms and individuals provide several types of fairness consultant procurement functions, as well as a general advisory role (General Procurement Advisor). Important distinctions can be drawn between the “Fairness Commissioner” model and that of the more commonly used model of “Procurement/Fairness Monitor”. A third model often referred to as either a “Process Monitor”, or a “Process Auditor” (dependent on the degree of value-for-money focus), was found to be the least commonly used. There are differences in both scope and roles among these models, as summarized below.

(i) Fairness Commissioner:

The title of Fairness Commissioner reflects the intended broad scope of advice and oversight across all the stages of a competitive call. In this model, involvement usually begins at the early stages of a procurement to provide overall guidance and advice throughout the call. A Fairness Commissioner may be retained after the business case and call document completion stages, but prior to the call release stage. Sometimes, a Fairness Commissioner is retained even earlier in the process to oversee pre-call development activities where staff undertake vendor and other party consultations to gather intelligence on potential solutions. Such meetings are becoming more common for complex, multi-year, RFPs (having mandatory and other criteria for evaluation, but where there are varying solutions/methods possible). In these cases, it is often expected that the consultant will have a role to advise on the development of the call itself.

Fairness Commissioners are often experts in the product or service field of the procurement and have early-stage, mid-stage, and late-stage process review roles, including:

- Advice on call development methods;
- Guidance to meet intended purposes of pre-call release consultations;
- Advice on call design/development features, objectives and evaluation techniques;
- Pointing out any artificial barriers to vendor participation;
- Ensuring call scope and deliverables are described clearly and appropriately;
- Assessing clarity of evaluation criteria;
- Confirming that terms and conditions are fair and reasonable;
- Attention to evaluation integrity such as, avoidance of bias or undue influence;
- Confirming that the evaluation process is properly designed;
- Requiring adequate documentation of the proceedings;
- Often, reporting to senior management at pre-identified key points;
- Advising post-evaluation on confidentiality factors, de-briefing of unsuccessful proponents/vendors, and approaches to negotiation/service level agreements; and
- Preparing a final report describing activities, process and degree of fairness compliance.

Appendix 2, part (a) provides more detail on Fairness Commissioner roles and responsibilities.

(ii) Procurement (Fairness) Monitor:

The role of a Procurement Monitor on a given procurement commences at a later stage in the process than that of a Fairness Commissioner. Hence, there is usually no involvement on the part of Procurement Monitors on processes in the earliest pre-call development stages of a procurement (as there can be by a Fairness Commissioner). In these cases, in-house resources are charged with taking into account, all necessary terms, conditions, evaluation criteria or specifications, liability, risk and legislative factors, for example. The Procurement Monitor role normally commences after completion of the call document, but sometimes prior to call release, to offer advice on critical aspects such as criteria clarity and pertinence, or evaluation techniques.

Often, a Procurement Monitor will not be brought in by an organization until the call has been issued/released to the marketplace. In such cases, any advice from a Procurement Monitor on the call document itself, would tend to cover the steps or procedures that can be taken to remove problems later found (such as unintended barriers to appropriate responses given unduly prescriptive requirements), and to oversee that satisfactory and timely communication takes place with bidders/proponents on any necessary call changes.

A Procurement Monitor will have many of the same typical mid and late-stage procurement roles and responsibilities as those outlined above for a Fairness Commissioner. Appendix 2, part (b) provides more detail on the Procurement Monitor roles and responsibilities.

(iii) Process Monitor/Auditor:

The role of a Process Monitor/Auditor has the least involvement in a procurement of all the fairness consultant models examined and is not an advisor during that process. Occurring only after the evaluation, or later-stage award process, the intent of this role is to provide after-the-fact fairness/audit assessment. A Process Monitor/Auditor is a party who was totally independent of the procurement process. Unlike the other models, the use of this function is usually an unplanned and unanticipated development arising from situations requiring immediate response and restoration of confidence such as:

- Complaints or controversy about the process that get high-profile;
- Public demands for review in the context of value-for-money, or best-use;
- Demand for accountability and transparency about project impacts;
- Challenges respecting private sector participation in public responsibilities; and
- Questions around new types of competitive processes.

Accordingly, the focus of a Process Monitor/Auditor will be upon the evaluation stage, adequacy of the steps taken to mitigate risk (e.g., financial, credibility, or liability), and assessment of the integrity of documentation. Activities often include reviews of scoring and other related processes, how vendor de-briefing/complaint processes were undertaken, and ensuring that correct documentation is in place. The Process Monitor/Auditor role has less time involvement,

or cost than either the Fairness Commissioner or Procurement Monitor models. Appendix 2, part (c) provides more detail on Process Monitor/Auditor responsibilities.

(iv) General Procurement Advisor:

It is the case that many organizations use external consulting firms, technical subject experts, and/or in-house staff to assist line and program areas in the design, principles, and specifications/criteria of a call document, particularly RFP documents. This role tends to focus on methodology and general procurement advice rather than the formal process monitoring, assessment and reporting that defines the “fairness” role. Absent the formal use of a fairness role, it can be difficult to determine the extent of that role actually played by in-house staff or external general advisors. Also, it was found that external firms that offer a fairness consultant role are actually used more often for general procurement activities (design of documents, or providing technical advice, for example). The distinctly different fairness function was cited in less than 20 percent of the project examples provided.

(d) Potential Costs of Using Fairness Consultants:

The total average cost of using external fairness services on three or four procurements, will approximate the full-time salary equivalent of certain professionals, or project managers. Given this, attention must be paid in the early planning stages of a procurement process to identifying the projects most likely to benefit from the use of an external fairness consultant. Having a fairness role performed by qualified, independent staff of an organization, supported by strong management control frameworks and senior management, should always be considered an option. However, the cost of using external fairness consultants, must be considered and weighed against the benefits that may accrue to the City, such as minimizing decision challenges.

It was found that, depending on the degree of complexity of a procurement, the cost of using the services of an external fairness consultant is about \$1,000.00 per day. For very complex procurements involving several departments, having highly technical or untested/new features, or responses needing considerable comparison and reconciliation, the cost of fairness services could be as high as \$3,000.00 per day. For other procurements involving fewer internal stakeholders, but involving, for example, a high risk, emerging technology, or public interest, the average cost for fairness services ranged from \$800.00 to \$1,200.00 per day.

The total average cost per project of using a fairness consultant was cited as being about \$25,000.00. However, it was also stated that these costs can be as high as \$50,000.00, depending on the nature, extent, and time involvement of activities agreed upon for the consultant.

(e) Potential Benefits of Using a Fairness Consultant:

The primary purpose of a fairness consultant is to assess and provide assurance on the procurement process, not its decision per se. Specifically, the consultant does not address whether the right product or vendor was selected, although this is the desired outcome. Rather, it is the process of the selection itself that is assessed in terms of whether all participants were evaluated fairly, and whether appropriate practices were followed.

For example, as pointed out by the Management Board Secretariat of the Province of Ontario, the use of a fairness consultant can be especially valuable where there can be two or more interpretations of call document requirements by respondents. While each interpretation may be equally legitimate, MBS wishes to receive advice on how fairness will be affected by evaluators taking one interpretation over the other. A fairness consultant can assist in ensuring full discussion and consideration of proposals in a climate promoting freedom of bias on the part of evaluators for product types, or certain vendor models, when others may have equal validity.

The potential benefits to an organization of using a formal fairness role to advise, monitor and assess a complex procurement (depending on extent of involvement) include:

- Obtaining a second opinion at key, pre-identified decision stages;
- Providing support to the purchasing manager in encouraging departmental best practices;
- Additional insight on correct competitive processes;
- Raising the profile within an organization regarding the importance of risk management;
- Assisting the consideration of all aspects of evaluation processes for better understanding;
- Addressing concerns for accountability/fairness given costs to respond to complex calls;
- Independent assurance of integrity of process with a signed attest statement; and
- Assistance in the debriefing of unsuccessful proponents/vendors.

2. Assessment of Findings and Recommendations for the City of Toronto:

(a) Assessing the Complexity of a Competitive Call:

Toronto is responding to changes in both its internal and external procurement environments and continues to implement improvements to its purchasing, financial management, integrity and accountability processes. Closer to senior government levels than most other municipalities, the City of Toronto is a very large organization with a wide range of responsibilities and complex initiatives. Accordingly, it can be concluded that the City should have stated requirements to assess certain of its complex procurement initiatives at the pre-call development stage. For the purpose of defining project complexity, procurements should be assessed for the presence of several characteristics, detailed in Appendix 3, and summarized as follow:

- Rapidly evolving products/new technology;
- High-risk endeavours;
- Multi-year commitments;
- Competition against a long-term incumbent;
- New types of procurement;
- Development/new use of properties; and/or
- Anticipated high profile and controversy.

It is, therefore, recommended that Council endorse the approach of using external fairness consultants (detailed in Appendix 2) in certain limited circumstances defined by call complexity and the likelihood of intense scrutiny such as high-profile projects.

It is also recommended that Departments review procurement initiatives at the planning and pre-call development stage for level of complexity as defined in Appendix 3, and the likelihood of intense scrutiny that may require the use of an external fairness consultant.

(b) Determining Internal versus External Accountability:

In addition to identifying the degree of complexity of a given procurement, clarity around the roles of staff and elected officials vis-à-vis external parties in procurement processes is a key factor in determining whether or not to use a fairness consultant. In turn, resource levels relative to the number and range of complex procurements to be managed must be taken into account. While the City has a number of in-house staff with the skills, capability, and experience to perform a fairness role, this is not their primary job responsibility. This does not mean, however, that an available individual(s) within the City could not appropriately fulfil the fairness role.

Where internal resources perform a fairness role, the best information possible is essential to support accountability including business cases, documentation, data, and decision-making criteria. Linkages between program planning, financial planning and accounting functions are essential and priorities should be reflected by best procurement practices. To the extent possible, the expectations of the City around best practice should be clearly stated as requirements in the call document. Adherence to best practices for procurement will minimize the need for external fairness consultants except on the most high profile and complex City initiatives.

It should also be noted that the decision to use internal expertise to perform a fairness role does not rule out the use of an external Process Monitor/Auditor post-evaluation (prior to, or after, announcement of an award). This could be the route followed if there are complaints or major problems that surface irrespective of processes in place such as a single-point of (RFP) contact, or stringent de-briefing and complaint processes.

3. Determining Whether and When to Use an External Fairness Model at the City:

Distinctions among the possible fairness consultant models, as well as between the fairness and purely advisory role (General Procurement Advisor), are critically important in assessing whether one model is more appropriate than another for a given procurement initiative. As seen, the respective fairness models generally commence at different stages of procurement, with the Fairness Commissioner often commencing pre-call release, although all perform a final attest and reporting role. Early-stage involvement in a procurement process, however, can create its own difficulties since it can be difficult to later justify that the consultant did not have undue influence or direct involvement in the process. Specifically, a potential conflict of interest can arise or be perceived to be attached to the subsequent reporting on the fairness of a procurement process by a party seen as having close ties to the design of the call in its early stages.

It is for this reason that many governments elect to use only “mid/late” stage roles rather than full early to late-stage fairness consultant involvement. By making this decision, government is seeking to clearly separate fairness advice, monitoring, assessment and reporting, from the early-stage technical, business case, or call design aspects of a procurement.



It is staff that should be the lead parties responsible for managing a procurement (including pre-call development consultations, call design/development, call release/issuance, information briefings, addenda to refine submission requirements, evaluation/scoring, recording results, negotiations where necessary, debriefing unsuccessful proponents, handling complaints, and awarding the call). Those having direct responsibility for carrying out these roles should not also perform a formal fairness function. Similarly, when expert technical advisors are brought in to advise on elements of call design, neither should those parties perform a formal fairness function.

It is, therefore, recommended that Departments intending to issue very complex competitive calls consult with a CAO-established Advisory Panel of City representatives (legal, finance, purchasing, and CAO) early in the call development stage to assess whether use of an external fairness consultant is warranted and which of the models described in this report is appropriate.

It is also recommended that the CAO in consultation with the CFO, Solicitor and Commissioners, develop Terms of Reference and procedures for the Advisory Panel.

#### 4. Fairness Consultant Reporting Relationship:

As a method of mitigating potential risks in very complex procurements, the recommendations of this report provide for the limited use of external fairness consultants by the City while recognizing that internal fairness consultant roles will be used when appropriate. Whichever party undertakes fairness monitoring/assessment, it is essential to ensure their independence from the in-house procurement management role. This requires well-understood and respected reporting requirements for the fairness consultant from inception to conclusion.

Council approval is required for contracts that involve a substantial expenditure or unusual circumstances of general public interest. For complex procurements, since significant risks and issues are involved and/or the nature of the procurement is very sensitive, specific contract award approval from Council should be obtained even if the value of the contract is below the established authority level delegated to staff. Also, since these are the types of procurement calls for which a fairness consultant may be used, the reporting relationship must reflect the senior levels of decision-making required. During the procurement process, status reports of the fairness consultant should be made to the most senior level of the administration for discussion and any action required. The final report of the fairness consultant, if favourable, should be made available at the time of reporting to Council on award recommendation. If unfavourable, the fairness consultant's report should first go to senior management for consultation on the preferred next steps to recommend to Council.

It is, therefore, recommended that the reporting procedures for fairness consultants in Appendix 4 be approved to ensure appropriate Council and senior management involvement in complex procurements.

#### 5. Continuing to Develop Best Practices in Procurement:

There are a number of best practices in procurement that will support role clarity, integrity of process, and management of complex initiatives. As seen, many of these will depend on

addressing accountability principles and frameworks early in the call development process. In addition, it has also been seen that adherence to best practices for procurement will minimize the need for external fairness consultants except on the most high profile and complex City initiatives. An overview of best practices is contained in Appendix 5, and can be summarized as:

- Pre-call development consultation with all stakeholders;
- Early legal involvement at call development/design stage;
- Separation of business case development, call development and fairness oversight roles;
- Single-point-of-contact requirements from call release until award;
- Treating any questions/interviews as a formal part of evaluation;
- Mandatory vendor/proponent de-briefing; and
- Independent processes for complaint submission, review, resolution and appeal.

Examining the potential utility and value of fairness consultants necessarily leads to considering areas of best practice most pertinent to City processes. This is because no single aspect of procurement (such as ‘fairness’) can be viewed in isolation of the entire procurement framework and policies in place. For example, early determinations of what a call should be achieving (reflected in mandatory criteria, terms and conditions) to the design of a complaint process (reflected in objective, arms-length practices) all contribute to ‘fairness’ practices. Two particularly valuable practices to formalize and enhance due diligence are described below.

(a) Single-Point of Contact:

An important best practice is to delegate authority to a single-point-of-contact named in the call document. This provision is intended to restrict all discussion, questions and complaint submissions about a procurement process, to only that designated staff person(s). In such cases, best practice dictates that inappropriate communications and non-compliance on the part of vendors/proponents, from call release to the final award decision, will result in enforced penalty.

Elected officials also have the responsibility in these cases to refer all related contacts, communications or complaints to the designated staff contact. This avoids avenues of influence or appeal in isolation of due process, which can subject major, priority projects to serious risk of cancellation, lost investment, and legal action. While this does not stop Council discussion and consideration of the initiative in the first instance, or the policy ramifications of changing circumstances, it does support legally required processes based on merit.

(b) Complaint Avoidance and Review Processes:

A critical aspect to procurement integrity is ensuring that staff manage an independent and non-politicized complaint process. At present, the City system permits any written vendor/proponent complaint for calls, of any value, to pre-empt delegated authority for award. Specifically, a written complaint will send the award decision directly to Council for award determination. This means the respective approval processes for calls (currently, Commissioners to \$500,000, Bid Committee from \$500,000 to \$2.5 M, and Standing Committee from \$2.5M to \$5M) are bypassed. This is not consistent with best practice nor does it support the purpose, cost and use of a fairness consultant. Specifically, mishandled complaints could pre-empt the report from an

external party brought in to provide the assurance of fair, equitable, and justifiable award processes.

A complaint handling process involving several steps is prevalent at senior government levels for complex procurements. First, following contract award recommendation, but prior to final approval, mandatory de-briefing meetings with vendors/proponents are required to review, for example, the process, evaluation methods, the score of a vendor, areas well addressed and those needing improvement. The City could also benefit from this process since it provides an opportunity to learn more about the marketplace as well as to convey public sector values. Second, the responsible procurement managers (supported by a fairness consultant if involved, and other internal staff as appropriate) address issues arising after evaluation but prior to award. Third, following participation in the mandatory de-briefing session as a pre-condition, vendors/proponents may submit a formal written complaint through the single-point of contact asking for an administrative review by a “Complaint Review Panel”.

It is, therefore, recommended that the CFO in consultation with the CAO, Solicitor and Commissioners, continue to establish best practices in procurement (examples are outlined in Appendix 5).

#### Conclusion:

Government procurements with significant public policy ramifications are increasing as are those involving technology, finances and liabilities that increase evaluation complexity. Such procurements often receive intense scrutiny extending to the conduct of elected representatives and government staff themselves. Hence, procurement practices that will contribute to fairness, clear communication, and avoidance of inappropriate lobbying or interference with contract award, are of interest to the City.

Accordingly, this report provides for the limited use of fairness consultants based on the collaborative recommendation of a Department issuing a call, and in-house experts. Where use of a fairness consultant is recommended, the role will be to report on compliance with best practices of the organization and the field. This will include matters such as conformance with required policies, assurance about call openness to the broadest possible market, appropriate criteria, and fair and impartial evaluation. The goal of using a fairness consultant is to obtain a written statement that attests a procurement was conducted in an objective, defensible fashion.

This report also reviews principles to adhere to if using a fairness function including, retention of in-house responsibility for policy-setting, and decisions about what and how to procure, for example. Also explained are accountability principles recognizing that advice and guidance from external parties should supplement rather than replace or duplicate staff management and control roles and responsibilities. Finally, this report describes some future areas of best practice for the City that will help all involved parties to communicate and understand the need to minimize potential conflicts-of-interest within and among the stages of a procurement process.

Contact:

Laurie C. McQueen  
Sr. Corporate Management & Policy Consultant  
Phone: 416-392-8895      Fax: 416-696-3645  
E-mail: lmcqueen@toronto.ca

Shirley Hoy  
Chief Administrative Officer

List of Attachments:

- Appendix 1: Use of Fairness Consultant Models in Other Jurisdictions
- Appendix 2: Fairness Commissioner, Procurement Monitor and Process Monitor/Auditor Models - Roles and Responsibilities
- Appendix 3: Characteristics of Complex Procurement Initiatives
- Appendix 4: Fairness Consultant Reporting Procedures
- Appendix 5: Examples of Best Procurement Processes

## **APPENDIX 1**

### **USE OF FAIRNESS CONSULTANT MODELS IN OTHER JURISDICTIONS**

A review of fairness consultant models (Fairness Commissioners, Procurement/Fairness Monitors and Process Auditors) used in other jurisdictions was undertaken using several sources. First, a survey of various government levels was conducted by staff of the Purchasing and Materials Division (PMMD). Second, telephone interviews were conducted by CAO and PMMD staff with senior government procurement staff. Third, research papers prepared for the Toronto Computer Leasing Inquiry, by the consulting firm Executive Resource Group, provided good overviews of potential roles cited by fairness consultant firms. Fourth, the City of Toronto has received communications listing project examples, from firms providing fairness consultant services.

#### **(a) Federal Government:**

While often cited as a high incidence user of Fairness Commissioners/consultants, the largest procurement arm of the Federal Government, namely, Public Works and Government Services stated that it does not make use of a Fairness Commissioner or Procurement/Fairness Monitor function. In contrast, due to trade regulations and procedures, any review of procurement follows a structured process through the Canadian International Trade Tribunal. Sources distinguished the complaint receipt and review role of the Tribunal (dealing with disputes around international trade agreements), from assessing the fairness in the procurement process itself. Nor does the Treasury Board of Canada Secretariat use an external fairness consultant or Process Monitor/Auditor. In contrast, they use an internal Contract Review Committee.

#### **(b) Provincial Governments:**

The Provinces of Alberta, Manitoba, New Brunswick, Newfoundland/Labrador, Saskatchewan, Nova Scotia and Prince Edward Island, do not use Fairness Commissioners or Procurement/Fairness Monitors. The Government Procurement Agency of the Province of Nova Scotia, however, distinguished the use of technical procurement advisors (for identifying specifications or evaluation criteria), from fairness roles. They characterized the complaint and dispute settlement component as the fairness element and are considering establishing a Province-wide, arms-length central group for this purpose. The purpose of the central group would be to have a direct settlement dispute role for the whole MASH (municipalities, academic institutions, school boards and hospitals) sector.

The British Columbia Office of the Comptroller General, and the Ministry of Management Services, Procurement and Supply Services, stated that it has occasionally used a fairness function and that the practice was first used in 2003. Because the use is so recent, B.C. does not have a formal policy to determine when to use a fairness consultant. Rather, the decision is made on a case-by-case basis for high-profile or possibly contentious issues such as the outsourcing of government work, or where there is a perception that a procurement will be biased in favour of a long-term provider when a new competitive call is issued.

In Ontario, since 2003, the Strategic Services Contract Management Office of the Ministry of Health, with about 900 contracts per year, has used a fairness consultant on two projects that had significant public interest with the attendant media attention. A fairness consultant was also used on a third project that involved a major information technology (IT) initiative. IT projects are most representative of the type of project for which the Government of Ontario has used the services of a fairness consultant. For example, IT constituted all three projects cited by one firm as its provincial fairness assignments.

The Procurement Policy and Information Technology Procurement Branch of the Management Board Secretariat (MBS), develops and standardizes best practices for the province as a whole. It has as a goal the reduction of reliance on external advisors. To help extend internal expertise and rigour, MBS is standardizing and promoting best practices across all Ministries.

MBS uses fairness consultants for large projects involving several Ministries, especially complex and high-value IT projects. A Fairness ‘Monitor’ model is used (and detailed terms of reference developed) reflecting an advisory, not a lead, role. This is because provincial procurement staff manage, develop and control the early-stages of a competitive call (i.e., where a Fairness ‘Commissioner’ model usually begins). Staff do all up-front work to develop the business case and to assess/advise on what the province is going to the market for and the method of procurement to do that. In this manner, MBS deliberately and purposefully de-couples the business design role from the oversight role of the Procurement/Fairness Monitor.

**(c) Municipal Governments:**

Very few municipalities were found to have used fairness consultants. Cities stating that they did not use the function included the Cities of Bangor, Boston, Brampton, Calgary, Cambridge, Edmonton, London, Los Angeles, Mississauga, Montreal, Niagara Falls, Philadelphia, Richmond, Vancouver, and Winnipeg. Regions stating that they did not make use of fairness consultants included Durham, Greater Vancouver, Halifax, Halton, and Peel.

In contrast, since 2001, the City of Ottawa occasionally uses fairness consultants on procurements where it is anticipated that there may be an accusation of bias or a perceived conflict of interest by evaluators. In addition to the role of the fairness consultant, senior staff in Ottawa review the evaluation and selection requirements prior to release of the call document.

In York Region, “process consultants” have sometimes been used to monitor and report on the fairness of major infrastructure projects and transit projects. Only one municipality, Halifax Region, reported having hired a Process Auditor for a high profile, high-value project worth \$400 M. The focus for fairness and process integrity in this case was to mitigate financial risks and assure value-for-money of the procurement. And, similarly, in the City of Toronto, the Honourable Coulter Osborne fulfilled a Process Monitor role.

## APPENDIX 2

### **FAIRNESS COMMISSIONER, PROCUREMENT/FAIRNESS MONITOR AND PROCESS MONITOR/AUDITOR MODELS - ROLES AND RESPONSIBILITIES**

#### **(a) Fairness Commissioner:**

The title of Fairness Commissioner reflects the intended broad scope of advice and oversight throughout most stages of a competitive call. In this model, involvement usually begins at the early stages of a procurement to provide overall guidance and advice throughout the call. A Fairness Commissioner may be retained after the business case and call document completion stages, but prior to the call document issuance stage.

Sometimes, a Fairness Commissioner is retained even earlier in the process to oversee pre-call development activities where staff undertake vendor and other party consultations to gather intelligence on potential solutions. Such activities are becoming more common for complex, multi-year, RFPs (having mandatory and other criteria for evaluation, but where there are varying solutions/methods possible). In these cases, it is also expected that the consultant will have a role to advise on the development of the call itself.

Typically, for very complex procurements, Fairness Commissioners who are also expert in the product or service field to be contracted for, have roles across all the following stages:

#### **(i) Early-stage involvement such as:**

- Pointing out call development methods, their respective requirements and merits (e.g., Requests for Information/Expressions of Interest, or Requests for Qualification that may precede issuance of call document for formal competition);
- Overseeing the call document design and development by raising for consideration:
  - up-front involvement of necessary legal/other parties;
  - objectives intended when selecting specifications, or mandatory and other criteria;
  - a range of available and preferred evaluation tools and techniques; and
  - the impact on fair and reasonable evaluation of various weightings for financial, service, quality, legislative compliance and interview components, relative to other acceptable weighting scenarios;
- Advising on the purpose, steps, degree of information provision and other processes for any call pre-release consultations held with potential tender bidders/RFP proponents;
- Pointing out avoidance of methods/approaches that can cause potential biases in design (due to embedded public policy issues) to enable appropriate vendor choice, beyond fairness of the process that ensues;

- Identifying potential inconsistencies, or lack of clarity in call document requirements, in order to meet approved and stated business objectives, statutory regulations, policy directives, administrative requirements and best practices for procurement;
- (ii) Mid-Stage involvement such as:
- Verification of the roles, responsibilities, decision authorities, and reporting requirements of the designated internal procurement management team;
  - Attending and monitoring any information, briefing, or other sessions held with bidders/proponents by the procurement management team to note anomalies and follow-up with procurement management team ;
  - Ensuring that evaluation team members are provided with briefings on best practices including:
    - the principles and duties of fairness, care and proprietary information protection;
    - having a single-point of contact in place prior to and following evaluation;
    - avoidance and disclosure of conflict of interest, bias, and undue influence;
    - exclusion of any technical consultants used to design/establish call requirements;
    - inclusion of more than two persons as an evaluation team;
    - arms-length from political involvement/participation;
    - scoring procedures and sign-off on individual scoring sheets;
    - formal evaluation/scoring of any interview component of the evaluation process;
    - the preparation, treatment and retention of evaluation documents;
  - Attending and monitoring evaluation team meetings to:
    - keep processes consistent with best practices (see above);
    - ensure all bids/proposals are evaluated in strict accordance with call specifications/criteria;
    - verification of bids/proposals evaluated as being non-qualified, non-compliant;
  - Ensuring that principles and measures of success for how the procurement process is carried out, are established and provided to the government client as public information;
  - Monitoring and documenting, at pre-identified points in the procurement process, the issues raised, solutions arrived at, and actions required and taken to ensure consistency with the original approved objectives;
- (iii) Late-stage involvement such as:
- Monitoring and immediate reporting to pre-identified senior management on any known or perceived conflicts of interest, occurrences of undue influence, or other factors (among management/evaluation team members, as well as key stakeholder representatives), that may negatively impact the integrity of the evaluation/scoring or assessment process;



- Ensuring that the procurement management team, evaluation team members and other stakeholders understand ongoing confidentiality responsibilities post-contract award;
- Advising on proper vendor/proponent de-briefing processes and complaint procedures;
- If engaged for the contract negotiation/service-level agreement stage, ensure that the process is conducted in an ethical, structured manner by appropriate, skilled specialists adhering to the mandatory criteria/irrevocable terms and conditions of the RFP/tender; and
- Providing a full report at the conclusion of the procurement process to accompany the recommendation of contract award, as to whether and how the process has complied with fairness, openness, and transparency requirements.

**(b) Procurement/Fairness Monitor:**

The role of a Procurement Monitor on a given procurement commences at a later stage in the process than that of a Fairness Commissioner. Hence, there is usually no involvement on the part of Procurement Monitors on processes in the earliest pre-call development stages of a procurement (as there can be by a Fairness Commissioner). In these cases, in-house resources are charged with taking into account, all necessary terms, conditions, evaluation criteria or specifications, liability, risk and legislative factors, for example. The Procurement Monitor role normally commences after completion of the call document, but sometimes prior to call release, to offer advice on critical aspects such as criteria clarity and pertinence, or evaluation techniques.

Often, a Procurement Monitor will not be brought in by an organization until the call has been issued/released to the marketplace. In such cases, any advice from a Procurement Monitor on the call document itself, would tend to cover the steps or procedures that can be taken to remove problems later found (such as unintended barriers to appropriate responses given unduly prescriptive requirements), and to oversee that satisfactory and timely communication takes place with bidders/proponents on any necessary call changes.

A Procurement Monitor will have much of the same involvement identified in 2(a)(ii) and (iii) as typical mid and late-stage procurement roles and responsibilities for a Fairness Commissioner.

**(c) Process Monitor/Auditor:**

The role of a Process Monitor/Auditor has the least involvement in a procurement of all the fairness consultant models examined and is not an advisor during that process. Occurring only after the evaluation, or later-stage award process, the intent of this role is to provide after-the-fact fairness/audit assessment. A Process Monitor/Auditor is a party who was totally independent of the procurement process. Unlike the other models, the use of this function is usually an unplanned and unanticipated development arising from situations requiring immediate response and restoration of confidence such as:

- Complaints about the process fairness that get political level profile;
- Public demands for review in the context of value-for-money, or best-use, auditing;

- Controversy about the necessity of a project process or decision;
- Vendor willingness to challenge government decisions based on legal precedent;
- Demand for accountability and transparency about project impacts on the public interest;
- Challenges respecting private sector participation in public responsibilities; and
- Questions around new competitive processes (e.g., Common Purpose Procurement).

Accordingly, the focus of a Process Monitor will be upon the evaluation stage, adequacy of the steps taken to mitigate risk (e.g., financial, credibility, or liability), and assessment of the integrity of documentation. Activities often include reviews of scoring and other related processes, how vendor de-briefing/complaint processes were undertaken, and ensuring that correct documentation is in place. The Process Monitor/Auditor role has less time involvement, or cost than either the Fairness Commissioner or Procurement Monitor models.

**(a) Prevalence of Model Use:**

All of the above models should be distinguished from external consulting firms that offer General Procurement Advisor roles used to provide technical subject expertise, or to assist line and program areas in the design, principles, and specifications/criteria of a call document, for example. These advisors focus on methodology and general procurement advice rather than the formal process monitoring, assessment and reporting that defines the “fairness” role. The distinctly different fairness function was cited in less than 20 percent of the project examples provided by external firms offering both fairness and general advisory services.

### **APPENDIX 3**

#### **CHARACTERISTICS OF COMPLEX PROCUREMENT INITIATIVES**

For the purposes of defining very complex procurement initiatives, assessment should be undertaken by a small group of representatives including the issuing Department, finance, legal, Corporate-wide/CAO representatives and others as required. Procurements should be assessed for the presence of several of the following characteristics:

- Rapidly evolving products, especially software (with a need to reconcile differing proposals);
- High-risk endeavours;
- Out-of-country vendors challenging required Canadian terms and conditions;
- New technologies such as waste management or information systems;
- Competition against a long-term incumbent (to avoid perception of undue advantage);
- Innovative forms of procurement;
- New, high-value products;
- Development/new use or operation of significant public sites/facilities/properties;
- Anticipated high-profile and controversy that can lead to few responses or pressure to take low bid/price regardless of other areas evaluated as best; and/or
- Private-public, or public-public, partnerships (known as P-3 projects).

#### **APPENDIX 4**

#### **FAIRNESS CONSULTANT REPORTING PROCEDURES**

The reports from a fairness consultant will be submitted at pre-determined key points in the procurement process to the responsible Commissioner, the CAO and the CFO.

Where the final report of a fairness consultant affirms adherence to objective and appropriate processes, it will be conveyed to Council accompanied by the staff report recommending contract award and commenting on costs, benefits, and lessons learned from using a fairness consultant.

Where the final report of a fairness consultant concludes that a procurement process was poor, the CFO and Commissioner consult with the Advisory Panel with the intent to report to Council recommending corrective action, termination of the procurement initiative, and/or seeking Council direction.

## APPENDIX 5

### **EXAMPLES OF BEST PROCUREMENT PRACTICES**

**(a) Management Framework Accountability:**

Linkages between program planning, financial planning and accounting functions is essential and priorities should be linked back to best procurement practices including:

- Acquisition and supply at the right time;
- Fair and open competition;
- Effective and efficient process management;
- Awards based only on mandatory requirements and best-value (can include qualitative evaluation against price/costs);
- Alternative ways to satisfy needs examined;
- Deliverables specified; and
- Movable Assets verified, managed, located and updated.

**(b) Best Procurement Practices:**

The following are examples of best procurement practices found to be in place at various government levels. They are particularly valuable in supporting role clarity and integrity of process. Many of the best practices require addressing accountability principles and frameworks early in the call development process. While they are of benefit to any procurement, they are of particular necessity for procurement initiatives defined as very complex. Adherence to best practices for procurements will minimize the need to use external fairness consultants except on the most high profile and complex City initiatives. An overview of best practices follows:

- Pre-call development consultation with vendors/providers, as well as for high-value projects, and procurements where new products or services are being sought;
- Pre-call development consultation with other parties, including sessions with Council members and the public as determined by the nature of the procurement initiative;
- Early legal involvement at call development/design stage (including contract expected);
- Rigorous in-house processes supplemented with tools/booklets on proper RFP design;
- Separation of business case development, call development and fairness oversight roles;
- Separation of the roles of technical/procurement advisors from fairness oversight;
- Single-point-of-contact requirements with consequences for non-compliance;
- Ensuring questions/interviews are weighted and scored as part of the formal evaluation;
- Mandatory vendor/proponent de-briefing;
- Complaint submissions made only to the designated single-point of contact;
- Formal complaint review, and appeal processes if required (no elected officials) with set time periods for decisions; and
- Fairness consultant Vendors of Record (distinct from general procurement advisors).