



Trillium Line Extension Project Fairness Commissioner

March 9th, 2020

- Since it was founded in 2002, P3 Advisors has been engaged in over 190 fairness mandates in municipal, provincial and federal jurisdictions (including over 60 public-private partnerships)
- None of the procurements that P3 Advisors has been involved in have been successfully challenged
- In the last 5 years, we have been involved in procurements of \$23.5 Billion and fairness mandate of \$32 Billion
- Louise Panneton and Jill Newsome have repeatedly been faculty members on the York University Osgoode Certificate training related to fairness and procurement
- All P3 Advisors resources who work on fairness mandates are trained through a rigorous program
- Fairness concerns that are raised undergo peer reviews within P3 Advisors



- Review and provide comments on the final draft of the RFP
- Review and comments on material and communications between the City and Proponents
- Monitor in person meetings held between the City and Proponents
- Monitor and assess whether the City is managing the procurement in a manner that is consistent with the terms of the RFP
- Monitor the evaluation process adopted by City
- Act as a facilitator between the City and Proponents in seeking or supporting solutions to address potential or actual fairness issue or concerns
- Prepare written report for delivery to the City

In respect of the Evaluation Process, the Fairness Commissioner is responsible for the following:

- a) review any document, including this Evaluation Framework, related to the Evaluation Process;
- b) attend any meetings for the purpose of observing the Evaluation Process;
- c) participate in any recommendation by Evaluation Manager to the BESC to approve any divergence from the Evaluation Framework, and any proposal or approval by the BESC to a divergence or amendment to the Evaluation Framework;
- d) observe the Technical and Financial Evaluation Process in order to assess the extent to which the Evaluation Process is fair and transparent
- e) review communication with Proponents, including clarification questions and responses (prior to being issued);
- f) advise the OLRT Bid Evaluation Steering Committee on the adherence of the Evaluation Process to the previously established RFP, and this Evaluation Framework;
- g) participate in review of Conflict of Interest;
- h) participate in all status meetings;
- i) report to the OLRT Bid Evaluation Steering Committee; and
- j) provide an attestation on the Evaluation Process, including but not limited to signing off on final ranking, openness, fairness, and transparency of process.

The Conflict Review Team is responsible for the following:

- a) assess any disclosure of relationships with Proponents identified by any Participant;
- b) assess any conflict of interest or potential conflict of interest that has been disclosed by a Proponent;
- c) make a recommendation on corrective measures to address conflicts of interest, as required, including the replacement of any Participant or disqualification of a Proponent, in consultation with the Fairness Commissioner and Norton Rose Fulbright;
- d) in the event that any material judgment or discretion is required to address conflicts of interest, the OLRT Bid Evaluation Steering Committee will be consulted through the Evaluation Manager; and
- e) provide a final presentation to the OLRT Bid Evaluation Steering Committee at the completion of the Evaluation Process

The Fairness Commissioner is not a member of the Conflict Review Team. This is generally the case in P3 procurements.

Conflict of Interest - General

- Part of our role in the evaluation process is to participate in the review of Conflicts of Interest
- All Evaluation Participants signed a COI form that was provided to the Conflict Review Team
- The Conflict Review Team escalated any declared relationships to the Fairness Commissioner to review from a fairness perspective



Conflict of Interest– Norton Rose

- P3 Advisors was aware that Norton Rose had existing client relationships with members of more than one Proponent teams that were unrelated to the Trillium Line Extension Project
 - These types of relationships with legal advisors are not abnormal in the P3 industry



Discretionary Clause

- Part 3 to Schedule 3 of the RFP, Section 3.0 (c) states:

If a Proponent fails to achieve any of the General Technical Submission Minimum Score, Design Submission Minimum Score, Construction Submission Minimum Score, or the Financing Plan Minimum Score, the Sponsor may, in their sole discretion, determine whether that Proponent's Proposal will continue to be considered in the RFP Process. In considering whether the Proponent's Proposal will continue to be considered in the RFP Process, the Sponsor may take into account, among other matters, any one or more of the following:

- (i) the severity of the failure to achieve the applicable minimum score;*
- (ii) the Proponent's total Technical Submission or Financial Submission score; and*
- (iii) whether multiple Proponents have failed to achieve a minimum score.*



Discretionary Clause

- The clause was included in the RFP which all Proponents had access to
- The clause is more substantive than similar clauses in the industry, namely because it specifically identified factors to consider related to its application
- One of the factors was “*the severity of the failure to achieve the applicable minimum score*” therefore when we assessed the application of the discretionary clause from a fairness perspective, we considered:
 - The proximity of the final score to the threshold (less than 3%)
 - The significance of the elements that lead to scores lower than 70%, based on the input and experience from the BESC



Discretionary Clause – Legal Opinion

- The BESC obtained a legal opinion related to the risk of not applying the discretionary clause
- The engagement of a Fairness Commissioner does not preclude the City from obtaining a legal opinion
- P3 Advisors did not consider the legal opinion in its assessment of the application of the clause from a fairness perspective



Fairness Commissioner Report

- Once the procurement process was complete, P3 Advisors submitted its fairness report to the City, which confirmed our role throughout the process and attested that we were *“satisfied that, from a fairness perspective, the processes undertaken related to the City of Ottawa Stage 2 Trillium Line Extension Project [have] been conducted in a fair, open and transparent manner”*

