

# Partnerships BC and Vancouver Island Health Authority

## Royal Jubilee Hospital Patient Care Centre

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### Fairness Advisors' Report on the Selection of a Recommended Preferred Candidate after the Proposal Phase of the Project

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#### **1. Introduction**

##### (a) *Designated Fairness Advisor Team:*

The ADR Chambers Team of Fairness Advisors designated to serve on this project are

***The Hon. Roger Kerans, FCI Arb, C.Arb***

The Team Leader, Roger Kerans, has lived in B.C. since 1996. Mr. Kerans is a leading expert on standards of review for fairness. He has conducted several fairness Advising tasks as well as hundreds of mediations or arbitrations since his retirement from the Bench. Mr. Kerans is the author of a book entitled Standards of Review, which deals with the review of decisions for fairness.

***The Hon. H. Benjamin Casson, Q.C.***

Ben Casson, who has lived in Sidney B.C. since 1990, is a leading expert on the conduct of efficient, even-handed and fair inquiries into even the most difficult areas in modern life, including organized crime, breach of public trust, improprieties by persons holding public office, and breach of fiduciary duties. For the past 41 years, Mr. Casson has been involved in the justice system as Crown Counsel (18 years), a legal manager (5 years), judge (23 years), arbitrator, consultant, and instructor in administrative law. He knows how to conduct inquiries efficiently and with due regard for the rights of the individual.

***Barry Vogel, Q.C.***

Barry Vogel of B.C. is a leading expert on the principles and duties of fairness, care and protection of confidential information, avoidance and disclosure of

conflict of interest, bias and undue influence, and has acted as arbitrator and mediator on many occasions where he was required to resolve this sort of issue. Mr. Vogel's experience as Practice Advisor for the Law Society of Alberta, in which he was a consultant to lawyers, gave him considerable exposure to and experience in professional and business ethics.

**(b) *Designated Task of the Fairness Advisor:***

The RFP (s.11.10) asserts that VIHA has engaged us “to monitor the evaluation process undertaken by the Evaluation Committee”. We understand the commitment to Proponents was that we would monitor *for fairness*. We were engaged, on April 25, 2007, to “ensure” that

" . . . all aspects of the Royal Jubilee Hospital Patient Care Centre Project are carried out in a manner that is fair, and that is free of unauthorized disclosure of confidential information, of unfair advantage, and of actual or perceived conflicts of interest. "

This is what we mean by fair: First, let us emphasize what is **not** the task of the fairness auditor. The task is not to establish the selection procedures, nor to make or suggest the selection, nor to offer legal opinions about the duties of anybody in the process. The task rather is to offer an assessment about the procedures established by the RFP and the carrying out of those procedures by VIHA and Partnerships BC. And the subject of the judgment is whether the recommended-selection process by the Evaluation Committee has been carried out in a fair and reasonable manner. The review, then, is a review of procedure, as opposed to a review of substantial decisions. As such, there is guidance available in the law. Concepts such as “fairness in action, review for fairness”, the “principles of natural justice”, and judicial review standards, are a good guide for the kind of review that should satisfy reasonable people that the procedure selected is fair, and the carrying out of that procedure has been fair.

Our task was to assess whether the procedure, in its design and in its execution, was one that reasonable and well-informed people would consider to be fair. It is beyond our capacity and our task to investigate any possible criminal behaviour, or breaches of confidentiality or non-disclosed conflicts of interest that in any way might affect or appear to a reasonable person to affect any decisions.

**(c) Reports:**

This is the second Report of the Team. The first was rendered after the completion of the selection of qualified Proponents (the “RFQ” stage). This Report relates to the selection of the recommended Preferred Proponent by the Evaluation Committee.

**(d) Consultations:**

Pursuant to our contract, the Team was available for consultations. These consultations often occurred, but we strove to limit our comment to warnings as to what we may say about a proposed course of action in a public Report, or to point out what a Proponent may argue. We confess there were a few occasions where we did not wait to be asked before we offered comment. In this way we sought to serve the interests of all Proponents, as well as VIHA and Partnerships BC, in a fair and reasonable process.

**2. The Request for Proposals**

Three of the original Proponents approved in the RFQ stage were sent the Request for Proposals for Royal Jubilee Hospital Patient Care Centre (the “RFP”).

The RFP spells out the specifications for the project, and also the selection procedure to be followed. VIHA and Partnerships BC made available to us for review all of the material pertinent to the process which included the RFP, the Amendments and other data on the data site, the Proposals, the Conflicts Investigations, the qualifications of the Evaluation Teams, the Evaluation Manual, evaluation criteria in the RFP, the reports of the Evaluation Teams, and a myriad of other documents pertaining to the process. In general, the procedure established was similar to many previous projects, which are generally considered to be fair, but we will make reference to and comment on some variations below.

The three Proponents all submitted Proposals in a timely fashion, as provided in Clause 8.1.

### **3. Scheduling**

The RFP spelled out a schedule for the preparation and evaluation of the Proposals, and for consultations by Proponents with the Project Team leaders. The Project Team gave full and careful consideration to all scheduling requests, and the balancing need not to unduly delay this project, and acted, in this regard, in a fair and reasonable manner.

### **4. Communications with Proponents after the RFP.**

#### ***a) Data Room***

Inevitably, between publication of the RFP and the submitting of Proposals, there are many amendments to the RFP, and other notifications, that all Proponents must receive. Fairness requires that the Proponents be treated in a like manner. The Data Room was established for the disclosure of all information to be shared amongst all Proponents. Email or written notice was given of new additions, and the system worked fairly.

#### ***b) Collaborative Confidential Meetings***

Further, in fairness, each Proponent must have a reasonable opportunity to be re-assured that it understands the RFP and other material. Moreover, it is in the best interests of VIHA that it hear suggestions for improvement of the specifications from Proponents. On the other hand, Proponents are in a competitive position, and do not wish to share ideas with their competitors.

The RFP fairly acknowledges a need for private, less formal, communications between each Proponent and project management. Clause 2.1 provided for discussions that were both “collaborative” and “confidential”. There were many of these for this Project, and some were very lengthy.

We monitored all of these meetings but one (that being a campus tour, notice of which we inadvertently were not sent), and satisfied ourselves that the Project managers did not offer to any Proponent any unfair advantage or disadvantage in the way of unique information, premature evaluation, or encouragement that a particular idea may win approval.

Whenever a request for information led management to conclude that the RFP needed clarification, the answer came in the form of an addendum to the RFP so that all Proponents were informed. We encouraged the Project Management Team to reserve and give written answers wherever it was thought needed, and this practice was, to our satisfaction, followed.

This RFP in Clause 7.4 permits varying Proposals, and immense number of variations to the specifications obviously were under consideration by Proponents. Many questions at the meetings were to the effect whether “this or that idea” would be acceptable. An affirmative answer would, of course, offer an advantage to the questioner, and pre-judge evaluation of the Proposals, and be unfair to other Proponents. Sometimes, it was said that there was nothing in the proffered idea that was contrary to the RFP, or that such an idea would not be unacceptable. These answers may possibly have given the questioner a modest advantage over a Proponent who did not have the wit to ask the same question, but in our view this was a fair development in what is, after all, a competitive process. It would be unfair to the questioner not to have some indication when an idea was clearly unacceptable, although it would be unfair for only one Proponent to hear that a certain idea *was* acceptable. In the absence of an addendum to the RFP, the best that a Proponent can expect by way of an assurance is that the idea in question is “not unacceptable”. This made for many delicate conversations, and a close monitoring.

We commend the Project Management Team for its sensitive and careful adherence to the rules. No advantage was offered. No negotiations occurred, by which we mean there was never a time when a member of the Project Management Team offered to do anything in return for the Proponents doing something. Nor, so far as we could determine, was there ever an occasion when proprietary information was disclosed.

This process, while necessary, can be cumbersome and frustrating for all. We commend the Proponents and the Project Management Team for their patience and conscientious following of the rules. Only on remarkably few occasions was it necessary for a Fairness Advisor to intervene to warn a person not to stray from the rules. In the result, the process was fair to all Proponents, because they had every opportunity to ask questions and make points for consideration.

### *c) Other Communications*

Clause 8.7 provides that all enquiries be by email to a designated contact person. This term was fair and reasonable for routine matters, even though one Proponent had some email difficulties at one point. We monitored these communications as best we could and are satisfied that there was substantial compliance with Clause 8.7, and that only routine notices and other administrative issues were the subject of these emails.

We assumed that VIHA and Partnerships BC would also consider it appropriate they follow the rules set forth in Clause 8.7. We attempted to monitor their efforts also, and found general compliance. On occasion, because of urgency, there was resort to un-monitored telephone calls, or “corridor chats” at other meetings. No log was kept. We are assured, however, that these related only to minor administrative issues.

We are satisfied that other communications were conducted in a fair manner, and no advantage was sought or gained and all requests given reasonable consideration.

## **4. Evaluation**

A member of our Team attended the opening sessions of the Evaluation Committee, and sub-teams of professional and technical experts serving as advisors, and asked the members to report to us any hint of collusion, fraud, or lobbying. None was received.

Under Clause 11.9, the VIHA itself took on the task, with assistance of counsel, to evaluate possible conflicts of members of the Project management team and the Evaluation Committee and its professional advisors, and found no irreconcilable conflicts. We have no reason to doubt this conclusion.<sup>1</sup>

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<sup>1</sup> At the RFQ stage, certain conditions were imposed on one Proponent with respect to one employee. The role of our Team was to monitor compliance with those conditions. We continued this monitoring role through the RFP stage, and have no reason to believe these conditions were not met.

e) An Evaluation Manual was prepared for the use of the evaluators. We reviewed the draft of this and found it fair and reasonable.

f) We monitored the final meetings of the sub-Teams to be satisfied that any dissent was given a fair hearing. It was.

g) We monitored the entire Evaluation process by the Evaluation Committee. It carefully followed the evaluation criteria in the RFP. Its methodology was reasonable, cogent reasons were given for each decision, and there was no regard to irrelevant considerations. The process was entirely fair and reasonable.

## **5. Conclusions**

We are of the view that the Evaluation of the Proposals met the criteria of fairness, openness, transparency and integrity.

We congratulate all members of the Evaluation Committee and the Project Management Team and Partnerships BC for the high degree of professionalism displayed throughout

DATED this 12 day of March, 2008.

ADR Chambers Inc.

Per: \_\_\_\_\_

The Hon. Roger P. Kerans