SEA TO SKY HIGHWAY PROJECT

REPORT #5 OF THE FAIRNESS REVIEWER

THE HONORABLE W. J. WALLACE, Q.C.

TO THE PROJECT EXECUTIVE BOARD

DATED THE 18th DAY OF May, 2005

1. BACK GROUND

In report #4 I expressed the opinion that the process leading up to and including the selection of S2S Transportation Group ("S2S") as the Preferred Proponent was a fair, impartial and unbiased process which was implemented appropriately. I now consider and express my opinion upon the fairness of the Finalization Process which is an essential part of the overall process and concludes, hopefully, in the execution by the parties of the DBFO Agreement.

The structure and scope of the Finalization Process is determined by the following provisions:

(1) RFP – Section 4.2.3 provides in part:

> "... the Preferred Proponent Agreement ... will provide for a period which will extend from the date of delivery of the executed Preferred Proponent Agreement up to April 15, 2005 (The DBFO Agreement Finalization Period) during which the Proponent may propose

> [1]certain changes to the Definitive DBFO Agreement which do not affect risk allocation, statutory or legal requirements or other matters of a material or substantive nature identified by the Preferred Proponent Agreement as not subject to change ..." *

The closing date of the Finalization Period was subsequently extended.

(2) The Preferred Proponent Agreement ("PPA") provides in part B:

> " As part of its Proposal the Proponent has submitted ... a mark-up of the Definitive DBFO Agreement setting out requested amendments to the Definitive DBFO Agreement in respect of matters that do not significantly and directly affect or relate to risk allocation or pricing (the Requested Amendments)."

2. Legal Matters

The Proponent hereby confirms its acceptance of all of the draft contract terms contained in the Definitive DBFO Agreement subject only to revision in respect of the following:
Subparagraphs (a) to (h)

[1] * Underlying within Paragraphs throughout document indicates "emphasis added" to underlined text.

Subparagraphs (a) to (h) designate certain specific categories of additions and modifications which may be the subject of negotiation by the parties during the Finalization Period.

The Preferred Proponent Agreement expressly provides that:

> The Proponent further confirms and agrees that, except as contemplated in paragraphs (a) to (h) above, no further changes, additions or modifications to the definitive DBFO Agreement will be requested or required by it prior to execution of the DBFO Agreement.

On January 7, 2005 the DBFO Project Director wrote to all three proponents advising them that:

> "(a) where the Province indicates in this letter that no further change to a particular provision will be considered, Proponents should view this as an indication that, in the Province's opinion, a Proposal which raises that issue (either as a Requested Amendment [as such term is defined in the Preferred Proponent Agreement] or as a condition of finalizing the Agreement under the Preferred Proponent Agreement) may result in that Proposal being considered nonconforming; and

(b) the Province considers that only issues of a technical drafting nature may be raised by the Preferred Proponent under paragraph 2(b) of the Preferred Proponent Agreement. Other proposed changes to the Concession Agreement or schedules that do not significantly and directly affect or relate to risk allocation or pricing should be included in a Proponent's Requested Amendments."

It is apparent that the above restraints, (which each Proponent had accepted) restricted the character and scope of the Requested Amendments which the Proponent could raise in the Finalization Period negotiations. Were it otherwise amendments might be made that cause the Preferred Proponent's response to the RFP to differ materially from that upon which it was originally evaluated and selected as the PP. Furthermore the competing proponents would be unaware of the Requested Amendments to the RFP or have an opportunity to respond to them.

Since the only parties participating in the Finalization Process are the Province and the Preferred Proponent I considered it appropriate, in order to ascertain whether or not the standard of fairness was maintained throughout the Process, that the Fairness Reviewer should continue to

monitor the Process until the DBFO Agreement was executed by both parties. The Province concurred in my doing so.

In monitoring the Finalization Process I received the cooperation of the DBFO Project Director as evidenced by the direction contained in his letter of February 23, 2005 to the effect that I should receive or have access to, during the Finalization Period the following:

1. Copies of all correspondence with the Preferred Proponent;

2. Copies of all correspondence received from the Preferred Proponent;

3. Schedule of anticipated meetings between the Province and the Preferred Proponent;

4. The privilege of attending all meetings between the Province and the Preferred Proponent related to the Finalization of the Concession Agreement;

5. The privilege of attending all meetings of the Province with respect to the planning and strategy in relation to the Finalization of the Concession Agreement; and

6. Access to any material that I, as Fairness Reviewer, consider necessary to facilitate completion of the Fairness Reviewer's Report.

I took advantage of the privileges so extended to me in my role as Fairness Reviewer and I reviewed at length the various schedules and issue statements prepared in contemplation of the finalization negotiations with the Preferred Proponent. On March 14 I attended a meeting held to review the Preferred Proponent's submissions respecting the Requested Amendments and the Province's responses thereto. On March 15 and 16 I attended full day meetings, held by the Province with the Preferred Proponent to discuss the requested amendments ("mark ups"). The Project Director commenced the discussions by reminding the parties that the process required them to confine their submissions to either:

a. Items specifically identified in the mark up; or
b. Items within the scope of the Preferred Proponent Agreement.

He reminded the Preferred Proponent of the 5 workshops and extensive exchange of correspondence which had taken place prior to closing and that the Preferred Proponent had provided a list of what it considered to be essential amendments. Accordingly the Province understood that addressing those issues would resolve the matters of substance for

Preferred Proponent. He reiterated that new items, related to pricing or involving a change to the risk profile, were not acceptable issues for negotiation during the Finalization Process.

As noted, discussions took place throughout Tuesday and Wednesday, March 15 and 16 at which time the discussions were adjourned so that the parties could consider the respective positions they had put forth.

On March 21st, 2005 the Project Director for S2S forwarded to the DBFO Project Director a five page proposal setting out the Proponent's Funders proposal in considerable detail (supported by a Legal opinion of the Funders solicitors).

As one might anticipate, the Funders did not agree that the Finalization Process negotiations were restricted to the degree expressed in the P.P.A. (supra). Rather the Funders adopted the position that the Province's letter of January 7th, 2005 (supra) qualified the terms of the P.P.A. to permit the successful proponent (whichever proponent it may be) to propose and negotiate changes that related and affected risk allocation and pricing and to assume the risk in so doing of the proposal being declared "non-compliant". (I refrain from expressing an opinion as to the substance of this position however I find it interesting to observe the "power-shift" which occurs from that which prevailed before the selection of the Preferred Proponent).

The Parties continued their intensive negotiations. On March 25, 2005 the DBFO Project Director issued a memorandum (8 pages) setting out the Province's perception of the status of the outstanding Issues. It dealt specifically with the 12 items raised by the Preferred Proponent and some 10 items raised by its Funders – each item set out the issue and stated the position of S2S, the Funders and the Province and thereby provided an excellent basis for the orderly discussion of the issues.

Negotiations continued throughout the months of April and May. I attended day long sessions on April 6th and April 15th at which the parties discussed in depth the issues that were still unresolved. Other negotiations were held by means of telephone conferences etc. and there was a constant interchange of views as to whether the proposed draughting reflected the goals, concerns and responsibilities of the respective parties.

It was a long and laborious process in which the parties and their respective legal counsel engaged. I was kept informed of the issues raised and the progress made to resolve them. The parties anticipated that the definitive DBFO Agreement would be executed in the latter part of May 2005.

I would at this stage strongly add this caveat, that, in future P3 projects, the process be structured to require all requests for amendments and negotiations with respect to revisions of the DBFO, be submitted and take place before the evaluation and selection of the Preferred Proponent, or if that is not possible, they be deferred to after the date that the DBFO Contract is executed and it then be amended in accord with its contractual provisions specifically designed to permit such revisions.

The practical convenience (in expediency, efficiency, etc.) of having unrestricted freedom to negotiate with the Preferred Proponent the terms of the final DBFO is, in my opinion, outweighed by the understandable propensity of the Preferred Proponent and its Funders to seek any possible economic advantage respecting risk and pricing not available to all Proponents at the time of the evaluation and the selection of the Preferred Proponent, with the result that the extreme care and effort taken to achieve fairness in the RFP process leading up to the selection of the Preferred Proponent may become an illusory exercise.

It is difficult in a project of this uniquely complex nature, with its multiplicity of possible contingencies which may arise over a 30 year period, to assess the effect of the amendments to the DBFO Agreement agreed to as a result of the extensive negotiations, however, despite this difficulty, I have concluded that the Requested

Amendments to the DBFO Agreement agreed to by the parties were not amendments of a material or substantive nature which significantly affected risk allocation or pricing.

CONCLUSION:

It is my opinion the finalization process as implemented by the parties did not contravene the terms of the RFP or the PPA nor did they in the circumstances that prevailed, violate the principle of fairness.

W. J. Wallace

Hon. W. J. Wallace

18 of May, 2005

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May 18, 2005

Project Executive Board
Sea to Sky Highway Project
Suite 1300 – 1075 West Georgia St.
Vancouver, British Columbia

Dear Sirs:

Re: Sea to Sky Highway Project

I enclose my final Fairness Review Report for this very interesting Project.

If you have any questions or concerns respecting the same do not hesitate to contact me.

Yours truly,

Hon. W.J. Wallace, Q.C.

WJWlmg
Enc.