

Report of the Process Monitor
On the BC Rail/CN RFP Process
for Passenger Tourist Train Service

Prepared for: The Honourable Kevin Falcon
Minister of Transportation
Parliament Buildings
Victoria, B.C. V8V 1X4

September 3, 2004

Fairfield Consulting Group

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Dear Minister Falcon:

In accordance with my terms of reference as the Process Monitor for the BC Rail/CN Passenger Tourist Train RFP, I am pleased to provide you with my report, addressing the fairness of the process.

Yours truly,

Gillian P. Wallace, Q.C.

I. INTRODUCTION

On November 25, 2003, the Government of British Columbia announced that it had selected CN as the successful proponent for the new BC Rail Investment Partnership. At the same time, it announced that BC Rail and CN would be issuing a request for proposals (“RFP”) to develop new passenger tourist train services in B.C.

On December 5, 2003, CN and BC Rail issued an RFP inviting proposals from qualified parties to operate third party passenger tourist trains over BC Rail’s network between North Vancouver and Prince George and on CN’s line between Prince Rupert, Prince George and Jasper, Alberta.

On January 16, 2004, I was appointed Process Monitor by the Minister of Transportation. The function of the Process Monitor was stated to be: “...to review issues of process related to the joint request for proposals as it moves to conclusion”. The Terms of Reference provide that the Process Monitor will:

- undertake a comprehensive review of the process to date to determine that it has been designed and is being managed in a fair and impartial manner;
- consider issues raised by proponents and/or stakeholders with regard to the process;
- identify issues and make recommendations to the Evaluation Team regarding corrective action; and
- prepare a final report for public release at the conclusion of the process addressing the fairness of the process.

II. BACKGROUND

On May 15, 2003, the Government of British Columbia initiated a process to restructure the B.C. Rail Freight Division. At the time, BC Rail’s passenger services had been discontinued. However, the government considered it to be desirable to reinstitute passenger tourist services on BC Rail’s and CN’s lines if this could be done on a reasonable economic basis. Consequently, one of the objectives identified for the transaction was establishing new third party passenger tourist services.

In the transaction agreement reached between the government and CN on November 25, 2003, CN agreed to conduct a public request for proposal process for passenger tourist train service on the BCR/CN rail network. It also agreed that the RFP process would be initiated prior to the closing of the sale of BC Rail’s assets to CN (the “freight rail transaction”).¹ This was to enable the successful proponent, if any, to work toward a commencement date for the

service in the spring of 2005. Because the RFP process was commenced prior to closing, initially it was conducted jointly by CN and BC Rail.

In appointing a process monitor, the Minister of Transportation acted to ensure that CN's contractual commitment to hold an RFP process was being exercised in a fair and impartial manner. However, it is important to note that this was the government's only involvement in the process. The government was not involved in the management, evaluation and decision-making processes with respect to the RFP.

III. REVIEW OF RFP PROCESS

A. Structure and Design of RFP Process

1. Development of RFP

The RFP was jointly developed by BC Rail and CN.ⁱⁱ It was designed to invite proposals for third party passenger tourist service that would support and promote economic development in the province, would be a commercially viable operation and could co-exist comfortably with CN's freight business.

It was recognized by CN and BC Rail in issuing the RFP that third party passenger tourist trains could be expected to have a positive economic impact in British Columbia, especially in BC's Interior and Northern regions. It was also recognized by CN that this service could enhance its relations with communities and businesses in the province. CN was anxious to demonstrate that, in acquiring BC Rail's freight business, it was a good corporate citizen of the province. Equally important to CN was the need to ensure that a passenger tourist service would be a successful operation, would not result in increased net costs to CN and would not unreasonably interfere with its freight operations.

2. Management of the Process

Subsequent to the development of the RFP, CN, with the approval of BC Rail and the government, retained InterVISTAS Consulting Inc. ("InterVISTAS") to manage the process. InterVISTAS would provide a single point of contact for proponents throughout the process. It was chosen because of its expertise in both transportation and RFP processes and its location in Vancouver. Its role extended to managing, co-ordinating and facilitating the process. However, InterVISTAS was not part of the Evaluation Committee that made the decision on the successful proponent.

A Steering Committee, consisting of François Hébert, Vice-President, Corporate Development, CN, François Lemay, Manager, Corporate Development, CN and Paul Brent, Vice-President, Marketing & Sales, BC Rail was formed to oversee

the process. The Steering Committee was supported by Paul Ouimet, Senior Vice-President, Business & Strategic Planning, InterVISTAS Consulting Inc.

Initially, an Evaluation Committee, with three representatives from CN and three from BC Rail, was formed to make the final decision on the proposals. The members of the Evaluation Committee from CN were Claude Mongeau, Executive Vice-President and Chief Financial Officer, François Hébert, Vice-President, Corporate Development and David Edison, Vice President, Corporate. The members from BC Rail were Paul Brent, Vice-President, Marketing & Sales, Dennis Lypka, Vice-President, Operations and Kevin Mahoney, Vice-President, Corporate Affairs. As will be discussed below, because the final decision was made after the completion of the freight rail transaction, it was made by an Evaluation Committee composed only of the three senior officials from CN; i.e., M. Mongeau, M. Hébert and Mr. Edison.

B. Overview of Process

1. Issuing the RFP

On December 5, 2003, CN and BC Rail jointly issued the RFP for third party passenger tourist trains. It was accompanied by a joint news release. Both the news release and the RFP were posted on CN's and BC Rail's web sites. In addition, senior officials from the companies developed a list of organizations known to be interested in operating passenger tourist trains in BC. These organizations were contacted and advised that the RFP had been issued.

2. Stage One – Expressions of Interest

The RFP set December 16, 2003 as the deadline by which expressions of interest were to be submitted to InterVISTAS.ⁱⁱⁱ An expression of interest was to include “an overview of the respondent’s activities and experience in passenger tourist train operations”. The RFP also stated that “[o]nly parties that can generally meet the considerations outlined in [the RFP] will be considered”.

Seven organizations submitted expressions of interest by the due date. However, two organizations that filed expressions of interest decided shortly after that they would not proceed to the next step. One, a US firm, after discussions with InterVISTAS, decided that the type of business it operated was not within the parameters of the RFP. The second, a British firm, decided to withdraw, but, through InterVISTAS, offered to provide capital and expertise to the other bidders. InterVISTAS communicated this offer to the others. One organization submitted an expression of interest late. It was not accepted.

CN and BC Rail were interested in receiving as many proposals as possible and in ensuring that the process was competitive. Consistent with this, they decided

that all five organizations that submitted expressions of interest on time and wanted to remain in the process should proceed to the next stage.

3. Confidentiality Agreement

In the RFP, CN and BC Rail reserved the right to require proponents to sign a non-disclosure and confidentiality agreement. On December 19, 2003, CN and BC Rail wrote to the five companies that had submitted expressions of interest advising them that, to proceed, it would be necessary to sign a confidentiality agreement. The form of agreement was included in the correspondence.

The confidentiality agreement was the same agreement that proponents in the BC Rail freight rail transaction had been required to sign. It imposed strict confidentiality requirements on proponents with respect to their participation in the process and all information obtained during the process.

The nature of the agreement and the restrictions it placed on the disclosure of information concerned several of the proponents. However, CN and BC Rail, quite understandably, felt that the agreement was necessary to protect the neutrality of the process, particularly in light of the intense interest in reinstating passenger tourist service amongst stakeholders and in some communities in the province. CN and BC Rail addressed some of the concern by providing approval for a proponent to hold discussions with stakeholders whose contributions were required to develop its proposal, subject to these stakeholders respecting the terms of the confidentiality agreement. At the end of the day, all five proponents signed a confidentiality agreement with identical terms.

4. Questions and Answers

The RFP provided that questions and requests for clarification were to be sent to InterVISTAS by the close of business, January 9, 2004. Thirteen questions were submitted.

The RFP also set January 16, 2004 as the date for providing answers to the questions. However, this date was subsequently adjusted because of the delay in one proponent signing the confidentiality agreement. Proponents were advised of the change in timing.

Responses to the eight questions submitted by the four proponents who had signed the confidentiality agreement by January 22, 2004 were provided to these proponents on that date. After extensive discussions about the confidentiality agreement, the agreement with the fifth proponent was concluded on January 27, 2004. The answers to the first set of questions were immediately provided to this proponent on January 27, 2004. In addition, on the same date, all proponents received responses to questions submitted by the proponent who delayed signing the confidentiality agreement.

One proponent submitted questions on January 27 and February 7, 2004, well after the due date of January 9th. CN and BC Rail decided that these questions could not be accepted because they did not meet the deadline and did not relate to the previous set of question; i.e., if the questions had been supplemental to the questions already submitted, consideration would have been given to accepting them.

5. *Submission and Review of Proposals – Stage 1*

The RFP set February 9, 2004 as the deadline for submitting proposals. Because of the delay in one proponent signing the confidentiality agreement, the deadline was extended by one week to February 16, 2004 by notice to the proponents.

Only three proposals were submitted to InterVISTAS on February 16th in response to the RFP. Two U.S. firms who had expressed interest ultimately decided not to submit a proposal. The three submitted were from British Columbia organizations.

The Steering Committee met to review the proposals on February 19, 2004. It determined that one of the proposals was incomplete and therefore non-compliant. During the day-long session, the other two proposals, from Great Canadian Railtour Company Ltd. and Whistler Rail Tours Limited, were carefully reviewed and assessed according to the criteria set out in the RFP.

The Steering Committee found both proposals to be thoughtful and well-developed. However, it determined that more detailed information was required from each of the proponents in order to be able to evaluate the bids effectively. Several common questions and some individual questions were provided to both companies to ensure that the Evaluation Committee would have common information. They were asked to respond by February 25, 2004. Responses were received from both companies by the deadline.

All questions were supplementary to the information sought in the RFP.

6. *First Extension of Time*

As set out in the RFP, CN and BC Rail initially contemplated completing the evaluation process by February 23, 2004 and concluding a final agreement with the successful proponent by April 23, 2004. This timetable was designed to enable the service to be operational in the spring of 2005. Marketing and capital acquisition require this amount of lead time.

However, it soon became apparent that the Competition Bureau process was taking longer than anticipated and, because of this, the RFP process was

unavoidably delayed. It was clear that until the freight rail transaction closed, the successful proponent would not be able to make the capital investment necessary to meet a spring 2005 start up. There was also a strike at CN that required the attention of senior officials and contributed to the delay.

Consequently, on March 29, 2004, a revised schedule of events was sent to the proponents. April 16, 2004 was set as the date to recommend a proponent for final negotiations and May 21, 2004, as the date to conclude the final agreement. As will be outlined below, this timetable also proved to be ambitious in light of the Competition Bureau process and it was subsequently revised.

7. Evaluation – Stage 1

The Evaluation Committee met to review the proposals on April 14, 2004. Both proposals were characterized as well developed proposals that were consistent with CN's goal of promoting economic and community development and tourism in the province. However, both gave rise to concerns about their economic and operational feasibility for CN. The Evaluation Committee decided that it needed to be more transparent and provide information to the proponents about the fixed costs to CN of operating a passenger tourism service. In addition, it was felt that the proponents needed more information about the nature of the track and operational considerations relating to running a scheduled service on it. The Committee decided that, at this stage, it was appropriate to sit down with each proponent to discuss these issues in a general way. Following these discussions, the proponents would be provided with detailed information about costs to CN and asked to submit revised bids on track costs and the tourist train operating plans.

It was also agreed that the third bidder would now be advised that its bid was non-compliant, but that CN would be pleased to enter into discussions with this organization about making track time available on a case by case basis.

8. Extension of Process – The Next Phase

The decision to defer evaluation, meet with the proponents, provide them with more information about CN's operations and seek revised bids on particular issues amounted to an extension of the process and resulted in some changes to it. While unusual, this step was seen as necessary to the development of fair and comparable bids that took CN's fiscal and operational concerns into account. In addition, at this stage, the two final proponents, Great Canadian Railtour Company Ltd. and Whistler Rail Tours Limited, were informed who the other proponent was but the confidentiality obligations were kept in place.

a. *Face to face meetings*

On May 4, 2004, a team of senior officials from CN and BC Rail met separately with each of the proponents. The meetings were structured similarly and the message provided to both proponents was the same: two bids are being considered, both are very impressive and CN continued to be committed to moving forward with the passenger tourist train concept. However, based on CN's fixed costs for track, crew and inspection, neither bid, as currently developed was economically viable for CN.^{iv} Concerns were also raised about the proposed schedules and whether the operating times for the service were realistic.^v

There was also discussion at these meetings about the amount of lead time necessary to get this service up and running. It was clear from the discussions with both proponents that, given the delays, it was not feasible to commence operations in 2005. The proponents were advised that the date for commencing service was revised until spring 2006.

CN informed the proponents that it would provide them with detailed information on CN's fixed costs in the next several weeks and CN also offered to organize a test run from North Vancouver to Whistler to demonstrate the optimal speed on this track and the time necessary for the run. It was also clarified that CN did not intend to complete the RFP process until the BC Rail/CN transaction closed.

b. *Run to Whistler*

On June 16, 2004, representatives of both proponents traveled from North Vancouver to Whistler with senior officials from CN and BC Rail.^{vi} During the run, CN, in separate meetings, provided detailed cost information to each of the proponents. This information was confirmed in writing on July 22, 2004 in a letter from InterVISTAS.

c. *Request for final bid*

The Competition Bureau approved the BC Rail/CN freight rail transaction on July 2, 2004. The transaction closed on July 14, 2004. On July 16, 2004, InterVISTAS wrote to each of the proponents advising them that, now that the BC Rail/CN partnership transaction had closed, the RFP process would be moving to completion. Each proponent was asked to prepare a final submission on rates for the use of CN property and their Tourist Train Operating Plan. The date for receipt of the submissions was August 6, 2004. The proponents were also advised that it was likely that the Evaluation Committee would call for a presentation from each proponent, with a final decision being made by the end of August.

d. Presentations

Oral presentations were made to the Evaluation Committee by each of the two final proponents, on August 25 and 26, 2004.

9. Evaluation

On August 26, 2004, the three-member Evaluation Committee met and carefully considered each proposal, assessing each against the criteria set out in the RFP, grouping the criteria into three general categories:

- Economic Impact
- Quality of Operations and Probability of Success, and
- Financial Value.

After considering all factors and recognizing that both bids were strong, the Committee decided that Great Canadian Railtour Company Ltd. was the successful proponent. It was also decided that negotiations should commence immediately to ensure that an acceptable agreement could be reached.

On September 2, 2004, CN and Great Canadian Railtour Company executed an agreement.

C. Role of the Process Monitor

As discussed, the appointment of the Process Monitor, on January 16, 2004, was made after the RFP process had been initiated. The Minister of Transportation had received expressions of concern about the process from some potential proponents, stakeholders and community members. As the sole stakeholder in BC Rail and pursuant to CN's contractual commitment to hold an RFP process, the government had an interest in ensuring that the process was being conducted in a fair and impartial manner. In light of the intense interest in the process and the strong competition between the proponents, the proponents and stakeholders also had an interest in being assured that the process was being conducted in a fair and impartial manner. The Process Monitor was appointed to address these issues and, thereby, enhance confidence in the process.

On being appointed Process Monitor, I was provided with copies of relevant documents held by government on this matter, including all correspondence received to date by the Minister of Transportation. I also met with the Minister^{vii} and senior officials involved in this file.

Next, I met with and interviewed officials from CN, BC Rail and InterVISTAS involved in the RFP process. I also was provided access to and reviewed files relating to the process. From the time of my appointment, I was copied on correspondence amongst CN, BC Rail and InterVISTAS and correspondence

sent by these companies to proponents and stakeholders. I attended the meetings held by the Steering Committee and the Evaluation Committee and the meetings with the proponents.

On January 29, 2004, I wrote to the five proponents advising them of my terms of reference and asking them to provide me with their views on the process to date and, in particular, any comments they had with respect to the fairness and impartiality of the process. I requested their response by February 6, 2004, to ensure that there was time to incorporate any changes resulting from these comments into the process in a timely way.

Three of the five potential proponents responded to my letter of January 29, 2004. All expressed a common desire to ensure that the process was fair and impartial. However, some responses were more detailed than others. Most of the issues raised related to clarification about the way the process was structured and the role of the government and InterVISTAS in the process. These issues were specifically addressed in correspondence to the proponents.^{viii} Comments on and concerns about the process and issues that needed to be addressed to ensure that it was both fair and impartial, and seen to be fair and impartial, were taken into account as the process evolved.

I also spoke to representatives of proponents, stakeholders and community representatives when they were referred to me by government officials and InterVISTAS. I listened to their concerns and provided information to them about the process.

From the outset, the principals involved in the RFP process from BC Rail, CN and InterVISTAS endorsed the concept of a Process Monitor and offered full co-operation. They were open and candid about the process and provided access to all relevant information. They consulted me on issues that arose as the process evolved and this advice was followed.

D. Observations on the Process

This RFP process had several unique and distinguishing features that are worthy of mention. First, the RFP provided proponents with broad scope to develop a proposal within the parameters of the RFP. Thus, there was considerable opportunity to develop unique and creative proposals. In fact, the two final bids were structured very differently.

Second, the interest amongst stakeholders and communities along the rail line in introducing passenger tourism service was high and contributed to an atmosphere that was, from time to time, emotionally charged.

Third, the two final proponents invested considerable time, energy and financial resources in developing exceptional proposals. Both approached the process

with intensity, enthusiasm and commitment. The competitive spirit between the two was evident throughout.

Fourth, public policy considerations that are more common for government to include in a process of this type – namely, supporting and promoting economic development of communities and tourism along the rail lines – were important criteria and introduced matters requiring qualitative assessment.

And, finally, the process evolved considerably over its nine-month timeframe. This was primarily a result of the length of time it took to complete the BC Rail/CN transaction. But it also reflected an evolution in CN's understanding of the information that would be helpful for the proponents in finalizing bids that would be economically viable for CN.

The role of Process Monitor provided me with a unique opportunity to have a glimpse into the rail and tourism industries in the province. I learned a great deal throughout the process and I am greatly indebted to the principals from CN, BC Rail and InterVISTAS, as well as to the proponents, for the gracious way in which they involved me in the process and educated me about their interesting worlds.

E. Conclusion

The RFP process was from the outset designed and conducted in a way that was intended to ensure procedural fairness for the participants in the process. CN and BC Rail were acutely aware of their need to ensure that all proponents were treated in a fair and impartial manner. In retaining InterVISTAS, who brought a professional and objective approach to the process, this objective was well served.

The various stages of the process have been set out in some detail in this report and I will not repeat them. However, throughout, impeccable attention was paid to ensuring that all proponents received the same information, received it at the same time^x and were treated equitably when responding to inquiries. This standard was not only consistently observed during the initial stages of the process - when information exchanges were being more formal and being handled in writing - but was also respected during the later stages of the process when there were also direct dealings and dialogue between the principals and the final two proponents.

Although slightly unorthodox, the process was strengthened by the modifications that were made in the latter stages. While CN was committed throughout to the concept of a passenger tourist service, understandably it was not willing to proceed if the service was not going to be economically feasible for CN. When the initial bids were reviewed and analyzed, it became apparent that it would be helpful if CN was more transparent about its fixed costs; i.e., what it required in fees to make the service economically viable. The decision to share this

information and seek revised final bids was a sensible one and served the process well.

The dialogue with the proponents was conducted throughout in a professional manner. InterVISTAS, acting under CN's and BC Rail's direction, handled these communications professionally, fairly and objectively during times that were sometimes emotionally charged.

The process benefited from the presentations to the Evaluation Committee made by the proponents at the end of the process. These presentations provided the Evaluation Committee with a valuable opportunity to ask questions about the proposals, to communicate directly with the proponents and to understand each of the bids in considerable detail.

The evaluation process was handled in a manner that was effective and entirely consistent with the considerations set out in the RFP. The bids were carefully evaluated with a focus on their relative strengths in the three critical areas of economic impact, quality of operations and probability of success and financial value. The final decision was a fair one that was entirely compatible with the terms of the RFP.

In summary, the process was conducted in a fair and impartial manner, consistent with current best practices. It was designed and executed with a view to establishing a successful passenger tourist service that will serve the economic interests of the communities along the route, will be operationally sound and can be conducted on a reasonable economic basis from CN's perspective. The proponents are to be congratulated for the quality of their bids and their co-operation throughout the process. CN, BC Rail while it was still involved, and InterVISTAS are to be congratulated for their professional approach and for being flexible, thoughtful, responsive, fair and impartial throughout the process.

Gillian P. Wallace, Q.C.

Victoria, British Columbia, September 3, 2004

ⁱ The BC Rail/CN merger was subject to approval by the Competition Bureau. At the time the RFP was issued, it was expected that the Bureau's decision would be made before the end of the fiscal year. However, the process took longer than expected and approval was not granted until July 2, 2004. The final transaction closed on July 14,

2004. The delay in completing the transaction resulted in considerable delay for the RFP process and some material changes to it.

ⁱⁱ It was also reviewed and approved by senior officials of the BC Government.

ⁱⁱⁱ The critical dates in the RFP process are set out in an appendix.

^{iv} CN never expected to make a lot of money through contracting for this service. However, it did expect to at least break even and, based on the original proposals submitted, this goal would not be achieved.

^v CN was consistent in advising the proponents that it was in the business of operating freight trains and it was critical that a passenger tourist service not interfere materially with its primary business.

^{vi} Officials traveled with representatives of one of the proponents on the way to Whistler and with representatives of the other on the way back to North Vancouver.

^{vii} The Honourable Judith Reid was the Minister of Transportation at the time the Process Monitor was appointed. Shortly after, the Honourable Kevin Falcon replaced her as Minister.

^{viii} One proponent expressed concern about InterVISTAS' role in the process. It was felt that the consulting firm was in at least a potential or perceptual conflict of interest situation because of work it had done previously for another proponent. I investigated this matter and informed the concerned proponent that this matter had been dealt with effectively and would not prejudice the process. In my investigation, I determined that InterVISTAS recognized at the outset of the RFP process that there could be a perception of conflict of interest and immediately disclosed this to CN and BC Rail. InterVISTAS then put in place strict internal procedures to ensure that the two members of the firm who had done work for the potential proponent would have no involvement in the role being played by InterVISTAS in managing the process and would not have access to any of the information obtained by InterVISTAS during the RFP process. In addition, it is noted that InterVISTAS' role was limited to managing, co-ordinating and facilitating the process. It was not part of the Evaluation Committee that made the final decision. For these reasons, I was satisfied that any perception of bias or conflict of interest was fully and adequately dealt with.

^{ix} As discussed above, one proponent received answers to the questions submitted 5 days later than the others because it had not yet signed the confidentiality agreement. However, given the circumstances, this delay was not inappropriate. By extending the time for submission of the proposals, CN and BC Rail acted to ensure that this proponent was not prejudiced by the delay.

APPENDIX

CHRONOLOGY

November 25, 2003	Province announces sale of BC Rail freight assets to CN. It also announces: “BC Rail and CN are issuing a request for proposals to develop new tourist-passenger services in B.C., through partnerships with third-party operators.”
December 5, 2003	CN and BC Rail issue a joint RFP, inviting the submission of proposals for the operation of third party passenger tourist trains over BC Rail’s network between North Vancouver and Prince George and on CN’s line between Prince Rupert, Prince George and Jasper.
December 16, 2003	Deadline for submitting expressions of intent to submit a proposal
December 19, 2003	Notification to proponents of requirement to sign a confidentiality agreement
January 9, 2004	Deadline for submission of questions and requests for clarification
January 16, 2004	Process Monitor appointed
January 22 & 27, 2004 (<i>extended from January 16th</i>)	Responses provided to questions
February 16, 2004 (<i>extended from February 9th</i>)	Deadline for submission of proposals.
February 19, 2004	Steering Committee meets to review proposals
February 20, 2004	Supplementary questions sent to proponents
February 25, 2004	Deadline for responses to supplementary questions
March 29, 2004	Revised schedule of events issued

April 14, 2004	Evaluation Committee meets; decides meetings with proponents are required and revised final bids will be requested
May 4, 2004	Meetings with proponents Decision to change start up date to spring 2006 Notification that process will not be complete until closing of BC Rail/CN partnership transaction
June 16, 2004	Test run from North Vancouver to Whistler
July 2, 2004	Competition Bureau approves BC Rail/CN partnership
July 14, 2004	BC Rail/CN partnership transaction closes
July 16, 2004	Request for final bids
August 6, 2004	Deadline for submission of final bids
August 25 & 26, 2004	Presentation by proponents to Evaluation Committee
August 26, 2004	Decision on successful proponent, subject to successful negotiation of an agreement
September 2, 2004	Agreement executed