

Clause 16 in Report No. 9 of Committee of the Whole was adopted, without amendment, by the Council of The Regional Municipality of York at its meeting held on May 25, 2017.

16

Review and Amendment of Regional Purchasing Bylaw

Committee of the Whole recommends adoption of the following recommendations contained in the report dated May 5, 2017 from the Regional Solicitor:

1. Regional Council enact a revised Purchasing Bylaw to incorporate the amendments set out in this report.
2. Bylaw 2014-53, as amended, be repealed.
3. The Regional Solicitor prepare the bylaw for consideration of Council.

Report dated May 5, 2017 from the Regional Solicitor now follows:

1. Recommendations

It is recommended that:

1. Regional Council enact a revised Purchasing Bylaw to incorporate the amendments set out in this report.
2. Bylaw 2014-53, as amended, be repealed.
3. The Regional Solicitor prepare the bylaw for consideration of Council.

2. Purpose

This report recommends that Council enact a revised Purchasing Bylaw to reflect changes resulting from a review of Bylaw 2014-53 (the “Purchasing Bylaw” or the “Bylaw”).

3. Background

A staff working group reviewed and evaluated the Purchasing Bylaw

Section 19.1 of the Purchasing Bylaw mandates review and evaluation of the Bylaw for effectiveness at least every three years. The most recent review was undertaken in 2013-2014 and culminated in Council enacting the current version of the Purchasing Bylaw in June 2014.

The review of the bylaw was conducted by the Purchasing Bylaw Review Working Group comprised of staff representing all Regional departments, with an appropriate mix of subject matter experts responsible for procuring program and service delivery, operations and maintenance and capital delivery.

The Purposes, Goals and Objectives of the Purchasing Bylaw informed the staff review and evaluation

The purposes, goals and objectives of the Purchasing Bylaw are set out in section 1.1, and require the Region's procurement practices to encourage competition, obtain best value, and ensure fairness, objectivity, accountability and transparency.

For the years 2014-2016, there were a combined total of 675 tenders and proposals awarded, with a total contract value of \$1.713 billion. Against this backdrop, staff considered the practical procurement issues, challenges and concerns that were identified since the last comprehensive amendment in 2014, always keeping in mind the purposes, goals and objectives in the Bylaw.

4. Analysis and Implications

The Purchasing Bylaw amendments recommended in this report are largely administrative in nature compared to the more substantive revisions in previous bylaw updates

There were significant revisions and amendments to the Purchasing Bylaw in 2009 and 2014, respectively, including safeguards against bid splitting, strengthened contractor performance and litigating bidder provisions, and increased Commissioner and CAO authorities to award RFTs and RFPs up to \$500,000 and \$2,000,000, respectively. As well, authority was delegated to the CAO to award contract renewals, and broad exemption categories were limited.

By contrast, the revisions recommended in this report focus on ways in which Regional procurement might be more responsive to business needs in executing Council's mandate while still preserving the overarching principles of competition, best value, fairness, objectivity, accountability and transparency. Staff recommend amendments in seven areas as set out below.

The threshold for issuing Requests for Tenders and Requests for Proposals should be increased from \$100,000 to \$150,000

The existing threshold value for requiring procurement through a formal Request for Tender or Request for Proposal process was established at \$100,000 in the year 2000. Based on a review of best practice, staff recommend that this limit be increased to \$150,000 to reflect inflation and changes in market conditions over the past 17 years. Increasing the threshold would result in a shorter lead time for procurement of goods and services and promote efficiencies for these modest contracts.

The overall impact of this suggested change would be relatively moderate. For example, in 2016, of 138 tenders awarded, 9 were between \$100,000 and \$150,000, which represents 6.5 per cent of the total awarded. In terms of RFPs, out of 93 awarded in 2016, 10 were between \$100,000 and \$150,000, representing 10.75 per cent of the total awarded.

The threshold for authorizing direct purchases and emergency purchases should be increased from \$100,000 to \$150,000

Commissioners currently have authority to award direct and emergency purchases up to \$100,000. The Chief Administrative Officer has authority to award emergency purchases above \$100,000. For the reasons set out above, staff recommend that the authority for Commissioners to award direct purchases and emergency purchases be increased from \$100,000 to \$150,000. Commissioners would be required to report to Council for authority to award direct purchases over the proposed \$150,000. It is also proposed that the Chief Administrative Officer retain the authority to approve emergency purchases over the Commissioners' limit of \$150,000 provided such purchases are reported to Council as soon as possible following the emergency.

The authority to purchase goods and services based on a "Best Value" analysis should be increased from \$50,000 to \$150,000, which aligns with comparable Ontario municipalities

Currently, the purchase of goods and services with a value under \$50,000 does not require the formal release of an RFT or RFP. The Bylaw provides, however, that staff undertake an inquiry to determine that "best value" has been achieved.

“Best value” is defined in the Bylaw as “the optimal balance of high quality and financial terms”. For purchases over \$50,000 and under \$100,000, the Bylaw requires that at least 3 quotes are solicited and that a report be submitted to Council if it is not recommended that the contract be awarded to the lowest cost.

It is recommended that the “best value” test be extended to the award of all contracts up to the RFT/RFP threshold of \$150,000. This would enable staff to solicit quotes and proposals without the full formality of an RFP or RFT but still provide for an objective evaluation of technical merit and cost. It is also recommended that a report to Council not be required if the award is not to the lowest cost contract. To support this broader application of the “best value” analysis, administrative protocols will be introduced requiring staff to diligently document the process by which “best value” was determined.

Each of the jurisdictions of the Regional Municipality of Peel, the Regional Municipality of Niagara, the City of Toronto, and the City of Hamilton, authorize staff to make purchases in excess of \$150,000 without resorting to RFTs or RFPs in a variety of situations including direct negotiation, “special circumstances”, single source or during emergencies. The Region of Waterloo’s threshold for this type of purchase is \$150,000. In the Regional Municipality of Durham, emergency purchases are not monetarily limited; however, if the value is more than \$100,000 reporting to a “designated official” immediately after the fact is required. The Regional Municipality of Halton and the City of Ottawa both currently have thresholds of \$100,000 for non-competitive purchases.

The CAO be authorized to award contracts resulting from RFPs where the highest score is not the lowest cost

Currently the Bylaw requires a report to Council where, following a formal RFP process, the highest scoring proponent as a result of the evaluation is not the lowest cost. RFP scores are determined by an evaluation committee of staff with subject matter expertise, using pre-determined objective criteria. Once scores have been assigned by the evaluation committee, in order to maintain the integrity of the RFP process and avoid liability, the Region is essentially bound to follow through with the award recommendation, provided that the award is within budget.

Reporting the results of non-lowest cost RFPs to Council in these circumstances informs Council of the financial implications of adopting the 80/20 evaluation methodology of technical merit versus financial elements, which is a widely accepted RFP weighting for municipalities. However, staff recommend that this reporting could be incorporated into the quarterly reporting of other delegated authorities under the Bylaw without the need for additional reports. Combining these reports would increase efficiency and allow for RFP contracts to be awarded in a more timely manner.

Review and Amendment of Regional Purchasing Bylaw

Commissioners should be authorized to approve renewal of contracts within their award limits

The 2014 Purchasing Bylaw introduced a new provision permitting the CAO to authorize renewal of contracts, provided that: (a) the option to renew the contract was included in the original award; (b) the total cost of the contract inclusive of the renewal is within the CAO's approval authority; and (c) the contractor has performed the contract satisfactorily. In addition, the total term including approved renewals or extensions may not exceed five years without a further approval from Council. Limiting this authority to the CAO has created unintended inefficiency in the contract award process as renewals of minimal dollar value currently require approval by the CAO. Staff recommend that the Bylaw be amended to permit Commissioners to be accorded the same authority to renew contracts, subject to the same conditions, which preserves the principles of transparency and accountability. This would also promote administrative efficiencies since the CAO would not be required to review numerous contract renewals from all departments which are within Commissioners' general authority.

A limited number of exemptions should be reinstated in the Bylaw

As a result of the Purchasing Bylaw review in 2014, the schedule of exemptions from the formal purchasing process for certain transactions and commodities was eliminated. Where appropriate, specific exemptions were preserved, for example agreements with service providers for Regional programs where agencies are selected based on compliance with certain criteria rather than through a competitive RFP process. Examples of this are agreements with day care providers and home nursing services under programs administered by Community and Health Services.

Staff have identified certain matters that are typically not subject to competitive process but are not explicitly exempt under the Bylaw. These include advertising requirements for Regional projects and events, the use of staffing agencies and planning corporate events. In addition, there are specific programs where the service provider is mandated by an external agency, e.g. safety training requirements. Staff are proposing to reinstate a limited number of exemptions to address these concerns.

The Litigating Bidder Prohibition should be amended for greater clarity and flexibility

Section 14 of the Purchasing Bylaw prohibits contractors who are engaged in unresolved litigation with the Region from submitting bids or being awarded

contracts until the litigation is resolved. This “litigating bidder prohibition” was introduced in 2007 and has been effective in avoiding or settling litigation, because all parties realize that it is in their respective best interests to focus their resources on settling disputes and getting “back to business” rather than litigating.

Staff recommend improvements to the litigating bidder prohibition language to focus, clarify and strengthen the intention of avoiding litigation or hastening resolution while protecting the Region’s interests. Such amendments would include:

- identifying general contractors’ obligation to “bond off” liens by subcontractors, where the Region has been named in its capacity as a property owner by a subcontractor in a *Construction Lien Act* claim; and
- further defining and clarifying the conditions and circumstances under which participation in formal alternative dispute resolution can allow litigating contractors to continue to bid and be awarded contracts, particularly where insurers have instituted legal proceedings which may need the benefit of analysis and discovery in order to fully assess the merits of the claim or defence.

5. Financial Considerations

The amendments to the Purchasing Bylaw recommended in this report will continue to support the Region’s objectives of obtaining goods and services that reflect the Purposes, Goals and Objectives of the Bylaw.

6. Local Municipal Impact

The bylaw will continue to support co-operative purchasing opportunities with local municipalities and public agencies and administrative protocols will be strengthened

Regional staff regularly engage in cooperative tenders with local municipalities and other public sector bodies. The Purchasing Bylaw provides for co-operative purchasing to be undertaken by the Region on behalf of local municipalities and other public agencies and equally for the Region to participate in opportunities for competitive procurement initiated by other agencies. The Region is an active member of the York Public Co-operative Group which identifies common needs for certain goods and services which are then procured by a lead agency on

behalf of the interested members. Local municipalities, the School Boards and York Regional Police are all members of this group.

The Bylaw does not require any amendments to facilitate these arrangements. However, staff propose to develop clearer administrative guidelines to govern this method of procurement. These will include clear timelines and protocols for engaging other agencies in co-operative purchases and for structuring the procurement documents in a manner that ensures best value for all participants.

7. Conclusion

Section 19.1 of the Purchasing Bylaw requires that the bylaw be reviewed and evaluated for effectiveness every three years. In accordance with this requirement, a staff working group of subject matter experts undertook the review, and have recommended a number of amendments to enhance responsiveness to business needs in carrying out Council's mandate while preserving the principles of competitiveness, transparency and best value.

For more information on this report, please contact Dan Kuzmyk, Deputy Regional Solicitor, Dispute Resolution and Construction Law, at Ext. 71401 or Elizabeth Wilson, Deputy Regional Solicitor, Municipal & Corporate Law, at Ext. 71402.

The Senior Management Group has reviewed this report.

May 5, 2017

7598266

Accessible formats or communication supports are available upon request