
HALDIMAND COUNTY

Report LSS-23-2023 Procurement Policy Update

For Consideration by Council in Committee on October 31, 2023



OBJECTIVE:

To adopt a revised Procurement Policy as of January 1, 2024.

RECOMMENDATIONS:

1. THAT Report LSS-23-2023 Procurement Policy Update be received;
2. AND THAT the revised Procurement Policy, included as Attachment 1 to Report LSS-23-2023 be approved to be in effect as of January 1, 2024;
3. AND THAT Policy 2013-02 be rescinded and the related By-law 1333/13 be repealed, as of December 31, 2023;
4. AND THAT authority is delegated to the Manager, Legal & Support Services to make minor housekeeping amendments to the revised Procurement Policy, as required.

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Respectfully submitted: Megan Jamieson, CHRL, General Manager of Corporate & Social Services

Approved: Cathy Case, Chief Administrative Officer

EXECUTIVE SUMMARY:

The current Procurement Policy (Policy) governing corporate purchasing procedures, was last updated in 2012 and implemented in 2013. At that time, the Policy underwent a thorough review, which involved a cross-divisional committee to ensure alignment with legislation, case law, best practices, and the enhancement of efficiencies for staff, suppliers and Council. The Policy was initially scheduled for a review every five years.

In 2018, staff became aware of significant changes in various procurement-related legislation, as well as the introduction of two new Trade Agreements. All of these changes would have a significant impact to the Policy and to the methods of purchasing goods, services and construction. Consequently, the decision was made to retain the current Policy, monitor legislative changes, participate in training sessions which provided insight into the new Trade Agreements, and initiate a collaborative process to gather feedback from staff and suppliers – all to prepare for a comprehensive rewrite of the Policy.

As a result of the efforts outlined above, staff have developed an updated draft Procurement Policy that ensures compliance with legislation and Trade Agreements, continues to support public procurement through open, fair and transparent processes, and provides for streamlined efficiencies while ensuring as much flexibility as possible.

Staff are seeking Council's adoption of the draft Procurement Policy (Attachment 1), with a scheduled implementation date of January 1, 2024.

BACKGROUND:

Purchasing staff within the Legal & Support Services division have been working on an update to the current Procurement Policy over the last few years. A presentation to Council in Committee will accompany this report and outline the new policy framework.

Although this is an extensive amount of time, there were a vast amount of variables that impacted the review and rewrite of the County's Procurement Policy (Policy) as noted below. In the rewrite of the Policy, four main factors were considered:

1. Legislation, Trade Agreements and Corporate Strategies
2. Case Law
3. Best Practices
4. Collaboration

Legislation, Trade Agreements and Corporate Strategies:

Municipalities are required to have a Procurement Policy as mandated by the Municipal Act. The specific content of each municipality's policy may vary, but the foundational principles of the Policy are guided by legislation. In 2013, the Policy was in compliance with the Agreement on Internal Trade (AIT), which had been in effect since July 1, 1995 and the Construction Lien Act, in effect since 1983.

While the Municipal Act has remained unchanged regarding the requirement for a Procurement Policy, the AIT and Construction Lien Act are no longer sanctioned and cannot be considered for the updated Policy. These have been replaced with two new trade agreements, the Construction Act of Ontario, as well as updates to other relevant statutes and regulations as described below.

- **Canadian Free Trade Agreement (CFTA):** The goal is to achieve competitive and economic benefits for all Canadians by reducing barriers and establishing open and stable domestic market conditions.
- **Canada-European Union Comprehensive Economic and Trade Agreement (CETA):** This shares a similar concept as CFTA, with the exception that the open and stable market conditions benefit both Canadians and Europeans.
 - **Note:** CFTA and CETA are collectively identified as the Trade Agreements.
- **Construction Act of Ontario:** This Act replaced the Construction Lien Act and introduced prompt payment requirements, adjudication processes, and changes to lien rights, holdbacks, trust obligations, etc.
- **Discriminatory Business Act:** The purpose is to prevent discrimination based upon various factors, including geographical location. This means that the Procurement Policy cannot have a local preference component.
- **Competition Act:** This Act aims to prevent anti-competitive practices in the marketplace.
- **Municipal Freedom of Information and Protection Act:** Suppliers are notified that their submissions may be provided to third parties based upon requests submitted to the County and in accordance with the Freedom of Information Act.
- **Accessibility for Ontarians with Disabilities Act:** This Act pertains to inclusion in the specification content as well as accessibility to procurement documentation.

In addition, the County's corporate strategic goals, objectives, and other policies must be considered in the development of the Policy, such as budget processes, delegated authorities, risk management, financial policies, etc.

Case Law:

Procurement staff continually monitor case law specific to challenges in government procurement activities. This practice provides an understanding of how the various levels of the court system interpret and apply the rules of the Trade Agreements, legislation, regulations, and more.

The foundation of procurement activities has been built upon common law, with the most relevant case and ruling coming from the Supreme Court of Canada in 1981. This is known as the Ron Engineering decision, which is based on the premise of a binding contract. Binding contracts are defined as “Contract A” and “Contract B”.

- “Contract A” is the bid document (i.e. Request for Tender) issued by the County. It outlines the scope of work, terms and conditions, rules regarding the bid process, specifications, and the irrevocable period which a bidder must honour their bid. Within Contract A, the County has a legal duty to ensure equity, transparency and fairness in the application of the rules regarding the bidding process. Failure to do any of the above could result in the County facing legal challenges for breach of a contract. Fiscal awards can lead to compensatory damages, such as loss of profit, essentially representing the profits a bidder would have earned from fulfilling the contract, as well as reimbursement of legal fees.
- “Contract B” is initiated once the agreement is executed between the County and the successful bidder. The contractual obligations are based upon the terms and conditions of the agreement.

Within the new Trade Agreements and public sector procurement, there has been a significant industry shift from the binding process outlined above to a non-binding process. While the duties of a fair, transparent and open process still remain, along with the requirement to comply with legislation, the significant benefit of this process is that there is no “Contract A / B” relationship. This means that there can be no breach of contract or fiscal compensation as a result of a lawsuit relating to the procurement process itself.

To engage in a non-binding process, the bid document issued by the County must include a statement indicating that the bid is non-binding and cannot include any irrevocable period. While there is a risk associated with this, since a bidder can withdraw before an agreement is executed, the benefits can far outweigh the risks. For instance, the bid can include the ability for bid rectification, which means that in cases where an administrative error had been made by the bidder (especially the lowest-priced qualified bidder), the County can provide time after the bid submission timeline for the error to be rectified instead of having to disqualify the bid (as is the case in a binding process), resulting in a time and cost savings. This process, overall, allows for more innovation through agile procurement practices and collaboration with suppliers, as they are the subject matter experts, ensuring the County is getting good value for its taxpayers.

Additionally, a non-biding process is not subject to common law, so if a bidder wanted to challenge the process, the bidder would need to rely on a judicial review of the process verses a statement of claim. Meaning that if challenged, the judiciary would review the process to determine if the actions taken were in accordance with the established process and within delegated authorities. There is no fiscal compensation to be awarded. If a judiciary did find that an action or decision was unlawful or unfair, the courts may order the municipality to correct the situation which may include requesting the County to reissue a bid, or reinitiate its evaluation process. This is a significant change that allows mitigation against potential challenges related to the County’s bid process.

Best Practices:

Procurement staff continually monitor and actively participate in various networks to discuss best practices, lessons learned, and other relevant topics including through various professional organizations such as the Ontario Public Buyers Association, Supply Chain Canada, the Ontario General Contractors Association and the Canadian Construction Documents Committee. Additionally, the Manager of Legal & Support Services is a Certified Professional Public Buyer (CPPB) and has held this designation since 2005; with recertification required every five years to ensure the certificant remains current with professional practices as they continue to evolve and change. Ongoing engagement allows staff to identify efficiencies in all procurement activities. Significant research and subsequent discussions have been conducted to review updated procurement policies from a variety

of municipalities including City of Brantford, City of Barrie, City of Toronto, Town of Newmarket, Town of Innisfil, City of Richmond, City of Hamilton, Town of New Tecumseth and Halton Region.

Collaboration:

Collaboration with staff and our supplier community is an ongoing effort. Continuous improvement and adaption to the marketplace are necessary to keep our processes current, efficient and effective.

To facilitate this process, a Steering Committee was established, representing a cross-departmental team of representatives from 15 divisions and users of various levels in the organization, to gather feedback on the current Policy and to gain a better understanding of today's challenges. The Steering Committee was also instrumental in reviewing and finalizing the proposed Policy.

While there was no specific outreach to the supplier community for the Policy update, open communication with the supplier community is ongoing in order to adhere to a transparent process.

Staff are committed to making improvements to our procurement processes to ensure compliance with legislation and maintain a transparent process; while also recognizing that the marketplace is continually changing, and flexibility, within legal parameters, is key to ensuring open and fair competition.

ANALYSIS:

Public procurement is guided by legislative principles that prioritize openness, accountability and transparency. Keeping these principles at the forefront of all County procurement activities, the Draft Procurement Policy (Attachment 1) also emphasizes:

- protecting the financial best interests of the County;
- encouraging competition amongst suppliers where practicable, to obtain best value through the combination of cost, quality and sustainability while ensuring quality, efficiency and effectiveness;
- promoting and maintaining the integrity of the Procurement process; and
- mitigating risk-averseness so that it does not stifle innovation and market participation.

The Policy represents a significant rewrite due to the new Trade Agreements that were not applicable during the update to the 2013 Policy and legislation changes, such as those made to the Construction Act. However, the Policy was drafted to ensure streamlined procurement processes and flexibility wherever possible. The information below outlines the areas of major changes to the Policy.

Binding and Non-Binding Procurement Methods:

The Procurement Policy now allows for both binding and non-binding bid documents, whereas only binding bid documents were permitted in the previous Policy. This change is recommended, as it is now a permissible and a flexible practice within public procurement that was not an option available during the 2013 Policy development. Staff are confident that enabling this new feature will provide greater flexibility to meet Council-approved and corporate procurement activities with reduced risk while maintaining a fair, open and transparent process.

The determination of when to use a binding versus non-binding process will be based on a variety of factors such as:

- risk tolerance – what is the likelihood and ramifications of a legal claim
- market leverage – is there a short supply of the goods or service
- project complexity – is it straight forward with clear specifications or is it very complex and uncertain.

Purchasing staff will continue to provide strategic guidance and communicate associated risks to the divisional staff accountable for the specific procurement activity.

Dollar Thresholds for Direct Purchase:

A direct purchase means that staff can purchase goods, services or construction directly from a qualified supplier of their choosing, which may include local suppliers, without undertaking a competitive bid process. Staff are proposing no change to the direct purchase value, which remains up to and including \$20,000 with the exception for purchases made by the Fleet division. Staff are proposing to increase the direct purchase value for the Fleet Division from \$20,000 to \$100,000, reflecting the top end costs of certain County vehicles.

Market conditions for various fleet equipment and vehicles still remain unstable, resulting in significant delivery delays, difficulties in obtaining competitive bids, or not receiving delivery at all, subsequent to an awarded bid, which requires the entire process to start all over again. It appears that this will be an on-going concern for the foreseeable future. As proposed in the draft Policy, the Manager, Fleet Operations or their designate will be permitted to reach out to suppliers directly to purchase equipment and vehicles that meet specifications directly from the supplier's inventory, which staff anticipate will assist in preventing the degree of delays currently being experienced.

Single and Sole Sourcing:

Single and Sole sourcing were two clearly defined functions within the 2013 Procurement Policy. Single sourcing involves choosing to purchase from one supplier directly when there are multiple suppliers capable of providing the goods, services or construction. This was permitted, subject to meeting specific criteria, such as if disclosure of information in an open competition would breach some duty of confidentiality or compromise security.

Sole sourcing, is the practice of purchasing from a single supplier when there is only one supplier available who can provide the goods, services or construction. For example, there was an absence of competition for technical reasons, and the good or services could only be supplied by a particular supplier.

The definitions and application of single and sole sourcing no longer exist, as they were defined under the AIT. The Trade Agreements include provisions for Limited Tendering, which is a non-competitive process used to obtain goods, services or construction from one source where other sources may be available or when only one source of supply exists that meets the County's requirements. Each of the Trade Agreements specify what type of purchase could be completed using Limited Tendering based upon the value of the contract. This is an extremely complex area within the Trade Agreements, with several annexes and product classification tables to reference. Accordingly, under the proposed Policy, Staff will be required to seek input from purchasing staff prior to utilizing Limited Tendering to ensure compliance to the legislation.

Supplier Eligibility and Relations

This is a new section introduced in the Policy, encompassing items such as referencing the Supplier Code of Conduct, Eligible Suppliers, Supplier Conflict of Interest, Litigation, Tie Bids, Debriefing, Alternative Dispute Resolution and Supplier Suspension.

Staff are also working on a Supplier Code of Conduct to formalize the County's expectations for any Supplier hired by the County. This will require Suppliers to perform all duties in a competent and impartial manner that can withstand public scrutiny, exercising sound judgement when conducting business for the County; and exhibiting solid business integrity that aligns with the County's core values and ethical standards. Non-compliance to this Supplier Code of Conduct, the terms and conditions of the agreement or poor performance can lead to a suspension from participating in the County's bidding opportunities.

The majority of this section has been updated or included in the Policy to align with the Trade Agreements.

Minor Changes and Housekeeping:

The entire document was reviewed to update definitions, ensuring alignment to Trade Agreements, legislation and County requirements, including role clarity, delegated authority and accountabilities.

FINANCIAL/LEGAL IMPLICATIONS:

The adoption of the draft Procurement Policy will not have a direct impact on the annual Capital or Operating Budgets.

While the marketplace is stabilizing in many areas, there are still some market uncertainties (i.e. labour shortages, construction materials) that impact bid prices. The flexibility of including non-binding agreements allows staff to negotiate deliverables that meet or exceed Council-approved initiatives, with the aim on aligning bid prices with approved budgets.

The overall intent of the Policy continues to provide a fair and open process for businesses to participate in competitive bids, and for the County to seek quality and value when procuring goods, services or construction.

STAKEHOLDER IMPACTS:

The revised Procurement Policy will apply to all Departments within Haldimand County. The Haldimand County Public Library independently adopts its own Procurement Policy; however, in the past, they have chosen to adopt the exact policy. If approved, the revised Procurement Policy will be made available to the Library for consideration.

The implementation of this Policy will require training, which will be provided by the Legal and Support Services Division, for all staff involved in the procurement process.

REPORT IMPACTS:

Agreement: No

By-law: Yes

Budget Amendment: No

Policy: Yes

REFERENCES:

None.

ATTACHMENTS:

1. Draft 2024 Procurement Policy