

Clause No. 1 in Report No. 4 of the Committee of the Whole was adopted, without amendment, by the Council of The Regional Municipality of York at its meeting on February 20, 2014.

1

ENACTMENT OF REVISED PURCHASING BYLAW AND EXECUTION OF DOCUMENTS BYLAW

Committee of the Whole recommends adoption of the following recommendations contained in the report dated February 13, 2014 from the Regional Solicitor, as amended:

1. **Regional Council authorize the enactment of a revised Purchasing Bylaw to incorporate the amendments set out in this report *and subject to the following:***
 - a. ***The authority for Commissioners be increased to \$500,000 and the authority for the Chief Administrative Officer be increased to \$2 million to award contracts as the result of RFPs.***
 - b. ***Contract extensions be allowed where there is a provision for the extension in the original contract and be authorized only by the Chief Administrative Officer.***
2. **Regional Council authorize the enactment of a revised Execution of Documents Bylaw to incorporate corresponding revisions and to address administrative changes.**
3. **Bylaw 2009-41, as amended, and Bylaw 2009-49, as amended, be repealed.**
4. **The Regional Solicitor prepare the bylaws for consideration of Council.**
5. ***There be a review of the Bylaw in three years.***
6. ***Staff report back to Council on the possibility of awarding nominal environmental points related to the geographical proximity of bidders.***

1. RECOMMENDATIONS

It is recommended that:

1. Regional Council authorize the enactment of a revised Purchasing Bylaw to incorporate the amendments set out in this report.
2. Regional Council authorize the enactment of a revised Execution of Documents Bylaw to incorporate corresponding revisions and to address administrative changes.
3. Bylaw 2009-41, as amended, and Bylaw 2009-49, as amended, be repealed.
4. The Regional Solicitor prepare the bylaws for consideration of Council.

2. PURPOSE

This report summarizes the results of the review of the Purchasing Bylaw undertaken by Regional staff and recommends the enactment of a revised bylaw. The report also recommends enactment of a new Execution of Documents Bylaw to reflect these changes and to address additional administrative issues.

3. BACKGROUND

The Region's Purchasing Bylaw fulfils legislative requirements for transparency and accountability and is subject to periodic review to evaluate its effectiveness

The *Municipal Act, 2001* requires all municipalities to adopt and maintain policies with respect to the procurement of goods and services. Bylaw 2009-41 (the "Purchasing Bylaw") and its companion procedures set out the methodology for purchasing goods and services and establish expenditure limits for Regional staff.

The Purchasing Bylaw was subject to a comprehensive review in 2009 and a new Purchasing Bylaw was enacted in October 2009. The Purchasing Bylaw provides for a review every five years to evaluate its effectiveness.

Most goods and services purchased by the Region are competitively procured either through a Tender or Request for Proposal

The Purchasing Bylaw governs all manners of procurement in relation to goods and services, including supply of equipment, service agreements, maintenance of roads and facilities, and capital delivery, the vast majority of which are competitively procured through either the “tender” or Request for Proposal (RFP) process.

Tendering is a formal, detailed, highly prescriptive process that calls for the delivery of specified goods and services within strictly defined parameters. Tenders are used when the purchaser knows exactly what goods or services it requires, and is simply looking for the lowest price for those specific goods and services. The lowest priced bid that conforms to the specified parameters must always be awarded the tendered contract.

An RFP, in contrast, is used when the purchaser is looking for the best value solution to resolve a problem or deliver a good or service, but may not be sure of the best way to achieve it. RFPs provide proponents with an overview of the perceived or expected requirements, but does not include a detailed project or design plan. The RFP solicits ideas and proposed solutions to achieve the desired result. The responses to the RFP are reviewed in accordance with pre-determined objective criteria and are evaluated to determine if the proponent has a proper understanding of the purchaser’s needs. The evaluation of the proposal will be based on several criteria including price, quality of the proposed solution and the experience and qualifications of the proposed team. A score is assigned to the various criteria, and the highest scoring (but not necessarily the lowest priced) bid must generally be awarded the contract.

As shown in Table 1, the scope of Regional procurement through tenders and RFPs is significant, both in terms of the number of contracts awarded and the dollar value of those contracts.

Table 1
Contracts Awarded

	Tenders Awarded	Proposals Awarded
2009	101	88
\$	641,177,867.00	47,591,797.00
2010	120	87
\$	295,571,920.00	114,846,941.00
2011	98	78
\$	470,437,008.00	105,091,576.00
2012	107	86
\$	359,370,104.00	249,108,260.00
2013	131	76
\$	248,135,571.00	69,015,255.00

A working group comprised of Regional staff was established to undertake a review of the Purchasing Bylaw and recommend amendments

In Fall, 2012, Legal Services, in conjunction with Supplies and Services, undertook a review of the Purchasing Bylaw in accordance with the requirement for review every five years. A working group with representation from the CAO's Office, Environmental Services (Capital Delivery) and Finance was formed to guide the process (the "Working Group"). The Working Group invited each department to nominate representatives to advance issues based on direct experience with administering the Purchasing Bylaw. Common concerns were identified, particularly with respect to the expenditure limits for authorizing the award of contracts, the authority of staff to approve extensions of existing contracts, and the interpretation of the Purchasing Bylaw with respect to single and sole source purchases. As well, many minor housekeeping matters were addressed.

The recommendations set out in this report represent the consensus of the Working Group achieved through consultation across all Regional departments.

4. ANALYSIS AND OPTIONS

The substantive amendments to the Purchasing Bylaw proposed by staff are set out below:

a) The authority for Commissioners and the CAO to award contracts as the result of RFPs be increased to \$1,000,000 and \$5,000,000 respectively

Under the current Purchasing Bylaw, Commissioners are authorized to award contracts as a result of an RFP process to a maximum of \$100,000. The CAO may award contracts to a maximum of \$500,000. Staff propose to increase these authorities to \$1,000,000 and \$5,000,000, respectively.

The existing limits have been in effect for over 10 years, during which time project values have increased significantly, particularly in capital delivery. This has led to a corresponding increase in the volume of staff reports submitted to Council. In 2013, there were 76 RFPs issued. Of these, 60 had a value of \$100,000 or more, and 16 required reports to Council seeking approval because they involved awards in excess of \$500,000 and/or were not the lowest bid. If the proposed revisions to delegated authority had been in place in 2013, 13 of the 16 reports would not have been necessary. Council approval was required notwithstanding that the award of contracts pursuant to RFP's is governed by a rigorous procurement process which is informed by rules established in decided court cases. As a result, although Council approval was required due to the spending limits prescribed in the Purchasing Bylaw, Council was not actually in a position to substitute its own decision in respect of such awards without attracting liability from the proponent recommended by staff as an outcome of the procurement process. The

proposed revisions to spending limits would streamline the reporting and approval process, and minimize the circumstances in which Council approval is required.

A review of senior municipal staff purchasing authority levels at large municipalities comparable to the Region indicates that the levels vary widely across the Province.

Table 2
Authority Delegated

Municipality	Authority Delegated
Toronto	up to \$500K (City Manager)
Peel	up to \$500K (Chief Financial Officer)
Niagara	up to \$1M (Commissioner & Purchasing Manager) up to \$5M (Commissioner & Treasurer/CAO)
Ottawa	unlimited (Deputy City Manager)
Mississauga	unlimited (Purchasing Agent)

b) Staff be authorized to approve contract extensions and renewals provided the total cost is within their delegated authority

The provisions of the Purchasing Bylaw authorizing the award of contracts by staff do not permit any discretion to extend or renew a contract unless specific authority has been obtained from Council. The Bylaw does impose a limit of a five year term on contracts and agreements unless otherwise approved by Council. In the absence of authority to renew or extend the initial term of contracts up to five years, all extensions and renewals of contracts must be reported to Council for approval regardless of the contract value. This can result in reports to Council on relatively routine, low cost matters.

Accordingly, an additional provision is recommended authorizing the CAO and Commissioners to extend or renew contracts provided the total cost of the contract inclusive of the extension or renewal is within their approval authority, the contractor has performed satisfactorily, and the total contract term will not exceed five years. This practice would be consistent with the intent of delegated authority in the Purchasing Bylaw and will contribute to streamlining contract administration.

c) The existing exemptions to the Purchasing Bylaw be revised to reflect current practices and to promote greater consistency

The current Purchasing Bylaw provides for an exemption from the formal purchasing requirements for certain transactions and commodities. These are set out as a schedule to the Purchasing Bylaw. Many of these items are administrative expenses that originated when the Purchasing Bylaw provided for payment of accounts e.g. utility bills, payroll deductions. These are now redundant and should be eliminated.

Other transactions which are classified as exempt include agreements that do not fit into the standard procurement model. For example, many programs administered by Community and Health Services require agreements with service providers which are not procured through a conventional competitive procurement. Agencies are generally selected based on compliance with certain criteria rather than a formal RFP process. Multiple agencies may be retained for the same or similar services so the competitive element is not critical to awarding the contract. Typically, the services are provided directly to individuals e.g. home nursing services.

Other exemptions to the Purchasing Bylaw were intended to capture agreements with service providers who are eligible for subsidies from the Region, e.g. day care and domiciliary hostel agreements. Again, a formal competitive process would not be appropriate for these arrangements. Accordingly, it is proposed that these exemptions be preserved and the Purchasing Bylaw be amended to specifically address service delivery arrangements that will not be subject to a formal procurement process. Other limited exemptions will be continued, including the relocation of utilities under Regional contracts where it is not practically feasible to procure the relocation services.

d) Include a formal RFP process to award contracts which represent a business opportunity to contractors and might generate revenue for the Region

In the course of the Purchasing Bylaw review, staff identified categories of agreements that were previously not clearly addressed in the Purchasing Bylaw but should be subject to a formal process. These, broadly, are agreements which represent a business opportunity to the service provider but which do not require the expenditure of Regional funds and may, in fact, generate income for the Region. Examples include the contract for cafeteria services, which provides compensation calculated as a percentage of revenue, and certain waste processing agreements whereby the contractor is entitled to retain a percentage of recycling revenue. Although the current practice is to award these types of contracts pursuant to RFPs, it is proposed that the Purchasing Bylaw be amended to formally require that these types of contract would be subject to an RFP process that will identify the contractor based on a best value analysis.

e) Certain business practices that do not fit the conventional procurement model would be subject to Council approval through specific reports

The exemptions in the current Purchasing Bylaw include certain arrangements which were exempted from a competitive process primarily because they do not readily fit a conventional procurement process. Examples of such services include maintenance agreements for proprietary software and certain long standing arrangements for services rendered to long term care residents. Staff do not support a continuing exemption for these kinds of arrangements because in many cases there is an opportunity for competition to provide the services. However, it is recommended that individual reports

be submitted to Council to set out the rationale for the business practice if staff seek to exempt the service from a competitive process. It is understood that the Fleet Services Branch of Transportation and Community Planning is also seeking Council approval of a procurement model that would be more responsive to their individual needs and will be reporting separately on this proposal.

f) The provisions permitting “sole source” and “single source” purchases be consolidated to create a Direct Purchase provision

The current Purchasing Bylaw provides for certain circumstances where goods and services may be obtained without a formal procurement process. These are presently classified as “sole” and “single” source purchases, which is generally consistent with the conventional terminology among procurement professionals. However, staff reported confusion in administering these provisions and found that the terms were often used interchangeably. Accordingly, it is proposed that the Purchasing Bylaw be amended to consolidate the two concepts in a revised section that will allow for purchases of goods and services to be made without a competitive process if certain criteria are met. These criteria-based exceptions will be termed “Direct Purchases”. Importantly, the same criteria will apply and essentially address two main scenarios: (a) where the compatibility with existing equipment, facilities or services is the paramount consideration; and (b) where there is only one legal entity capable of providing the goods or services. The requirement to obtain Council approval for Direct Purchases over \$100,000 will be retained.

g) Include a new provision in the Purchasing Bylaw to provide a framework for prohibiting contractors who have performed poorly on Regional contracts from securing new contracts

A continuing concern for staff in administering contracts is the lack of remedies available to deal with poor performance by contractors. The current Purchasing Bylaw provides that senior staff are responsible for monitoring contractor performance and may prohibit a contractor whose performance has been unsatisfactory from bidding on future Regional contracts. This provision has not been invoked to date largely because the basis upon which contractors should be banned was not clearly articulated and there were no consistent processes in place to document contractor performance.

Staff recommend that the contractor performance provisions be significantly expanded. The proposed Purchasing Bylaw would provide that a contractor could be banned, upon a recommendation of staff approved by the CAO, from bidding on future Regional contracts based on, for example, any of the following:

- consistent or significant failure to adhere to project schedules or to follow contract requirements
- consistent or significant failure to perform the contract in accordance with generally accepted standards of workmanship
- failure to comply with legislative requirements
- dishonesty or criminal actions in relation to or within the scope of a Regional contract

Staff are of the opinion that these provisions in the Purchasing Bylaw will provide a sound objective framework to implement a performance management strategy and establish clear and defensible criteria against which performance may be evaluated. The right to ban contractors would be incorporated in the Region's standard form of procurement documents. The effectiveness of this strategy will also clearly depend on appropriate training and support for staff to ensure documentation is in place to support any proposed ban.

The City of Windsor has recently enacted a new purchasing Bylaw that incorporates contractor performance provisions and provides for the City's CAO to release the ban if satisfied that the performance issues have been satisfactorily addressed by the contractor.

h) Amend the preamble to the Purchasing Bylaw to support Regional strategic goals

The preamble to the current Purchasing Bylaw states the purposes and objectives of the Purchasing Bylaw. These are stated to be:

- to encourage competition among contractors
- to obtain the highest quality goods, services or construction at the least possible cost
- ensure fairness, objectivity, accountability and transparency in the procurement process

It is recommended that this preamble be expanded to reference two additional strategic objectives: environmentally sustainable procurement and the requirements of the *Accessibility for Ontarians with Disabilities Act* ("AODA"). Environmentally sustainable procurement will be undertaken provided the requirements to obtain best value and promote competition are also met. Many requirements under AODA are currently mandated by legislation and the incorporation in the Purchasing Bylaw would be an acknowledgment of this and also signals that enhancements may be proposed where appropriate.

Various proposed amendments of an administrative or “housekeeping” nature will make the Purchasing Bylaw clearer, more concise and easier to understand

Concurrently with the major proposed amendments outlined above, it is recommended that the Purchasing Bylaw be redrafted for enhanced clarity. It is hoped that this will lead to greater consistency across the organization in administering the Purchasing Bylaw. The proposed redrafting includes:

- using “plain language” consistently throughout
- adding definitions of important terms or concepts and improving existing definitions
- clarifying existing processes and practices, (e.g. the use of standstill agreements in the context of the Litigating Bidder Prohibition)

In addition, Legal Services in conjunction with Supplies and Services is preparing an interpretive guide which will be available to Regional staff to address frequently asked questions and promote consistent interpretation.

Staff recommend revision of the Execution of Documents Bylaw to reflect changes to the Purchasing Bylaw and changes in the Region’s organizational structure

The Execution of Documents Bylaw is a companion bylaw that generally provides for the execution of standard agreements and documentation where no competitive procurement is required. If Council authorizes the amendments to the Purchasing Bylaw set out in this report, it is recommended that a new Execution of Documents Bylaw be enacted to provide for corresponding revisions, for example, to permit staff to authorize extensions and renewals of agreements. As well, it is timely to review this bylaw to reflect organizational changes in the Regional administration.

Link to key Council-approved plans

The review of the Region’s Purchasing Bylaw supports the 2011 to 2015 Strategic Plan which provides a commitment to Strengthened Organizational Capacity by applying continuous improvement activities to core business systems and practices.

5. FINANCIAL IMPLICATIONS

The amendments and enhancements to the Region’s Purchasing Bylaw will continue to support the Region’s objectives of obtaining goods and services that reflect best value and fiscal prudence.

6. LOCAL MUNICIPAL IMPACT

There are no local municipal impacts directly arising from this report.

7. CONCLUSION

Consistent with the requirement in the Purchasing Bylaw to review the Purchasing Bylaw and evaluate it for effectiveness every five years, the staff Working Group assigned with responsibility for this task has, in consultation with staff from all Regional departments who procure goods and services on behalf of the Region, recommended a number of amendments to strengthen, improve and clarify the Purchasing Bylaw. The proposed amendments are consistent with best procurement practice, and promote the purposes, goals and objectives of the Purchasing Bylaw.

For more information on this report, please contact Dan Kuzmyk, Senior Counsel, Litigation at Ext. 71401 or Stan Gal, Director of Supplies and Services, at Ext. 71650.

The Senior Management Group has reviewed this report.