

Accountability Officer Roles and the City of Toronto's Procurement Process

Date: October 13, 2021
To: Executive Committee
From: City Manager
Wards: All

SUMMARY

This report responds to City Council direction for a review of the role of Toronto's Accountability Officers in relation to the procurement process and identification of any gaps.

The City Manager's Office has consulted with Toronto's Accountability Officers to understand their perspectives related to the City's procurement process and reviewed models of oversight of procurement processes in other jurisdictions.

RECOMMENDATIONS

The City Manager recommends that:

1. City Council receive this report for information.

FINANCIAL IMPACT

There is no financial impact resulting from the adoption of the recommendation in this report.

The Chief Financial Officer and Treasurer has reviewed this report and agrees with the financial impact information.

DECISION HISTORY

City Council on May 5 and 6, 2021, directed the City Manager to report to City Council on:

- a. a review of the role of the Accountability Officers in relation to the procurement process and identification of any gaps; and
- b. a review of the possibility of Toronto adopting the Open Contracting Global Principles or any other similar principles.

This report responds to part a. of this direction. A report on part b. is on the agenda of the October meeting of the General Government and Licensing Committee.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2021.EX23.2>.

COMMENTS

Role of the Accountability Officers in Relation to Procurement

The roles of Accountability Officers (AOs) are set out in the City of Toronto Act, 2006 and Chapter 3 of the Toronto Municipal Code. The City Manager's Office consulted with Toronto's AOs to understand their perspectives related to the City's procurement process. Neither provincial legislation nor Chapter 3 of the Municipal Code explicitly addresses oversight of the procurement process by AOs, however their roles in the process can be summarized as follows:

- The Auditor General assists City Council in holding itself and staff accountable for the quality of stewardship over public funds and for achievement of value for money in City operations. With respect to procurement, this role would most often be carried out by reviewing processes after the award of a contract by looking at any questions related to cost, vendor experience, process fairness, and/or fraud.
- The Lobbyist Registrar oversees and determines whether breaches of the Lobbying By-law occur. The Lobbying By-law restricts communication in relation to a procurement process to that which is allowable under the Procurement By-law and applicable procurement policies and procurement documents. Supplier or affiliated persons found to be a lobbyist are also subject to the Lobbying By-law's Code of Conduct.
- The Ombudsman promotes fairness in City services, helps the public resolve problems, and helps the City serve the public better. The Ombudsman's Office is one of last resort, conducting investigations, mediations and recommending solutions and system improvements. The Ombudsman could investigate questions related to the fairness of and accessibility to dispute mechanisms that are in place and whether access to information was appropriate through the procurement process.
- The Integrity Commissioner supports members of Council and local boards (restricted definition) by: advising and educating them about the rules in the City's codes of conduct and the Municipal Conflict of Interest Act (MCIA); dealing with

complaints that these rules have been broken; and advising about City requirements governing their ethical behaviour. The Commissioner can only investigate a procurement issue upon receiving a complaint that a member is somehow involved and is alleged to have breached their ethical obligations.

In general, the AOs are most likely to be involved in a procurement matter after a procurement process has concluded. There is less opportunity for involvement and oversight by these Offices - and therefore a potential gap - during an open procurement process.

When consulted by the City Manager's Office for this report, the AOs did not recommend a change to their mandates or greater intervention by their Offices in open procurement processes.

Existing Fairness Mechanisms

The City has put in place mechanisms to support trust, confidence and fairness in the procurement process, including some that can be triggered during an open process. For example:

- Dispute mechanisms set out in Article 10 of the [Purchasing By-law](#) include:
 - A pre-award bid dispute process which allows the Chief Procurement Officer to delay an award, or any interim stage of a procurement, pending the acknowledgement and resolution of a pre-award dispute.
 - A post-award bid dispute process allows for referral to the Controller for an impartial review and allows for the Controller, in consultation with the City Solicitor, to dismiss the dispute or accept it and direct appropriate remedial action including but not limited to rescinding the award and any executed contract, and canceling the solicitation.
- In July 2004, City Council endorsed the approach of [using](#) external fairness consultants in certain limited circumstances defined by call complexity and the likelihood of intense scrutiny (<https://www.toronto.ca/legdocs/2004/agendas/council/cc040720/adm5rpt/cl011.pdf>). Fairness monitors provide an attestation report on the fairness of a specific procurement process, which is attached to the award report.
- As set out in Article 8 of Municipal Code Chapter 195 the Purchasing By-law, all awards between \$500,000 and \$20 million are awarded through the Bid Award Panel and any awards greater than \$20 million go to the appropriate Standing Committee. All of the award reports are public documents.

Because many of these processes are staff-managed or staff-initiated, and because of the limited opportunities for AO oversight of open procurement processes, an additional independent mechanism could enhance the perception of fairness of open procurement practices. City Council could direct further study into such oversight mechanisms, which would take into account the considerations below.

Key Considerations

Models in other jurisdictions illustrate some potential fairness or oversight features that could be considered for the City's procurement process. Some examples from other jurisdictions include:

- The City of Montreal's Inspector General oversees the contracting processes and how contracts are carried out by the City or by a related entity. This position has powers to investigate and inspect books and records, to cancel, rescind and suspend any contracting process under certain conditions, and to make recommendations to the City Council.
- The federal Office of the Procurement Ombudsman investigates complaints after contract award, provides dispute resolution services, and reviews widespread federal contracting issues and provides recommendations on how to improve them. The Procurement Ombudsman cannot impose sanctions, penalties or remedies, or cancel or change the terms and conditions of contracts.
- The Canadian International Trade Tribunal provides an opportunity to review the propriety of the procurement process related to contracts covered by certain trade agreements. It has the authority to inquire into complaints and decide whether the federal government broke certain procurement obligations, and to recommend remedies. In addition, the Tribunal has the authority to write to the senior management of federal government institutions about their procurement processes in general.

Additional study would be required to explore any new mechanisms that could be developed within the City of Toronto's Accountability Framework and governance model. Any considerations for changes to increase independent oversight in Toronto's procurement process would need to consider:

- How the function would complement the City of Toronto's existing Accountability Officers without overlap;
- The current fairness monitor policy and dispute processes;
- If any additional separation from City staff would be effective (i.e. establishing an external accountability function rather than situating it within the City's administration);
- Cost-effectiveness; and
- Powers and mandates, including:
 - Scope (including whether oversight would cover the entire process lifecycle from design to award, or certain parts of the process);
 - Whether the mechanism would provide advice, recommendations and/or make decisions;

- The ability to suspend or terminate a procurement process or to recommend or impose other remedies; and
- Reporting obligations.

Further study and future recommendations could also draw on considerations raised in the 2005 "Toronto Computer Leasing Inquiry" by Justice Bellamy related to fairness in procurement, including:

- The qualifications and expertise of the person or people carrying out an oversight function;
- The need for maintaining a balance between fairness and objectivity in procurement processes, and flexibility in meeting the City's procurement needs; and
- The opportunities for such a function to provide advice on the process, to sit with the evaluation committee, and to report publicly on any fairness issues.

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SIGNATURE

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