

Procurement Policy Updates resulting from amendments to Toronto Municipal Code, Chapter 195, Procurement

Date: April 18, 2024
To: General Government Committee
From: Chief Procurement Officer
Wards: All

SUMMARY

The purpose of this report is to recommend updates to the Purchasing and Materials Management Division's procurement policies to ensure alignment with the amended Toronto Municipal Code Chapter 195, Procurement ("Procurement Bylaw"), which will take effect on July 1, 2024. This report also responds to a request from City Council to report back on updates required to align the City's procurement policies with the TransformTO Net Zero Strategy.

The Procurement Bylaw was reviewed in 2023. The amendments, adopted by City Council at its meeting on December 13, 14, and 15, 2023, will come into effect on July 1, 2024. To facilitate implementation of the amended Procurement Bylaw, revisions to procurement policies are also required. Most revisions are considered administrative in nature. This report focuses on the Procurement Processes Policy and the Social Procurement Policy which require more substantial revisions and are being brought to City Council for review and adoption in advance of the July 1, 2024 effective date. The proposed updates to the Procurement Processes Policy include the addition of policy considerations regarding the use of fairness consultants.

A more substantive review, including divisional consultation, will be required to align the City's procurement policies with the TransformTO Net Zero Strategy. This report recommends the Chief Procurement Officer report back in Q1 2025 with required updates. The additional time will provide staff the opportunity to identify how the procurement process can best advance divisional TransformTO objectives and how the Purchasing and Materials Management Division can directly advance TransformTO through the use of procurement.

RECOMMENDATIONS

The Chief Procurement Officer recommends that:

1. City Council direct the Chief Procurement Officer to make the required administrative updates to procurement policies, as set out in this report, that result from City Council adoption of [GG8.21](#) - Amendments to Toronto Municipal Code, Chapter 195, Purchasing, and Review of Open Contracting Global Principles and the Role of an Inspector General.
2. City Council amend the Social Procurement Policy, as set out in Attachment 1 of this report, effective July 1, 2024.
3. City Council amend the Procurement Processes Policy, as set out in Attachment 2 of this report, effective July 1, 2024.
4. City Council direct the Chief Procurement Officer to review the Supplier Suspension Procedure to ensure continued alignment with the amended Procurement Bylaw.
5. City Council direct the Chief Procurement Officer to report back in Q1 2025 with an update on the alignment of the City's procurement policies with TransformTO.
6. City Council amend the definition of Procurement Policies in Municipal Code, Chapter 195, Procurement, effective July 1, 2024, to read: The written policies that are intended to implement this Chapter.

FINANCIAL IMPACT

There are no financial implications arising from the recommendations in this report.

Funding for procurement processes, including engagement of fairness consultants, for the budget year is included in the divisional annual Operating and Capital Budgets and for future years will be requested in the divisional Operating and Capital Budget submissions for the respective future years. Over the period 2004-2023, the City of Toronto has spent approximately \$1.95 million on fairness consultant services for 163 procurement processes. The annual spending on fairness consultants fluctuated from \$5,373 to \$255,846 based on the type and complexity of procurements in any given year.

The Chief Financial Officer and Treasurer has reviewed this report and agrees with the information presented in the Financial Impact Section.

DECISION HISTORY

At its meeting on December 13, 14, and 15, 2023, City Council adopted [GG8.21, Amendments to Toronto Municipal Code, Chapter 195, Purchasing, and Review of Open Contracting Global Principles and the Role of an Inspector General](#), which renamed the Bylaw to Chapter 195, Procurement, amended the Chief Procurement Officer's and Division Heads' authority to process limited solicitations to align with current trade agreement thresholds, clarified the beginning of the blackout period, and extended the Chief Procurement Officer's authority to cancel a procurement. City Council also directed the Chief Procurement Officer to report back on any updates to Council-approved policies that are required to make the City's procurement policies consistent with TransformTO.

At its meeting on July 19 and 20, 2023, City Council adopted [AU2.5, A Review of the Procurement and Award of the Winter Maintenance Performance-Based Contracts](#) and requested the Chief Procurement Officer to implement a policy or procedure which establishes the criteria for engaging an independent fairness consultant to monitor a procurement process.

At its meeting on July 12, 13, 14 and 15, 2016, City Council adopted [GM13.13, Amendments to the Purchasing By-Law and Procurement Processes Policy](#), which amended Municipal Code Chapter 195, Purchasing in order to adopt a Supplier Code of Conduct, be prepared for upcoming trade agreements, align with the Province of Ontario's Broader Public Sector Procurement Directive as a leading practice, and improve the clarity of the Purchasing Bylaw. A decision history on previous amendments to Chapter 195 is included in this report.

COMMENTS

At its meeting on December 13, 14, and 15, 2023, City Council adopted GG8.21, Amendments to Toronto Municipal Code, Chapter 195, Purchasing, and Review of Open Contracting Global Principles and the Role of an Inspector General, which amended Chapter 195 (the Procurement Bylaw), effective July 1, 2024. Corresponding revisions to procurement policies are required. Most revisions are considered administrative in nature and will enhance the clarity and effectiveness of the Procurement Bylaw. Two policies require more substantial revisions, which are being brought now for City Council review and adoption in advance of the July 1, 2024 effective date: the Social Procurement Policy and the Procurement Processes Policy. The revisions to procurement policies recommended in this report will also take effect on July 1, 2024.

Administrative procurement policy amendments to correspond with the Procurement Bylaw

This report recommends updating all procurement policies to correspond with the approved administrative amendments made to the Procurement Bylaw. The changes include:

- Where required, replacing reference to specific RFX types (for example, Request for Proposals or Request for Tenders) with the term 'solicitation'.
- Where required, updating job titles, including 'Chief Procurement Officer'.
- Changing reference of 'Online Procurement System' to 'Electronic Tendering System'.
- Replacing 'purchasing', 'provision' or 'acquisition' with 'procurement'.
- Replacing 'vendor', 'bidder', 'participant' or 'proponent' with 'supplier'.
- Updating the names of the following divisions or units:
 - 'Environment and Energy Division' to 'Environment and Climate Division'
 - 'Real Estate Services Division' to 'Corporate Real Estate Management Division'
 - 'Toronto Office of Partnerships' to 'Strategic Partnerships Office'; and
 - 'Corporate Access and Privacy unit' to 'Corporate Information Management Services unit'.
- Replacing 'call document', 'procurement document' or 'solicitation document' with 'solicitation'.
- Replacing 'designate' with 'delegate'.
- Replacing 'proposal' or 'quotation' with 'bid'.
- Updating references made to Toronto Municipal Code Chapter 195, Purchasing with the new Bylaw name, Procurement.
- Replacing any reference to specific committees with 'appropriate Standing Committee'.

The above housekeeping amendments will provide greater clarity and consistency when interpreting and administering procurement processes. Staff recommend the updates come into effect on July 1, 2024 to correspond with the amended Procurement Bylaw.

Social Procurement Policy

The Social Procurement Policy was adopted by City Council in 2016, with effect from January 1, 2017. The purpose of the policy is to embed supply chain diversity and workforce development initiatives within the City's procurement processes to drive inclusive economic growth. The proposed amendments, set out in Attachment 1, include the housekeeping amendments proposed above, as well as more substantial revisions, including:

- Amending definitions to improve clarity.
 - Replacing references to 'Equity-seeking Communities' with 'Indigenous, Black and Equity-deserving Communities'.
 - Clarifying the definitions of 'Apprentice' and 'Workforce Development - Use of Diverse Suppliers in the Supply Chain'.
- Aligning the value of solicitations that are subject to the supply chain diversity component of social procurement with the limited solicitation thresholds in the Procurement Bylaw. Where feasible, a quotation from a minimum of one diverse supplier must be included for invitational solicitations valued up to:
 - \$120,000, if completed by divisions (increased from \$50,000).
 - \$133,800, if completed by Purchasing and Materials Management Division (increased from \$133,800).

A review of the Social Procurement Policy and Program was completed by PMMD, in consultation with Social Development, Finance and Administration Division, and a report with recommendations for substantive policy changes is planned for Council's consideration in Q4 2024.

Procurement Processes Policy

The Procurement Processes Policy works with the Procurement Bylaw to set out consistent and standard approaches for all stages of the City's procurement processes and to reinforce the principles of fairness, openness, transparency and integrity. The Procurement Processes Policy was last reviewed and amended in 2016 at the same time as the Procurement Bylaw. Revisions that are proposed in the Procurement Processes Policy are set out in Attachment 2 and include:

- Renaming the policy from the Procurement Processes Policy to the Procurement Policy.
- Updating limited solicitation thresholds in line with the Procurement Bylaw.
- Administrative updates to clarify interpretation and improve readability.
- Incorporating a new section that sets out policy considerations regarding the use of fairness consultants.

Renaming the Procurement Processes Policy

The terms 'procurement' and 'procurement process' are distinct. 'Procurement' is a comprehensive term encompassing the acquisition of goods and services, while 'procurement process' is focused on the processes related to the acquisition of goods and services that begin after the City has decided on its requirements and continues through to and including award and contract execution. The new title accurately depicts the purpose of the policy, which includes procurement planning and supplier management.

Administrative updates to clarify interpretation and improve readability

The proposed Procurement Policy (currently the Procurement Processes Policy) includes recommended changes to provide for greater clarity and readability. The proposed changes include applying consistent numbering, removing definitions that are already included in the Procurement Bylaw and modifying certain provisions for clarity. The changes will provide greater consistency in interpreting and administering the policy.

Adding a section on fairness consultants to the proposed Procurement Policy (currently Procurement Processes Policy)

Fairness consultants are external organizations that assess a public body's adherence to its prescribed procurement processes, with a specific focus on the maintenance of openness, fairness and transparency. Fairness consultants may have different titles, such as Fairness Commissioners, Fairness Monitors and Process Monitors, and different roles depending on when they are engaged in a procurement process, such as:

- In an external audit function after a procurement process has been completed.
- In a monitoring capacity at any stage of a procurement process, with the objective of observing and assessing adherence to the principles of openness, fairness and transparency of the procurement process. This may include providing advice to staff on opportunities to align with the prescribed procurement process more closely as it relates to openness, fairness and transparency.
- In an advisory capacity from the early stages of a procurement process, often before a solicitation is developed, with a view to wider public policy objectives.

The City of Toronto began using fairness consultants as early as 1999, in response to the Toronto Computer Leasing Inquiry and subsequent Bellamy Report. In 2004, City Council endorsed an approach to using external fairness consultants in certain limited circumstances defined by call complexity. The approach has been followed by the Purchasing and Materials Management Division (PMMD), but it was not set out in a formal policy. In June 2023, the Auditor General released a report on the Procurement and Award of the Winter Maintenance Performance-Based Contracts, which recommended the Chief Procurement Officer implement a policy or procedure which establishes the criteria for engaging an independent fairness consultant to monitor a procurement process. This report recommends incorporating policy considerations regarding fairness consultants into the Procurement Policy (currently the Procurement Processes Policy), which will be supplemented by a procedure to provide additional guidance.

Use of Fairness Consultants for City Procurements

Since 2004, the City of Toronto has spent approximately \$1.95 million on fairness consultant services on 163 procurement processes over the period 2004-2023. The annual spending on fairness consultants fluctuated from \$5,373 to \$255,846 based on the type and complexity of procurements in any given year. Divisions are responsible for determining when a fairness consultant is required, for budgeting for fairness consultant services, and for procuring this service with support from PMMD. Fairness consultant services are typically procured using a roster established by PMMD. Divisions may also use a Divisional Purchase Order when the value of the fairness consultant contract is below the threshold for Division Heads to process through a Divisional Purchase Order (i.e., currently \$50,000; increasing to \$120,000 on July 1, 2024).

The involvement of a fairness consultant in a procurement is intended to enhance the City's existing controls on the procurement process. The benefits of using a fairness consultant include:

- Additional oversight of the procurement process, with the overall goal of ensuring perceived and actual fairness of the procurement process.
- Reducing the risk of bid disputes and other challenges, due to the perception of increased impartiality in the assessment of adherence to the procurement process, including award.
- Support for PMMD staff during supplier debriefings post-award.

Recommended Policy Updates

Based on a review of the use of fairness consultants in the City's procurement process and best practice in the public sector, this report recommends the proposed Procurement Policy (currently Procurement Processes Policy) be amended to include the following policy considerations, which are also detailed in Attachment 2.

1. The role of a fairness consultant

As fairness consulting for public procurement is an unregulated field, there is the possibility for different interpretations of the role of a fairness consultant. While the scope of work for fairness consultants is set out in solicitation documents when fairness consultant services are procured, additional clarity in policy regarding the role of fairness consultants may limit misunderstandings and unnecessary delays during the procurement process.

Fairness consultants are engaged by the City to monitor adherence to the City's prescribed procurement process, as approved by City Council and further prescribed by the Chief Procurement Officer, specifically related to the principles of openness, fairness and transparency. Fairness consultants are typically included during the development of the solicitation, but may be engaged at any stage of a procurement process including in an external audit function post-award if necessary. Fairness consultants may provide advice to City staff on opportunities to align with the prescribed procurement process more closely as it relates to openness, fairness and transparency and specifically respecting the procurement process for which they have been engaged. It is beyond the scope of fairness consultants to make general recommendations regarding the City's procurement process or public policy objectives.

2. Responsibility for determining when a fairness consultant is required

While the roles and responsibilities of City staff regarding fairness consultants are generally understood and observed, setting them out in policy will improve clarity.

Division Heads are responsible for determining whether a fairness consultant is required for a procurement process. Division Heads are also responsible for assessing the financial impact of procuring a fairness consultant and determining if funding is available. The Chief Procurement Officer may review a solicitation at any time during the procurement process, in consultation with the City Solicitor, to determine and advise staff whether a fairness consultant is required. The Chief Procurement Officer has the final authority to decide when a fairness consultant will be engaged for a procurement process.

3. Risk factors that require the use of a fairness consultant

To increase consistency in the use of fairness consultants, this report recommends that every open competitive procurement be assessed for whether a fairness consultant should be engaged and documentation retained on file to support why a fairness consultant is or is not engaged before the issuance of a solicitation.

Guidance for determining when to engage a fairness consultant will be set out in procedure, which will include criteria for the mandatory use of a fairness consultant (for example, for negotiated Requests for Proposals valued over \$10 million). Additional criteria and guidance will be included in procedure to support Division Heads and the Chief Procurement Officer to determine when there is a particular benefit to the City in engaging an external organization to observe and attest to the fairness of a procurement process (for example, for procurements that are complex, controversial, politically sensitive, or high-risk).

4. Reporting

Fairness consultants must provide a written report to the Division Head and the Chief Procurement Officer that documents adherence to the City's prescribed procurement process, specifically related to the principles of openness, fairness and transparency and that highlights any unresolved issues relating to fairness. Reports from fairness consultants are already expected, but setting these requirements out in policy improves clarity and consistent application.

Supplier Suspension Procedure

In addition to a number of new and amended definitions that are reflected in the proposed Procurement Policy (currently Procurement Processes Policy) attached to this report, the definition of Suspended Supplier in the Procurement Bylaw was updated to read: A supplier that has been suspended, deemed ineligible, prohibited or disqualified for non-compliance with the Supplier Code of Conduct for any duration from bidding on future procurements under § 195-13.14. PMMD regularly reviews and, when necessary, updates procurement procedures, in line with section 3.1(A) of the Procurement Bylaw. This report recommends prioritizing a review of the Supplier Suspension Procedure, which was last updated August 15, 2018, to ensure continued alignment with the amended Procurement Bylaw.

Alignment with TransformTO Net Zero Strategy

The TransformTO Net Zero Strategy (TransformTO) was adopted by City Council in 2021. TransformTO is the City's climate action strategy that triggers new and accelerated implementation actions to drive down community-wide greenhouse gas (GHG) emissions, particularly in the short term, and establishes the trajectory needed to reach net zero by 2040. The City's purchasing power is one way that the City can make environmentally sustainable and equitable investments for today and the future, while empowering communities and modernizing industry to supply solutions to realize the City's net zero targets. Enhancing sustainable procurement is a short-term action item in TransformTO.

As corporate implementation of TransformTO has advanced, PMMD has been working with Environment and Climate Division (E&C) to clarify governance and accountability for how sustainability is embedded in procurement processes. Section 3.1 of the Procurement Bylaw sets out that the Chief Procurement Officer is responsible for: coordinating procurement processes and solicitations on behalf of the City; determining the appropriate procurement process to be used for the procurement of any good or

service; and establishing templates for common or repetitive solicitations. Section 4.1 of the Procurement Bylaw sets out that division heads are responsible for participating in the development of template specifications, quality requirements, scope of work and other requirements including contract documentation for routine procurements conducted by their division. As such, sustainability criteria are developed by divisions, often in collaboration with E&C, and PMMD works with divisions to incorporate these sustainability criteria into solicitations. Section 4.1 also sets out that division heads are responsible for directing and overseeing the negotiation, execution and management of all contracts led by or coordinated by their division, which would include managing compliance with any sustainability requirements incorporated into solicitations and contracts. Additional review and discussion with E&C and other divisions is required to further detail these roles in procurement policy.

PMMD has an additional role in enhancing sustainable procurement through the use of procurement tools. As part of its Greening Government Strategy, the Government of Canada introduced a Standard on the Disclosure of Greenhouse Gas Emissions and the Setting of Reduction Targets. The standard affects procurements valued over \$25 million, initiated on or after April 1, 2023. Government of Canada departments are required to include an incentive or requirement, depending on the solicitation type, for suppliers to disclose their greenhouse gas emissions and set reduction targets through Canada's Net-Zero Challenge or another equivalent initiative. PMMD has met with the Treasury Board Secretariat, Public Services and Procurement Canada and Environment and Climate Change Canada to discuss the standard and Canada's Net-Zero Challenge. Additional discussion and collaboration with the federal government, E&C and divisions is required to develop and recommend to City Council an approach to supply chain GHG emissions disclosures for the City.

This report recommends that the Chief Procurement Officer report back in Q1 2025 with an update on how roles and responsibilities for sustainable procurement will be detailed in policy, and how the City can implement an approach to supply chain GHG emissions disclosures.

Amendment to the Definition of Procurement Policies

Through GG8.21, section 3.1(A) of the Procurement Bylaw was amended to add authority and responsibility for the Chief Procurement Officer to prescribe procurement policies not specifically provided for in the Procurement Bylaw. On July 1, 2024, the following section 3.1(A) will take effect:

3.1 The Chief Procurement Officer shall have the authority and responsibility, subject to Council policies, for the following:

A. Approving and prescribing procurement policies and procurement procedures not specifically provided for in this Chapter, in consultation with division heads and the City Solicitor.

Through the Procurement Bylaw, City Council sets the strategic policy direction for procurement. The amendment that was made through GG8.21 was intended to improve operational efficiency by allowing the Chief Procurement Officer to write, approve and

prescribe the policies and procedures required to give effect to this strategic policy direction without requiring City Council to effectively re-approve policy statements. Through updating the procurement policies to align with the amended Procurement Bylaw, staff have identified a gap between section 3.1(A) and the definition of procurement policies. The current definition of procurement policies is: The written policies approved by Council that are intended to supplement this Chapter.

This report recommends amending the definition of 'Procurement Policies' in the Procurement Bylaw to read: The written policies that are intended to implement this Chapter. This amended definition deletes the reference to policies being 'approved by Council' and clarifies that the policies are intended to implement, rather than supplement, Chapter 195.

Deleting 'approved by Council' improves operational efficiency by allowing the Chief Procurement Officer to prescribe procurement policies that will give effect to the Council-approved Procurement Bylaw. For example, this authority would allow the Chief Procurement Officer to make the administrative updates described above without reporting to City Council. Making this deletion also requires clarifying that the Chief Procurement Officer's authority extends only to those policies that are intended to implement the Procurement Bylaw. Replacing 'supplement' with 'implement' limits the Chief Procurement Officer's authority to implement only strategic policy direction that has already been approved by City Council. For example, the addition of fairness consultants to the proposed Procurement Policy (currently Procurement Processes Policy) and the revised definitions in the Social Procurement Policy would continue to be reported to City Council under the recommended amendments to the definition of procurement policies.

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SIGNATURE

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ATTACHMENTS

Attachment 1 - Proposed Social Procurement Policy
Attachment 2 - Proposed Procurement Policy