
For Information

REPORT TITLE: **Peel Procurement and Trade Agreement Requirements**

FROM: Stephen Van Ofwegen, Commissioner of Finance and Chief Financial Officer
Andrea Warren, Interim Commissioner of Public Works

OBJECTIVE

To provide an update on the Region of Peel's progress toward aligning its procurement practices with the requirements of national and international trade agreements.

REPORT HIGHLIGHTS

- The Canada-European Union Comprehensive Economic and Trade Agreement (CETA), Canadian Free Trade Agreement (CFTA) and Ontario-Quebec Trade and Cooperation Agreement (OQTCA). CETA and CFTA came into effect in 2017. The OQTCA came into effect in 2009.
 - These trade agreements require government entities at the federal, provincial, and municipal level to comply with their public procurement stipulations.
 - Staff are committed to aligning the Region's procurement practices and policies with the government procurement requirements outlined in the trade agreements.
 - Aligning with the new trade agreements provides benefits in helping to promote fair, open, and transparent procurement practices that increase competition amongst the bidder community and provide cost efficiencies for the Region.
 - Compliance with the agreements does present several challenges for the Region, including the requirement to describe procurement document technical specifications via performance and functional requirements rather than design or descriptive characteristics.
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DISCUSSION

1. Background

As detailed in a previous report to Regional Council at its meeting held on February 8, 2018, three current trade agreements, the Canadian Free Trade Agreement (CFTA) between the Canadian federal government and Canadian provinces and territories, the Comprehensive Economic and Trade Agreement (CETA) between the Canadian federal government and the European Union, and the Ontario-Quebec Trade and Cooperation Agreement (OQTCA), all include government procurement obligations, including obligations on the part of municipal governmental entities such as the Region of Peel (Resolution 2018-81). The intent of the procurement sections of all of these agreements is to ensure that all governmental procurements are conducted in a fair, open, and non-discriminatory manner so as to maximize bidder participation in the procurement process and to ensure that governments

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are transparent with the bidding and contract award information that they make publicly available.

In 2018, following Council approval, the Region enacted a new Procurement By-law 30-2018. The new By-law recognized the impact of these new trade agreements and adopted the following as one of its Guiding Principles:

“to promote procurement processes and decisions that are in compliance with applicable legislation and trade agreements and that are consistent with the strategic objectives established for the Region of Peel, Peel Regional Police and Peel Housing Corporation;”

The Procurement By-law also addresses local preference:

“In accordance with the Region’s Local Preference Procurement Policy and applicable trade agreements, goods and services shall not be afforded preferential treatment under this By-law or in any Bid Solicitation based on location or origin of the goods and services.”

Although the three trade agreements have differing minimum dollar thresholds above which procurement processes are required to comply with each respective trade agreement, the Region has utilized the lowest minimum procurement threshold (\$100,000) from among the different agreements as it’s standard for compliance.

2. Current State

As detailed in the 2018 report, while a number of previously established Peel procurement policies and procedures already aligned with the requirements of the trade agreements, Regional staff committed to working diligently towards full compliance.

Beyond the well-established and standard Peel Region policies and procedures that promote and support fair, open, and transparent procurement activity, the following provides a sample summary of the areas in which the Region of Peel’s current procurement policies and procedures comply with the requirements of the trade agreements:

- Adherence to minimum dollar thresholds, above which bid opportunities are provided openly to the international bidding community,
- Enforcement of mandatory minimum open bidding periods,
- Public issuance of Notice of Planned Procurement (NOPP) alerts in order to inform the vendor community of upcoming bid opportunities. NOPPs allow government entities to shorten bidding periods,
- Usage of selective tendering (prequalification) in order to justify issuing subsequent bid opportunities to a limited vendor pool,
- In cases where required products or services are indicated by name in a procurement document and must be carried in a vendor’s bid submission, the capacity for bidders to offer an “equivalent” alternative product or services for the Region’s consideration
- Public disclosure of pricing submitted by compliant bid vendors,
- Public disclosure of evaluation criteria and weightings for bid processes requiring evaluation,
- Collection and reporting to the Committee on Government Procurement of all Region procurement activity above \$100,000.

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Regional Procurement staff have conducted an environmental scan of nearby municipalities in order to try to ascertain their level of trade agreement compliance. Many of these municipalities refer to the requirement to adhere to the trade agreement-mandated requirements in their respective municipal procurement by-law. Additionally, many have adopted the procedures outlined in bullet form above.

Approach to Specific Product Manufacturers and Service Providers

The trade agreements outline a requirement that a procuring entity, in prescribing the technical specifications for the goods or services being procured, shall (from the text of the CETA agreement) "...set out the technical specification in terms of performance and functional requirements, rather than design or descriptive characteristics...". In effect, this means that a procuring entity should make every effort to avoid naming products by trade name, patent, copyright, design, type, specific origin, producer, or supplier that a bidder must carry in their bid submission. Compliance with this requirement presents a significant challenge to both Peel and the other municipalities it canvassed.

Typically in the past, the design portion of a Peel construction project was based on specific makes and/or models of large equipment (e.g. pumps and motors that are required for a new water pumping station or computer/electronic hardware). Formerly, these products would be indicated as "First-Named" in a Regional bid document but "Acceptable Alternatives" (requiring little or no design change in order to utilize) would also be identified and named within the document. Bidders would indicate in their bid submission which product(s) make/manufacture they intended to carry as part of their submission.

As a result of the trade agreements enactment and in an effort to move towards the requirement for setting out specifications in terms of performance or functional requirements, Peel does not currently indicate products as "First-Named" within its procurement documents as this implies a pre-determined Regional preference but rather, it provides a list of "Acceptable Products", in its construction documents, as applicable, that bidders must carry. Additionally, Bidders are provided with the opportunity to offer their own preferred product(s) in their bid (i.e. an "equivalent") and, in those cases, should a bidder provide the lowest compliant bid price in a procurement process, its submitted preferred product(s) are reviewed by the Region to ascertain whether the product offering meets or exceeds the standard set by the listed "Acceptable Products" in the document. In cases where it does, the bidder-offered products is/are approved for use in the project.

3. Proposed Direction

In order to demonstrate full trade agreement compliance and achieve the benefits detailed further below, Regional staff are currently in the process of developing a framework to facilitate a methodical transition away from developing project specifications based solely on traditional design/descriptive characteristics. The focus will initially be on larger and more complex projects across the Region. The benefits of this move towards describing a particular project requirement in performance/functional terms are as follows:

- By focusing on prescribing the particular need in terms of outputs (the desired outcome) rather than inputs (a prescribed way of achieving the desired outcome) it puts the onus on the vendor community to seek out the available products that meet or exceed the output requirements. This can help to foster innovation and efficiencies by making Regional staff aware of previously unknown yet suitable products available both domestically and from abroad,

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- Performance-based specifications help to “level the playing field” for all potential product suppliers. There is no perceived bias in favour of a particular product manufacturer, or supplier, thus supporting a fair and open opportunity for all interested parties,
- A larger and more varied number of potential product suppliers are likely to be offered for the Region’s consideration in response to performance-based specification bid documents, helping to drive costs down through increased competition.

It should be noted that the CETA trade agreement does acknowledge that there may be situations where it is impractical to describe a specification requirement by functional description. CETA provides if “...there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that, in such cases, the entity includes words such as “or equivalent” in the tender documentation”, the government entity undertaking the procurement is not required to use a functional description. In these cases, consideration will be given to conducting open and competitive procurement processes to pre-approve certain large products/equipment for use on Regional projects with an ongoing opportunity for suppliers to submit their products for pre-approval consideration on an annual basis.

Furthermore, the trade agreements state that there is an obligation on the part of governmental entities to not seek or accept advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement

RISK CONSIDERATIONS

Moving to a performance/functional-based technical specification model does pose challenges. Bid review and contract award processes are likely to be lengthened by the need to assess and approve what will likely be a greater range of (in some cases unknown) products offered by the vendor community to meet the technical need.

Certain suppliers, some of whom have longstanding supply relationships with Peel (for instance in cases where a certain product was specified for use over a series of similar procurements to simplify equipment servicing tasks and maintain a manageable spare parts inventory) may not welcome the increased competition that full trade agreement compliance will engender.

The trade agreements do not of themselves create a direct legally binding obligation on municipal government entities. This is because the trade agreements have been entered into directly only by the senior levels of government. In the case of Peel, a direct obligation of compliance has been voluntarily assumed through the adoption of the above referenced guiding principle in the Region’s Procurement By-law. Moreover, failure to comply with the procurement requirements of the trade agreements may lead to challenges from vendors (suppliers or otherwise) who may claim that they were not treated fairly or in accordance with the trade agreements or the Region’s Procurement By-law. Repercussions from higher levels of government may also result where compliance is not maintained.

FINANCIAL IMPLICATIONS

The implementation of performance-based specification in procurement documents will result in increased competitive tendering processes and may result in reduced long-term capital expenditures related to the Region’s capital program.

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CONCLUSION

The Region of Peel has taken a number of significant steps to align its procurement practices with the requirements of national and international trade agreements and this commitment has been embodied in Peel's Procurement By-law 30-2018, as amended. More work is required to achieve full compliance and the Region is now developing the framework to do that.

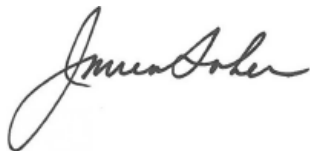
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Reviewed and/or approved in workflow by:

Department Commissioners, Division Directors, Legal Services and Procurement.

Final approval is by the Chief Administrative Officer.



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