

October 2, 2020

File No.: 582892-1

Sent Via E-mail

Donna Teggart, CAO/Treasurer
Municipality of Trent Lakes
760 Peterborough County Road 36
Trent Lakes, Ontario
K0M 1A0

Dear Ms. Teggart:

Re: Legal Review and Development of Purchasing Policy and Procurement Templates

On June 3, 2020, Dentons entered into an agreement with the Municipality of Trent Lakes (the "**Municipality**") to provide a legal review of the Municipality's current purchasing policy and procurement templates. This report is addressed to you in accordance with that document. Denton's response to the RFP that the Municipality accepted, proposed a course of action that was accepted, and is consistent with the provisions of the agreement that allow for alterations. The Municipality made suggestions on changes as well, which Dentons agreed to, and which is consistent with the provisions of the agreement respecting additional services. As a result of this, and timing of receipt of instructions, the parties waived the September 11th completion date and discussed a date in early October with a Council presentation scheduled for October 9, 2020. An email from Jessie Clark dated September 15, 2020 requested that the procurement documents be submitted with a written report instead of a presentation.

Services requested that were not agreed to be included, relate to providing advice on an issue between the Municipality and its insurance provider regarding Coco Paving forwarded to us on July 7, 2020. The material received however was reviewed in the context of the policy and document review. We did not have the information to do anything else. A request was also made that we provide an opinion on e-signatures and associated risks, which was provided in July and discussed at that time.

Examples of current RFP documents being used were to be provided, but instead we were advised that an existing document would be written over for the next procurement and no existing procurement templates were provided. This added to the project, as templates created did not always align with what might have been expected, creating additional work and more questions.

For this reason, a decision was made to focus on the policy and checklist first, and then the templates. This was discussed at our July virtual meeting.

The Process Followed

Rattagan Macchiavello Arocena ► Jiménez de Aréchaga, Viana & Brause ► Lee International ► Kensington Swan ► Bingham Greenebaum ► Cohen & Grigsby ► Sayarh & Menjra ► Larrain Rencoret ► Hamilton Harrison & Mathews ► Mardemootoo Balgobin ► HPRP ► Zain & Co. ► Delany Law ► Dinner Martin ► For more information on the firms that have come together to form Dentons, go to [dentons.com/legacyfirms](https://www.dentons.com/legacyfirms)

After an initial kick-off meeting between the Dentons team and the Municipality represented by yourself, Jessie Clark and Ann Rooth, we were provided with the names and contact information for Department Heads and others to be interviewed to determine what about the current policy was working well, and where it could be improved. It was noted that there currently exist a number of inconsistencies between the Policy and practice, so a new policy needs to be one that will be used.

We interviewed eight persons identified as key to this exercise: yourself (CAO / Treasurer), Jessie Clark (Director of Corporate Services / Clerk), Ann Rooth (Deputy Clerk / Purchasing Coordinator), Steve Broadbank (Director of Emergency Services), Ivan Coumbs (Director of Public Works), John Eisinga (Chief Building Official), and Chris Allen (Purchasing Coordinator for County of Peterborough). The County of Peterborough Purchasing Coordinator was added to the interview list because we were advised that the Municipality participates in joint tenders with the County, so consistency is important.

Information concerning current practices that we received through the interviews included:

- a concern that the lowest cost was not always the best bidder to retain as other factors like time and quality of service were equally if not more important;
- informal processes that had developed around retaining engineering consultants based on a phone call with a quote returned by email;
- the need to procure equipment that supported mutual aid agreement obligations;
- situations where no bids are received and how to move forward;
- problems encountered getting three quotes for small jobs;
- options to allow for electronic submission of bids so as to engage a larger pool of bidders;
- pressure to purchase locally;
- desire to have flexibility to sole source; and
- options for contract renewals.

Through the interview process it was learned that procurements related to IT and technology services as well as other asset purchases, were done by the County of Peterborough and did not have to be part of the template development as a result.

Another key suggestion related to improving the procurement process was to look at delegating authority to staff to carry out procurement functions to staff once Council has approved the budget.

The Guiding Principles / Best Practices Applied

A primary source of information concerning best practices in regards to municipal procurement is the Toronto Computer Leasing Inquiry / Toronto External Contracts Inquiry reports. The recommendations of the Inquiry are set out together in volume 4 which can be found at:

https://www.toronto.ca/ext/digital_comm/inquiry/inquiry_site/report/pdf/TCLI_TECI_Report_Executive_Summary.pdf.

Those that are most relevant to developing a procurement policy can be summarized/modified as follows:

- Councillors should separate themselves from the procurement process (#130)
- Procurement should be overseen and managed by one department (#133)
- Staff engaged in procurement should receive adequate and ongoing training (#136-141)
- There should be a strong presumption in favour of mandatory competitive tenders (#146)
- Changes to procurement policies should be made public (#148)
- All potential interested parties should be made aware of the municipality's intent to purchase goods or services (#149)
- The purchasing coordinator should work closely with department heads on their procurement matters (#150)
- When more than one municipality is involved, each should designate a lead individual for the project (#154)
- The roles and responsibilities of staff involved in procurement should be clearly defined in advance (#155)
- Legal services should be involved in major procurements (complex or significant cost) from the outset (#164)

After conducting interviews and assessing the information obtained about the Municipality's needs, we reviewed a number of templates of municipal policies obtained from municipalities' that were comparable. These included the Municipality of Blue Mountains, the Municipality of Kawartha Lakes, the Town of Orangeville, the City of Burlington, the City of Peterborough and the County of Peterborough.

The Policy Update

The *Municipal Act*, 2001 (the "**Act**") provides in section 2 that municipalities are responsible and accountable governments with respect to matters within their jurisdiction. It provides direction and guidance to municipalities in respect of achieving this through provisions providing for accountability officers, and mandatory policy requirements among others. One mandatory policy is the requirement that municipalities have a procurement policy, as set out in section 270(1)3. This policy must be approved by the council of the municipality unless the municipality has a by-law that delegates authority to staff. Generally, in such circumstances procurement principles, spending limits and matters that council must approve are contained in the by-law, where details that are more administrative are contained in the policy.

The proposed policy has been the subject of much debate over the summer to ensure that it is aligned with the objectives of the Municipality. We view this as a necessary exercise to achieving a policy that is clear, complete, provides the accountability required by the *Municipal Act*, and reflects the operational needs of the Municipality. The draft Policy meets the following objectives:

- provides clear recognition of its purpose and objectives, and purchasing principles;
- provides an administrative framework for the procurement of goods and services, and sets a review requirement every five years so it will continue to reflect best practices;
- established dollar limits and approval requirements;
- recognizes the principles noted by Justice Bellamy in her report recommendations;
- recognizes the role of Council in approving the municipal budget and large expenditures identified in it, while delegating authority to staff to act to procure goods and services required by the Municipality;
- recognizes the need for practices for unconventional situations such as an emergency or other situation where a sole source procurement may be appropriate;
- provides for matters that are commonly exempt for the procurement process and carries forward the provisions of the current policy in this respect;
- addresses bid irregularities and actions to be taken to provide added transparency; and
- reflects the legal requirements respecting public procurement and addresses potential conflicts.

It is important to note that the delegation of authority contemplated by this policy is provided for in section 23.1 of the Act. While many municipal council decisions are made with reliance on a confirmatory by-law enacted at the end of each council meeting, it is highly recommended that this policy be enacted by virtue of a stand-alone by-law that addresses specifically the adoption of the policy and also the delegation of authority.

Checklists

One of the most significant work products that was provided outside of the documents initially requested by the Municipality was a Checklist, that sets out step by step how to move a procurement forward, and who has responsibility for what. The Municipality asked for this following discussion about what we learned through the interview process. The document provided sets out steps and addresses common issues in regards to procurement of goods and services:

- Pre-Procurement Checklist;
- Procurement Checklist; and
- Post-Procurement Checklist.

In addition, given the significance of recent changes to construction law we prepared and provided a Prompt Payment and Adjudication Checklist to be used specifically to address the requirements of the new *Construction Act*.

We were not retained to prepare a Procurement Manual, which is a best practice many municipalities including the County of Peterborough, have in place. A Procurement Manual is not a legal review exercise, and it continues to be our recommendation that the Municipality consider retaining a procurement expert to work with you in assembling a Procurement Manual. It would provide in depth guidance in respect to procurement, that a needed but are outside of what a policy is intended to achieve. It would also best ensure that there is sufficient information available to guide staff in applying the policy; the checklists are a starting point and respond to many questions asked, but are not intended to be a step-by-step guide in the way some may wish to have. A concern about lack of clarity that has been raised is a request for greater detail on roles and responsibilities, which is out of scope of this retainer and is best addressed in a Procurement Manual.

Templates prepared for the Municipality

The first template to be provided was the Services Agreement, with the expectation that comments received on it would be applied to other templates. We accessed our Dentons precedent files as well as reviewed the policies, by-laws and documents in use in many municipalities including the Town of Blue Mountains, Fort Erie, Orangeville, City of Burlington, Saskatoon and City and County of Peterborough. As requests for a further telephone conversation were not replied to, not all template documents prepared have been reviewed by staff of the Municipality. It is important to again note that Templates attached do not reflect a review of current templates and none were provided. Also, they contain several notes to draft (NTD) as a way of providing helpful information for those intending to use them.

Large and complex procurements, it is respectfully submitted, should be drafted or reviewed with assistance from legal counsel. Finally, certain templates should not be used without first seeking legal advice, and this has been clearly marked. As noted by Justice Bellamy, there are situations where procurement is complex and/or the value of what is being acquired requires assistance from legal counsel.

The following documents that have been prepared in response to this retainer and not revised, and those currently in use have not been provided, are attached:

1. Proposed Procurement Policy;
2. Checklist comprehensive steps and guidance for (i) pre-procurement, (ii) during procurement process and (iii) post-procurement matters;
3. Prompt Payment and Adjudication Checklist, respecting compliance with the *Construction Act*;
4. Request for Proposal containing provisions for consecutive and concurrent negotiation – it is recommended that legal advice be sought in respect of this type of procurement;
5. Invitation to Tender (ITT) – this is referred to in the Policy as Request to Tender, and as clarity has not been provided the ITT reference is used in the document as per Jessie's email;

6. Request for Quotation;
7. Request for Supplier Qualifications – until Jessie's email, this has been referred to as Vendor of Record (VOR) and this is reflected in the procurement documents;
8. Request for Expression of Interest or RFEI;
9. Standard form of Contract template for Professional Services;
10. Standard form of Contract template for Goods;
11. Opinion respecting use of electronic signatures; and
12. CCDC 2 Supplementary Conditions.

Finally, it is important to recognize that they templates were prepared without specific guidance or direction from the Municipality and without access to your existing procurement documents, so they may not be appropriate for use in all circumstances. Again, it is recommended that legal advice be obtained if there is any question or concern as a misunderstanding can lead to liability. These documents are not intended to be shared with parties outside of the Municipality without the express written permission of Dentons, as municipal processes and practices vary and there is a concern that provisions could be wrongly applied or misinterpreted. Dentons would be pleased to discuss this further at an appropriate time, but this is out of scope of this retainer.

Project Completion

In an email dated September 20, 2020, Jessie Clark narrowed down the elements of this retainer as she saw them to the following, with comments added where appropriate:

- Presentation to department heads – Not part of the RFP, and request subsequently withdrawn;
- Updates on progress and next steps – completed
- Service delivery review – completed;
- Revised documents – see above;
- A summary report for public presentation – Not part of the RFP or response and subsequently withdrawn;
- Copies of relevant research information – Not part of the RFP and not agreed to; clarity is required; and
- Staff training – withdrawn as not part of proposal response.

In addition to the list submitted above, the following documents have also been provided as requested:

- Comprehensive Pre-during-post procurement Checklist;
- Prompt Payment and Adjudication Checklist; and
- Opinion respecting use of electronic signatures.

Thank you for selecting Dentons to carry out this project for you. If you have any questions please do not hesitate to contact the writer. We are always happy to assist.

Very truly yours,

Dentons Canada LLP



Mary Ellen Bench
Counsel

Enclosures