

PROCUREMENT PRACTICES – An Overview

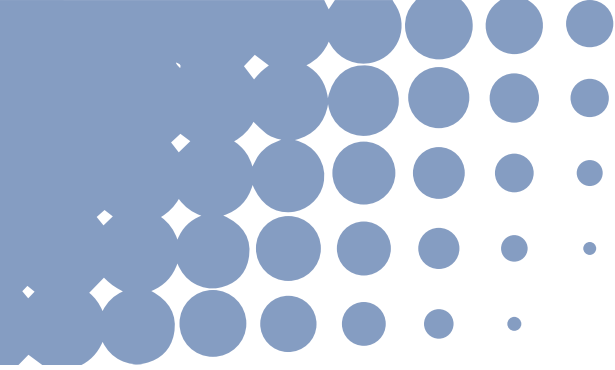
City of Brampton –
Council Workshop

February 22, 2021

Agenda

01. Why Are We Here?
02. Basics of Procurement
 - Overview of Procurement in Canada
 - Key Procurement Issues
 - Managing Lobby and Vendor Complaints
 - Council's Role in Procurement
03. Procurement in Brampton
04. Quarterly Report
05. Council's Motion
06. Going Forward
07. Questions

Why Are We Here?



The workshop objectives:

- ✚ Understand the City's procurement processes and Council's role
- ✚ Address Council's inquiries and motion to report back on potential changes to contract extension and renewal processes
- ✚ Receive Council's feedback and input

BASICS OF PROCUREMENT

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Procurement Law and Regulation

Governance

Trade Agreements

For example:
CFTA
CETA
Bilateral
Regional Trade Agreements

Agreement on Government Procurement

Statutes, Regulations and Directives

For example:
Broader Public Sector Accountability Act
MBC Directive

City's Purchasing By-law

Internal Governance

Internal Procurement Policies
Corporate Compliance Obligations

Contractual Obligations

Non-Binding Procurements

Binding Procurements Contract A/Contract B

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Overview of Procurement



- ❖ A public sector organization, or an entity that receives the majority of its funding from government, must be conscious of the “procurement regulatory framework” within which it is obliged to function
- ❖ A councilor’s role is at least in part to make inquiries as to whether the municipality has acted within its “procurement regulatory framework”
- ❖ For the City, its procurement regulatory framework includes the City’s Purchasing By-law and applicable domestic and international trade agreements

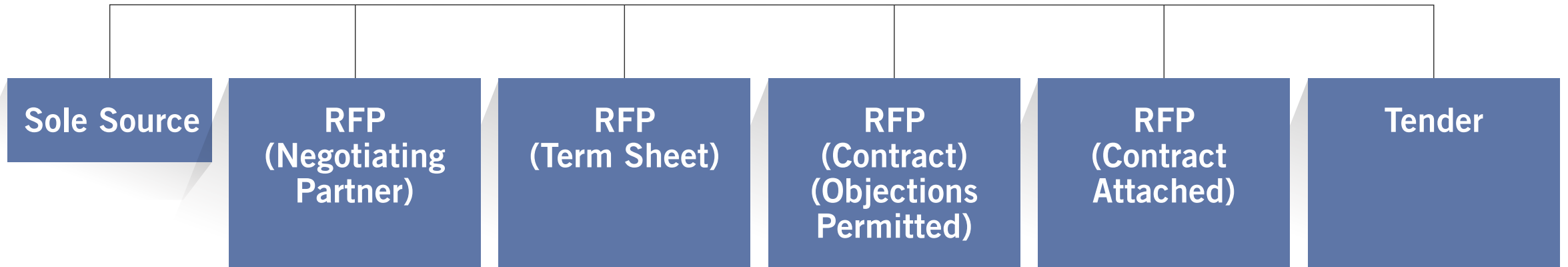
Overview of Procurement – “Binding” Procurements



What is a “binding” procurement process?

- ❖ These are procurement processes that are intended to create a binding contractual relationship between the procuring authority and each bidder that submits a compliant bid
- ❖ Binding procurements intend to create a bidding contract or “Contract A”
- ❖ This is the principle established by the Supreme Court of Canada in the seminal procurement law case: *The Queen (Ontario) v. Ron Engineering Construction (Eastern) Ltd.*
- ❖ Binding procurement processes have strict and relatively rigid rules that must be followed in procurement

Procurement Spectrum



Key Procurement Issues

- ✦ Fairness
 - Conflicts of Interest
 - Rights of the Highest Ranked Bidder
 - Negotiations and Procurement
- ✦ Procurement Integrity

Procurement Fairness



What does “fairness” look like in a procurement process?

Fairness obligations take many forms, but most commonly relate to:

- ❖ fair/equal disclosure of information to all bidders;
- ❖ reasonable time for bidders to submit their proposals/tenders;
- ❖ fairness in evaluation and evaluation methodology;
- ❖ absence of procuring authority bias;
- ❖ absence of procuring authority conflict of interest; and
- ❖ following the procurement process rules as established.

Fairness and Conflict of Interest



- ❖ Canadian procurement law obliges procuring authorities to carry out “fair” procurements
- ❖ While there are several aspects to the concept of fairness, all fairness obligations tend to focus on whether the competitive procurement process and, in particular, the procuring authority’s evaluation of Proponents, has been conducted fairly
- ❖ Among the key elements of fairness are the obligation to avoid conflict of interest, unfair advantage, and bias
- ❖ Conflicts of interest can present a problem when they arise from either the procuring authority’s conduct or from a Proponent’s conduct, or both

Fairness and Conflict of Interest



- ❖ Conflict of interest is generally defined as any interest of an individual or firm (on either the procuring authority side or the bidding side) that conflicts, may conflict, or may be perceived to conflict, with the procuring authority's obligation to conduct an objective, unbiased and impartial procurement
- ❖ On the bidding side, conflict of interest usually includes an interest of a proponent that could or could be seen to compromise, impair or be incompatible with the effective performance of the proponent's obligations under the relevant contract

Fairness and Conflict of Interest



Unfair Advantage – Access to Confidential Information:

- ✦ This occurs when a proponent has access to confidential information about the project that is not available to other proponents and, therefore, creates an unfair advantage to the proponent

Unfair Advantage – Relationship with the Procuring Authority:

- ✦ This is a circumstance in which a prospective Proponent or Proponent team member has a pre-existing assignment with the procuring authority that can result in access to confidential information, or an interface advantage that may result in an unfair advantage (and that may result in a corresponding unfair disadvantage to other Proponents)

Fairness and Conflict of Interest



Bias or Reasonable Apprehension of Bias:

- ✦ This can cover a range of possible fact situations, but usually arises from bias demonstrated by the procuring authority in its evaluation process or its final decision on award. Bias is often thought of as a consequence of a conflict of interest or a type of conflict of interest

Fairness and the Rights of the Highest Ranked Bidder



- ❖ A procuring authority's obligation to award to the highest ranked bidder (often the lowest price bidder in tender processes) is usually a matter of the procuring authority's contractual obligations under Contract A
- ❖ Since Contract A should set out the basic rules of how a bidder can win the competitive procurement process, if the procuring authority fails to follow the rules set out in Contract A for selecting the winner, it has breached Contract A
- ❖ There are also cases where the Court has imposed an implied obligation to award to the highest ranked bidder in the absence of an explicit obligation
- ❖ Flexibility with respect to evaluation and award will be highly dependent on the specific Contract A terms and conditions

Fairness and Negotiations



- ❖ The right to amend a contract AFTER the identification of the successful bidder but BEFORE contract execution is a difficult legal issue
- ❖ Prior to the *Tercon* case, SCC case law had held that negotiation and competitive procurement were mutually exclusive legal approaches (and therefore negotiation should not be part of a competitive procurement). However, *Tercon* seems to acknowledge a role for negotiation even WITHIN a competitive procurement process if, (i) the intention to negotiate is disclosed in the procurement documents, and (ii) the contract is not changed “fundamentally”
- ❖ There is very little guidance in the case law as to what is a “fundamental” change.
- ❖ As a practical matter, a good yardstick is whether a contractual change, had it applied to all bidders, might have changed the ranking of the bidders

Fairness and Negotiations – De-scoping



Example: The Negotiation Problem – De-scoping the Garage During Negotiations

Scenario #1 (With Garage)

Bidder Ranking	Scope of Work	Price Breakdown	Total Price
1. ABC Co.	Building	1,000,000	1,300,000
	Garage	3,00,000	
2. XYZ Co.	Building	900,000	1,350,000
	Garage	450,000	
3. MNO Co.	Building	1,100,000	1,400,000
	Garage	3,00,000	

Scenario #2 (No Garage)

Bidder Ranking	Scope of Work	Price Breakdown	Total Price
1. XYZ Co.	Building	900,000	900,000
	Garage	0	
2. ABC Co.	Building	1,000,000	1,000,000
	Garage	0	
3. MNO Co.	Building	1,100,000	1,100,000
	Garage	0	

Procurement Integrity



- ❖ Ensuring the integrity of a City's procurement processes and procurement reputation includes dealing with unethical bidders
- ❖ Generally, an “unethical bidder” is a bidder that has engaged in unethical or corrupt procurement practices in the past
- ❖ This is a different matter than managing unethical behavior in a current procurement (which is generally managed by way of disqualification and, where applicable, debarment from future procurements)

Procurement Integrity



Example from the Globe and Mail – April 30, 2020

- ✦ Zurich Insurance Co. Ltd., which guaranteed completion of the St. Michael's project through insurance-like contracts known as surety bonds, has asked an Ontario court to rule that its obligations to pay for construction of the hospital are now void, court records show
- ✦ In court filings, Zurich alleges e-mails discovered by one of its consultants in March “appear to prove collusion” on the procurement process for the hospital project. Zurich accuses Bondfield of providing a secret e-mail address to a St. Michael's official so he could pass information about the bidding process to the company's former chief executive officer

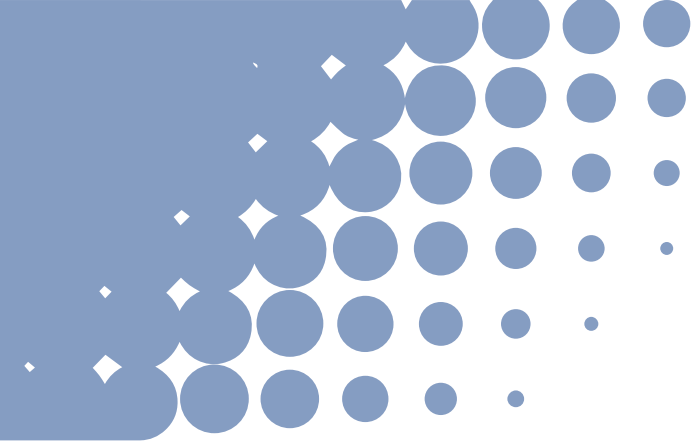
Lobbying and Vendor Complaints



Single Point of Contact

- ❖ Effective management of communications is critical to permitting the City to discharge its procurement fairness obligations
- ❖ Each procurement process will have a designated procurement contact at the City who is a single point of contact. This is important for consistency of communication and to ensure that bidders are provided with the same information at the same time
- ❖ Section 3.2 of the Purchasing By-law provides that: *“The Mayor and Members of Council who receive inquiries from Bidders related to any specific Procurement are required to advise the Bidders(s) to communicate with the contact person listed in the procurement document.”*

Lobbying and Vendor Complaints



Procurement Complaints

- ✦ Establishing an objective and non-political framework for the resolution of procurement complaints is critical to mitigating legal risks related to procurement complaints

Council's Role in Procurement



- ❖ Council's authority in procurement matters is governed by the City's Purchasing By-Law
- ❖ Section 3.0 provides an overview of Council's role
- ❖ Council approval is required prior to the commencement of a Procurement in excess of \$1M or a Procurement less than \$1M where there is significant risk, involve security concerns or significant community interest

Council's Role in Procurement



- ❖ Section 3.1 provides as follows: *“In keeping with municipal procurement best practices, the Mayor and Members of Council shall have no involvement in specific Procurements, including not seeing any related documents or receiving any related information from the time those Procurements have been advertised or solicited until the Contract has been entered into.”*
- ❖ A benefit of having a highly professionalized procurement function in a municipality is the ability to insulate and protect Councillors from allegations of attempting to influence procurement decisions

Council's Role in Procurement



❖ Bellamy Report Recommendations:

- *City Council should establish fair, transparent, and objective procurement processes. These processes should be structured so that they are and clearly appear to be completely free from political influence or interference.*
- *Councillors should separate themselves from the procurement process. They should have no involvement whatsoever in specific procurements. They have the strongest ethical obligation to refrain from seeking to be involved in any way.*

Council's Role in Procurement



Potential Pitfalls

- ❖ Politicization of procurement decisions
- ❖ Accusations of bias in procurement decision making
- ❖ Lack of clarity regarding roles, responsibilities and accountabilities
- ❖ Harm to the City's procurement reputation
- ❖ Cancellation of procurement processes

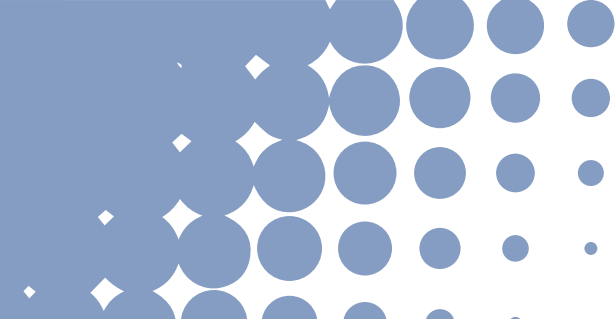
PROCUREMENT IN BRAMPTON

Purchasing By-law

Current Purchasing By-law in effect since March 1, 2018 focused on:

- ❖ Compliance with new trade agreements
- ❖ Addressing Ombudsman's recommendations
- ❖ Supporting Procurement Modernization
 - Low value threshold increased to \$25,000
 - Invitational procurements threshold adjusted to \$25,000 up to \$100,000
 - CAO approval for procurements over \$1 million
 - Update conditions for Limited Tendering/Direct Negotiations
 - Overall policy modernization and disentanglement
 - Utilize new Corporate Policy Framework

Procurement Processes and Authorities

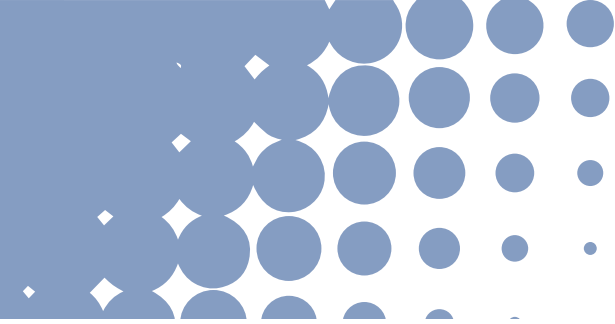


Value	Procurement Process	Award Authority
Up to \$25,000	Low Value Direct Purchase	Department Head
\$25,000 to \$100,000	Competitive Invitational	Purchasing Agent and Department Head
\$100,000 and greater	Competitive Public	Purchasing Agent and Department Head
\$25,000 and greater	Non-Competitive (Limited Tendering)	Purchasing Agent and Department Head
\$1 million and greater	All	Purchasing Agent, Department Head and CAO

Low Value Direct Purchase

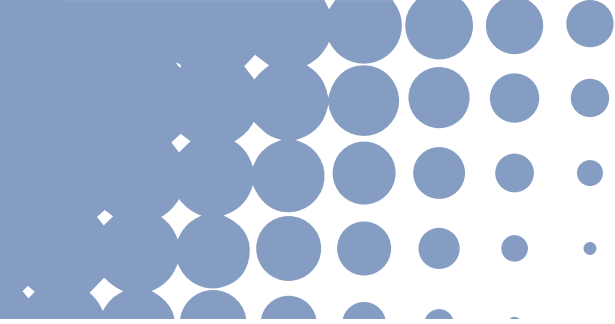
- ✦ Purchases valued up to \$25,000
- ✦ No competitive procurement process required; however, Departments responsible to obtain value at a competitive price
- ✦ Purchasing Card Program effective March 1, 2019
- ✦ Purchasing Card (P-Card) preferred method of payment
- ✦ P-Card advantages include
 - Increased rebate
 - Reduced administrative work
 - Streamlined and automated processes

Competitive Invitational Procurement



- ❖ Purchases valued \$25,000 to \$100,000
- ❖ Procurement conducted by operating departments
- ❖ Document templates and reference materials available
- ❖ Departments encouraged to use the City's vendor database
- ❖ Review of procurement and award of contract approved by Purchasing
- ❖ New invitational procurement program to be launched Spring 2021 to include Supply Chain Diversity

Competitive Public Procurement

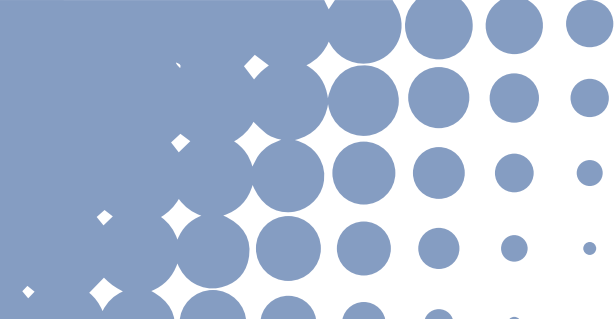


- ❖ Purchases valued \$100,000 and greater
- ❖ Council approves procurements estimated \$1M and greater
- ❖ Publically advertised bid opportunities
- ❖ Purchasing leads the procurement process
- ❖ Operating departments responsible for development of scope of work
- ❖ Purchasing and operating departments work together to develop the procurement documents
- ❖ Contract award approved by Purchasing and operating department; \$1M and greater requires CAO approval

Non-Competitive Procurement

- ❖ Purchases greater than \$25,000
- ❖ Referred to as Limited Tendering
- ❖ Council approves requirements estimated \$1M and greater
- ❖ Schedule C of the Purchasing By-law sets out circumstances where non-competitive procurement is permitted
- ❖ Operating departments provide business case and select vendor
- ❖ Purchasing approval required
- ❖ Examples include purchase of goods/services
 - if goods or services regarding matters of a confidential or privileged nature are to be purchased and disclosure through a competitive process could reasonably be expected to compromise confidentiality, result in the waiver of privilege, cause economic disruption, or otherwise be contrary to the public interest
 - if goods or services can be supplied only by a particular vendor and no reasonable alternative or substitute goods or services exist for the following reasons:
 - a) the protection of patents, copyrights, or other exclusive rights; or
 - b) due to an absence of competition for technical reasons

Co-operative Procurement



Co-Operative Purchasing (Co-Op)

- ❖ conducted by a public body or buying group on behalf of one or more public bodies to achieve the benefits of volume purchases and administrative efficiencies
- ❖ procurement method must be consistent with the City's procurement processes
- ❖ City representatives participate in the procurement process and the City's requirements are included in the procurement documents

Example: traffic signals maintenance with Mississauga and Peel Region

Leverage Partnerships

- ❖ use of an existing contract to purchase same goods/services at the same or lower price from another public body or buying group contract
- ❖ no participation in the procurement by the City; however, the City ensures that the procurement method is consistent with the City's procurement processes

Example: Biofuel with TTC

Procurement Types

Request for Quotation (RFQ)	Request for Proposal (RFP)	Public Tender	Request for Prequalification (RFPQ)
<ul style="list-style-type: none">— Conducted as an invitational process— Prices are requested on prescribed goods, services and construction— Award based on lowest compliant bid	<ul style="list-style-type: none">— Conducted as invitational or public process— A need is identified and vendors propose solutions— Proposals evaluated on technical and financial criteria— Award based on quality and price	<ul style="list-style-type: none">— Conducted as a public process— Prices are requested on prescribed goods, services and construction— Award based on lowest compliant bid	<ul style="list-style-type: none">— Conducted as a public process— Used to gather information on vendor capabilities and qualifications to create a list of prequalified vendors— Subsequent competitive process conducted

Contract Extensions

- ❖ Contract Extension means an amendment to a contract where the terms of the contract do not include the option for such amendment, for example:
 - increase in contract value
 - change in scope
 - extension of time

Example: Adding a newly built facility to an existing building maintenance contract (janitorial service, window cleaning, etc.)

Example: Additional software licenses due to increased number of users

- ❖ Contract Extension requested by operating departments with business case
- ❖ Approved by delegated department authority and Purchasing; \$1M and greater requires CAO approval

Contract Renewals

- ❖ Contract Renewal means an amendment to a contract where the terms of the contract include the option for such amendment, for example:
 - increase in contract value
 - extension of time

- ❖ Contract Renewal options included in procurement documents

Example: This contract shall be for a three-year period with two additional one-year optional renewal periods.

- ❖ Exercised at the City's discretion, subject to agreement by the vendor
- ❖ Subject to pricing and satisfactory performance by the vendor
- ❖ Approval obtained at time of original contract award

Practices in Other Public Buying Entities

	Region of Peel	City of Mississauga	City of Brampton
Limited Tendering/Direct Negotiations	> \$100k requires Council Approval	> \$100k requires Council Approval	\$1M and greater requires Council Approval to proceed with procurement
New Procurements	No Council Approval (exception noted above)	No Council Approval (exception noted above)	\$1M and greater requires Council Approval to proceed with procurement
Contract Extensions	Requires Council approval for greater of 20% of the total contract price or \$250K (does not apply to Direct Negotiations)	Requires Council approval for: - greater than 20% of the original value and greater than \$100k or, - over \$1M	No Council Approval
Contract Renewals	Renewal options included in original procurement documents and award reports and no subsequent approvals required to exercise renewals	Renewal options included in original procurement documents and award reports and no subsequent approvals required to exercise renewals	Renewal options included in original procurement documents and award reports and no subsequent approvals required to exercise renewals
Procurement Reporting to Council	Tri-annual reporting of contract awards greater than \$100K. Contract renewals and extensions not reported.	Monthly reporting of contract awards, extensions and renewals greater than \$100K. Proposed new by-law to change frequency to quarterly.	Quarterly reporting of contract awards, extensions and renewals \$100K and greater.

Quarterly Reporting

- ❖ Purchasing By-law prescribes quarterly reporting requirements of the City's purchasing activities
 - New Contracts with a value of \$100,000 and over;
 - Contract Extensions and Renewals with a cumulative value of \$100,000 and over;
 - Exceptions;
 - Emergency Purchases; and
 - Disposal of assets
- ❖ Purchasing activities reported to Council as information only; approvals obtained in accordance with the By-law

Quarterly Reporting

#	Lead Department	Ward #	Bid Call No. and Description	Procurement Type	Vendor	Contract Amount (Includes total contract value at the start of the reporting quarter)	Current Quarter Contract Renewal (In Scope)	Current Quarter Contract Extensions
1	Community Services	4	RFP2020-102 DESIGN, SUPPLY AND INSTALLATION OF AN OBSTACLE COURSE AND ROCK CLIMBING WALL ADDITION AT KEN GILES RECREATION CENTRE	Competitive	IMPACT CLIMBING INC.	\$ 253,789		
29	Corporate Support Services	ALL	RFP2019-089 PROFESSIONAL SERVICES TO UPGRADE ORACLE/PEOPLESFT ENTERPRISE FINANCIALS 9.2	Competitive (Consulting Services)	SPYRE SOLUTIONS INC	\$ 750,000		
30	Corporate Support Services	ALL	LT2020-094 TELECOMMUNICATIONS HARDWARE/SOFTWARE UPGRADE WITH MAINTENANCE AND SUPPORT FOR A THREE YEAR PERIOD	Limited Tendering	AVAYA CANADA CORP	\$ 2,054,000		
55	Public Works & Engineering	ALL	RFP2016-041 SUPPLY AND DELIVERY OF TRAFFIC CONTROLLER CABINETS	Contract Extension	TACEL LTD.	\$ 807,574		\$ 53,568
56	Public Works & Engineering	ALL	RFP2016-063 FIRE LIFE SAFETY INSPECTION, CERTIFICATION AND DEMAND MAINTENANCE - (RECREATION FACILITIES)	Contract Extension	COM-PLEX SYSTEMS LTD.	\$ 693,345		\$ 181,000
84	Public Works & Engineering	ALL	RFP2016-063 FIRE LIFE SAFETY INSPECTION, CERTIFICATION AND DEMAND MAINTENANCE	Contract Renewal	M-L FIRE & BURGLARY ALARMS LTD.	\$ 708,895	\$ 200,000	

Original Contract Amount	Previous Contract Extensions	Previous Contract Renewal	Revised Contract Amount
\$391,571.40	\$322,462.70	\$93,540.00	\$807,574.10

Council's Motion

- ✦ At December 2, 2020 Committee of Council Meeting, Council passed the following motion:
 - 2. *That staff be directed to report back on the potential for future contract extensions and renewals, of a value greater than \$200,000 or if the extension of a contract is of equal or greater value than the original contract, to be brought forward to Council for information prior to contract extension/renewal execution.*

Proposed Changes

- Contract extensions and renewals of a value greater than \$200,000

Original Contract	Cumulative Contract Extension or Renewal	Revised Contract Amount
\$1,000,000	\$200,000 *	\$1,200,000
\$5,000,000	\$150,000	\$5,150,000

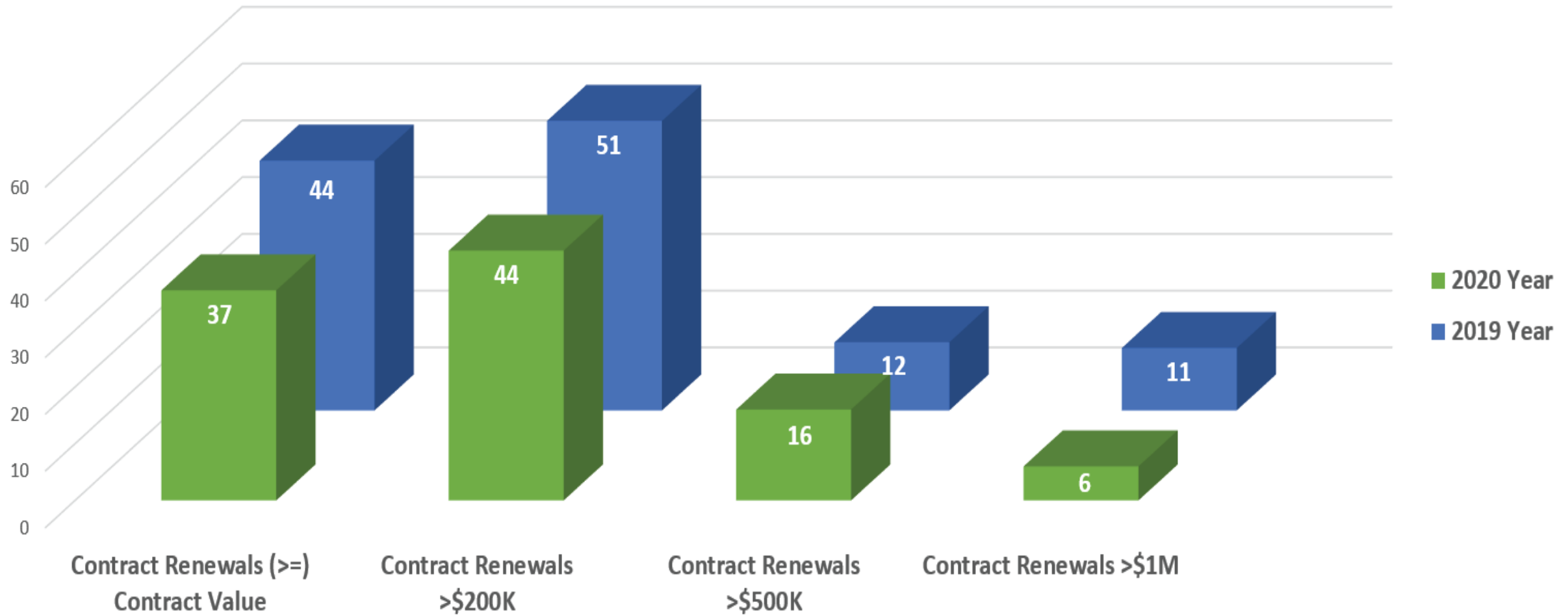
- If the extension and renewal of a contract is of equal or greater value than the original contract

Original Contract	Cumulative Contract Extension or Renewal	Revised Contract Amount
\$40,000	\$40,000 *	\$80,000
\$5,000,000	\$150,000	\$5,150,000

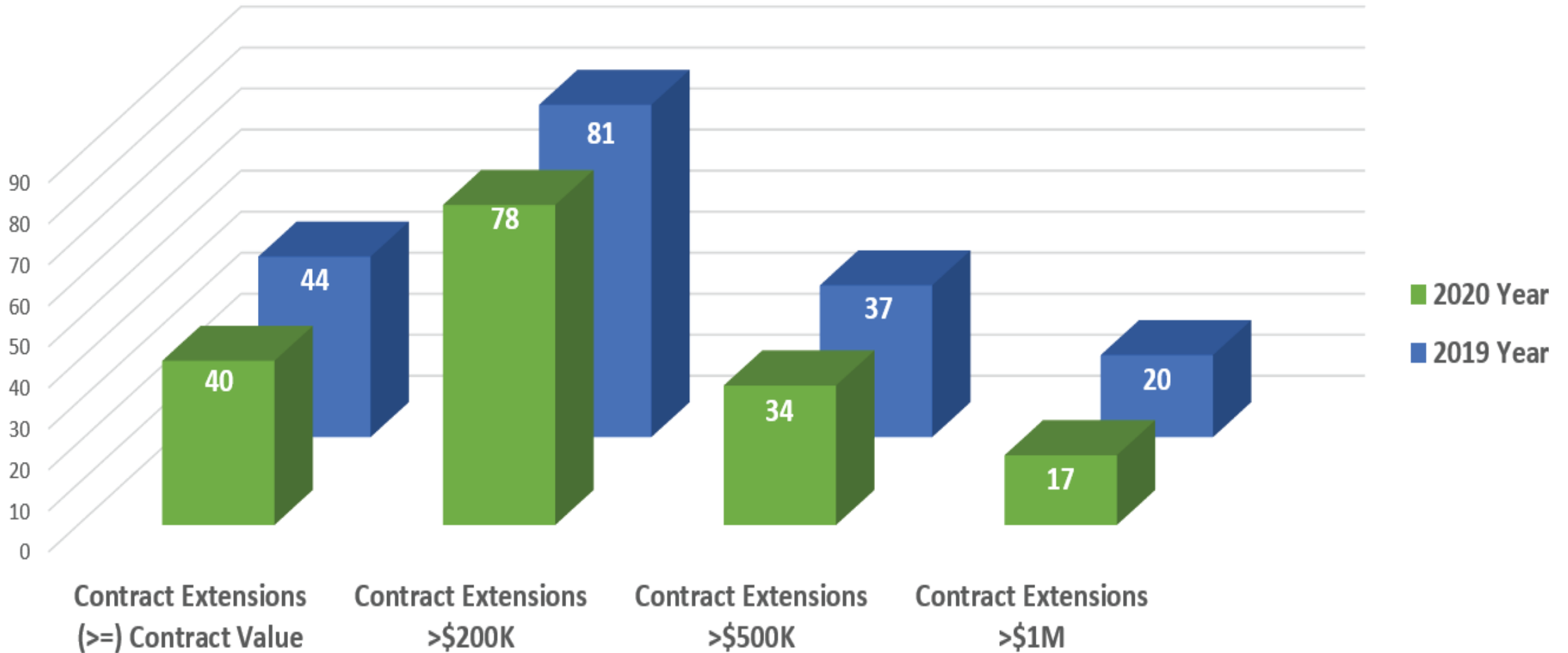
* Denotes activities to be reported to Council for information prior to contract extension and renewal execution.

- Once the threshold is met and reported, all subsequent contract extensions and renewals will be reported to Council.

Contract Renewal Reports



Contract Extension Reports



Current Council Input

- ❖ Council currently has input on all projects from inception to release of tender
 - Capital Projects - Official Plans, Master Plans, Program Approval, EA's, Design input, Budget, Procurement report
 - Operationally – Level of Service discussions/reports, Business case, Budget
- ❖ Budget submissions are line by line, a description of what is being budgeted for, the funding allocated and funding source
- ❖ Many times, staff request council direction on issues affecting the City
- ❖ Begin procurement reports advise on what is being procured, procurement methodology and the intent to renew, if applicable
- ❖ Once the procurement starts there is a 'black out period' to protect the procurement from influence ensuring fairness and transparency
- ❖ Purchasing by law requires quarterly reporting on all purchasing activity that has been undertaken (the only reporting that is post procurement)

Operational Impacts - Resources

- ❖ Increased number of reports for Council review and consideration; the proposed motion as it stands will result in at least 200 additional reports each year
- ❖ Staff time / resources to prepare increased number of reports to Council
 - Estimated time per report is about 6 weeks (2 weeks to Director, 2.5 weeks from Commissioner to CoC, one week to ratify at Council)
- ❖ Staff involved – Operating dept, purchasing, finance, legal, any other affected areas, clerks office, council
- ❖ Long lead times for complex procurements requiring resources to be allocated, many take months to complete

Operational Impacts on Contract Extensions



- ❖ Contract extensions are required when the limit of the contract is reached and any contingency is expended. Usually involves unforeseen items, change in scope
- ❖ Some contract extensions are zero cost i.e. schedule extensions
- ❖ Every contract extension is robustly reviewed for completeness, fairness with appropriate back up following authority levels in the Purchasing By-law
- ❖ Contract extensions are typically within the approved budget; if a budget amendment is needed, that would trigger a report to council
- ❖ Requiring council approval prior to approving a contract extension may put a stop to the ongoing work on site or delay deliveries impacting programs all of which have significant financial consequences for the City

Operational Impacts on Contract Extensions



- ✦ May miss construction windows (prime summer season, in stream works, winter shut down)
- ✦ Delays to delivery of essential services/goods – impact to City programs, externally funded projects at risk
- ✦ City now has an obligation to pay an approved invoice within 28 days per the Construction Act
- ✦ Potential deterrence of qualified vendors due to difficult Owners and/or higher prices – excessive red-tape
- ✦ Delays in approvals due to summer break, Christmas recess and lame duck period (18 meetings/year)
- ✦ Increase the contingency carried on PO's to avoid excessive reports and on site delays; encumbers funding

Operational Impacts on Contract Renewals



- ✦ If a contract is to include an option to renew, council would approve that as part of the procurement report
- ✦ The option to renew a contract is part of the bid price so is tested against the market. Renewal financial terms are known up front (better financial planning, not subject to market volatility) i.e. Salt contract
- ✦ Renewals are not automatic, based on a thorough review of performance and market tested pricing. City can renew or retender at our own will
- ✦ Gives the City maximum flexibility
- ✦ If things change, we have the opportunity to take the work back to the market (i.e. COVID-19 impact on janitorial services)

Operational Impacts on Contract Renewals



- ❖ Would require at least 6 months notice if contracts that currently have renewals, if the recommendation to renew was not approved
- ❖ If renewals require council approval, the market will reflect that uncertainty in pricing. Now they are incentivized to submit good pricing and perform well
- ❖ Good for vendor - reliable cash flow, City is known as a fair client, reflects well on vendor for future work
- ❖ Good for City – known cost, known performance, saves on 6 month onboarding time, optimizes resources
- ❖ If renewals are currently standard practice, the vendor community should be notified

Going Forward

- ✦ Supply Chain Diversity Program
- ✦ Fair Wage and Community Benefits
- ✦ Update to Purchasing By-law
- ✦ Continue Procurement Modernization
- ✦ Reverse Vendor Tradeshow 2021

Questions?



THANK YOU!