

Winnipeg's Sustainable Procurement Action Plan—What Does It Mean for You?

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Background

Sustainable procurement is a growing practice designed to enhance the economic, social, environmental and cultural impacts of purchasing decisions for the benefit of the community. In 2022, the City of Winnipeg (the "City") developed and approved the Sustainable Procurement Action Plan (the "Plan") and, through its \$400 million annual procurement spending, is embarking on its implementation.



The Plan is based on four pillars: environmental, ethical, social and Indigenous. Those pillars support stated goals summarized in the Plan, which include, but are not limited to, increasing employment in equity groups.

Beginning in March, the City began piloting social procurement requirements in projects through requests for proposals ("RFPs") and construction tenders. To begin the transition:

- Only the successful bidder will have to respond to the sustainable procurement clause.
- There are no accountability requirements beyond reporting.
- Contractors can determine the percentage commitment.
- There will only be one sustainable procurement clause (i.e. goal) per tender.

These pilot projects are intended to test the construction industry's ability to respond to social procurement requirements in the future and set achievable benchmarks for future projects. At the end of the year, the City will examine the data collected from the pilot projects for use in future years.

What does sustainable procurement mean for you?

Companies will need to begin developing policies and procedures now to ensure they are ready to respond to mandatory sustainable procurement requirements within RFPs and tenders in the future.

For the purpose of this article, we will focus on the goal of increased employment of equity groups as an illustrative example. The following is a non-exhaustive list of considerations for

businesses when responding to this goal:

- Develop policies around affirmative action employment practices.
- Develop policies and practices to monitor recruitment efforts, current employment levels and retention strategies for employees.
- Develop reporting mechanisms.
- Develop human resource policies and practices for voluntary self-identification of employees and prospective employees.

The City has released an example tender and Social Procurement Questionnaire providing examples of acceptable answers. We recommend that companies review these documents to assist bidders in understanding how to respond to RFPs and tenders in the future.

When developing policies, employers should be mindful of labour, employment and privacy laws. Employers are entitled to set targets for affirmative action hires pursuant to section 11(b) of the *Human Rights Code*:

11 Notwithstanding any other provision of this Code, it is not discrimination, a contravention of this Code, or an offence under this Code

...

(b) to plan, advertise, adopt or implement an affirmative action program or other special program that

(i) has as its object the amelioration of conditions of disadvantaged individuals or groups, including those who are disadvantaged because of any characteristic referred to in subsection 9(2), and

(ii) achieves or is reasonably likely to achieve that object.

The protected characteristics include, but are not limited to, ancestry/race, nationality, ethnic background, religion, sex, gender, sexual orientation, physical or mental disability, or social disadvantage.

Employers cannot require or mandate employees to self-identify as having a protected characteristic. Self-identification is a voluntary process.

As a best practice, employees and prospective employees should be informed why this information is being collected and how it will be used. Employers must also take care not to improperly disclose private employee information in breach of privacy laws.

It is important to also understand that affirmative action hiring policies cannot breach the terms of a collective agreement.

The foregoing is only one example of how to plan for and respond to sustainable procurement

requirements. In the future, bidders must be prepared to consider and respond to all the goals set out in the Plan.

The transitional period will tell us a lot about how the Plan will ultimately be implemented by the City and what the consequences to the industry may be. Tendering and procurement law must remain fair to all bidders equally, and the Plan cannot be implemented in a manner that runs counter to well-established legal principles that have been developed by Canadian courts. As with so many facets of the tendering process, the “devil will be in the details.”

For additional information on the potential implications of the Plan to your organization and how to prepare, please contact Bailey J. Harris at bjh@tdslaw.com or call her at (204) 934-2569 or Meghan C. Ross at mcr@tdslaw.com or call her at (204) 934-2467.

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