



Ontario's BPS procurement directive

by Matthew R. Alter and Ian J. Houston



IN RESPONSE TO CRITICISMS RAISED BY THE ONTARIO AUDITOR General's report on the use of consultants in the public health sector, as well as the concerns of the public over the use of public money, the *Broader Public Sector Accountability Act, 2010* (BPSAA) was fast-tracked through the legislative process receiving Royal Assent in early December 2010 and proclaimed into law in January 2011. The BPSAA authorizes the Management Board of Cabinet, a committee of the Government of Ontario's Executive Council tasked with advising the government on internal financial and human resource management, to issue directives to broader public sector organizations related to the procurement of goods and services.

The new procurement directive

The Management Board of Cabinet wasted little time in releasing the *Broader Public Sector Procurement Directive*, its initial directive governing procurement in Ontario's "broader public sector"¹. As of April 1, 2011 it applied to all hospitals, school boards, colleges and universities, community care access

corporations, and the Children's Aid Society. As of January 2012, the directive applies to other publicly funded organizations receiving \$10 million or more in public funds in the previous government fiscal year.

Currently exempt from the directive are municipalities, local boards, long-term care homes, boards of health, First Nations, district social services boards, organizations that undertake their activities for the purposes of profit to their shareholders and public bodies designated under the *Public Service of Ontario Act*. Also exempt are publicly funded organizations that received less than \$10 million in public funds in the previous government fiscal year, although they are encouraged to apply best practices in procurement to increase efficiency, fairness and transparency.

According to the Ontario Ministry of Finance, which will continue to oversee public sector procurement under the newly formed BPS Supply Chain Secretariat, the directive builds on the *Supply Chain Guideline* (2009), on which it was based, by better aligning procurement rules within the public sector and

applicable trade agreements². Both documents reflect increased public scrutiny of government procurement in an era of fiscal constraints and in the wake of some high-profile failures in the procurement process.

Purposes and principles

The underlying purposes of the directive are to: ensure that publicly-funded goods and services (including construction, consulting and IT) are acquired through an open, fair and transparent process; outline the responsibilities of BPS organizations at each stage of the procurement process; and ensure that procurement processes are managed consistently throughout the BPS.

These purposes reflect five key principles:

- accountability;
- transparency;
- value for money;
- quality service delivery; and
- process standardization.

Requirements of the directive

BPS organizations are required to adhere to both the BPS Supply Chain Code of Ethics and mandatory procurement policies and procedures.

The Code of Ethics

The Code of Ethics requires the personal integrity and professionalism of individuals at BPS organizations involved in supply chain activities; a standard of accountability and transparency, including a commitment to obtain the best value for public money; and a commitment to compliance with the code and applicable laws, as well as continuous improvement in purchasing or other supply chain activities.

BPS organizations must formally adopt the code in accordance with their governance processes. The code does not supersede any code of ethics that an individual organization may already have in place, but instead is intended to supplement it with standards of practice specific to supply chain management.

Mandatory policies and procedures

Under the directive's procurement policies and procedures, there are 25 mandatory requirements. Notable requirements, as numbered in the directive, include:

- (1) **Segregation of duties** – (at least three out of five of the requisition, budgeting, commitment, and receipt and payment functions must be separated within the organization).
- (2) **Competitive procurement thresholds** – (for goods, non-consulting, consulting and construction, any procurement worth more than \$100,000 requires an open, competitive process).

(6) **Posting competitive procurement documents** – (required use of an electronic tendering system that is readily accessible by all Canadian suppliers)

(9) **Evaluation criteria** – (procurement documents must clearly outline criteria used to evaluate submissions, including weight; mandatory conditions are to be kept to a minimum to ensure no bid is unnecessarily disqualified; maximum justifiable weighting must be allocated to the price of the goods and services).

(10) **Evaluation process disclosures** – (evaluation methodology must be fully disclosed and state that submissions not meeting mandatory criteria will be disqualified).

(13) **Winning bid** – (the submission receiving the highest evaluation score and meeting all mandatory requirements must be declared the winning bid).

(14) **Non-discrimination** – (no preferential treatment).

(15) **Establishing the contract** – (the contract must use the form of agreement included with the procurement documents, except where an alternative procurement strategy has been used).

(20) **Supply debriefing** – (procurements valued at more than \$100,000 must set out suppliers' entitlement to a debriefing, allowing 60 days following the contract award for a request for debriefing).

(25) **Bid dispute resolution** – (procurement documents must outline procedures to ensure disputes are handled fairly, reasonably and in a timely fashion, consistent with the dispute resolution procedures in applicable trade agreements).

The mandatory requirements are intended to ensure value for money, a fair procurement process and a reduction in business risk.

In theory, this should reduce costs to BPS organizations and result in the more cost-effective use of public funds. In practice, the implementation of, and compliance with, the directive may increase the short-term costs for BPS organizations where the ethics code, policies and procedures are initially integrated.

For larger BPS organizations the effect may be minimal and could be seen as part of the continuous improvement cycle necessary in all large organizations, but for BPS organizations that just cross the financial threshold of \$10 million there may be struggles with the additional administrative, accounting, legal, and training costs. Further, since the directive requires BPS organizations to segregate procurement roles and to provide varying levels of approval authority, compliance may necessarily involve internal reorganization.

Exemptions, exceptions and implementation

The directive provides that a BPS organization may apply an exemption, exception or non-application clause as available under the *Agreement on Internal Trade (AIT)*³ or other trade agreement, but must formally establish the applicability of the clause on which it proposes to rely. Where a BPS organization

BPS organizations must formally adopt the code in accordance with their governance processes.

does not obtain a decision on an exemption prior to proceeding with a procurement, the organization assumes the potential risks that its funding will be adversely affected and that a challenge could be initiated by a vendor deprived of the right to compete for the work. Decisions regarding a procurement (such as whether or not a competitive process will be used) must be made by the organization's approval authority prior to the commencement of the procurement.

Annex 502.4 of the *AIT* sets out provisions for procurement by municipalities, municipal organizations, school boards and publicly-funded academic, health and social service entities (MASH entities). Section L(h) of Annex 502.4 expressly exempts the procurement of services by licensed professionals including: medical doctors, dentists, nurses, pharmacists, veterinarians, engineers, land surveyors, architects, accountants, lawyers and notaries. Services provided by such professionals will not automatically qualify for an exemption, and may depend on the specific type of service being provided. The Ontario Ministry of Finance is advising BPS organizations to seek independent legal advice with respect to the application of s related to trade agreements, such as the *AIT*.

The BPS Supply Chain Secretariat will work with other

government ministries to assist BPS organizations with the implementation of the directive. Training materials, templates and process maps will be available online, including an Implementation Guidebook⁴. Questions about implementation may be directed to BPSSupplyChain@ontario.ca or to the BPS Supply Chain Secretariat, Ministry of Finance at (416) 327-1147.

Conclusion

The new directive is not a radical departure from the 2009 Supply Chain Guideline, but it is somewhat more detailed, broader in scope and poised to expand. How the directive will be interpreted and administered, and how current ambiguities in the directive will be clarified or resolved, remains to be seen. Organizations should ensure that their staff are familiar with the new procurement requirements and where there are questions or concerns, organizations should seek legal advice. 

Matthew R. Alter is a Partner with the Construction, Engineering, Surety and Fidelity Group, and a member of the Public-Private Infrastructure Projects Group at the Toronto office of BLG LLP. Matthew can be reached at malter@blg.com or 416-367-6196. **Ian J. Houston** is a Partner and Co-Chair of the Regional Practice Group Leader for the Construction, Engineering, Surety and Fidelity Group at the Toronto office, and can be reached at ijhouston@blg.com or 416-367-6111.

1. The BPS Directive is available at www.fin.gov.on.ca/en/bpssupplychain/documents/bps_procurement_directive.html

2. www.fin.gov.on.ca/en/bpssupplychain/directive_questions.html

3. http://www.ait-aci.ca/index_en/ait.htm

4. www.fin.gov.on.ca/en/bpssupplychain/implementation_tools.html and www.fin.gov.on.ca/en/bpssupplychain/documents/bps_procurement_implementation.html