From BPS Guideline to BPS Directive: Has the Hospital Procurement Bar Moved?  
Understanding the new Broader Public Sector Procurement Directive

John Beardwood

There have been an increasing number of concerns regarding procurement practices in the public sector, together with intensive media scrutiny of those practices in the health sector. Yet, notwithstanding those concerns, only Ontario and British Columbia have developed a comprehensive procurement framework to address these issues. (While a review of the British Columbia’s procurement requirements is beyond the scope of this article, British Columbia’s procurement manual is available electronically [BC Minister of Finance n.d.]. For more detailed information, please also see the BC Purchasing Handbook [BC Government 2010].) However, the way that the procurement regime in Ontario has developed has led to the potential for additional confusion in an area that is already complex, being based on the interaction of common law principles, trade agreements (e.g., the Agreement on Internal Trade) and governmental guidance (e.g., the Management Board of Cabinet procurement directive of July 2009). Specifically, the Ontario Ministry of Finance has issued and replaced in quick succession – over a two-year period – a series of documents seeking to provide guidance as to procurement practices. In April 2009, the Ministry of Finance issued the broader public sector (BPS) Supply Chain Guideline. (For a detailed review of guidelines, please see Understanding the PPP: The BPS Supply Chain Guideline [Beardwood 2010], which contrasts the procurement requirements under the guideline with annex 502.4 to the Agreement on Internal Trade and the Management Board of Cabinet procurement directive [July 2009] at: http://www.fasken.com/understanding-the-ppp/). However, notwithstanding that the guideline was issued in just 2009 and organizations were still in the process of understanding the implications of the guideline on their procurement practices, the guideline has now been replaced by the Broader Public Sector Procurement Directive (Ontario Ministry of Finance 2011), available as of February 1, 2011, on the Ministry of Finance website and effective on April 1, 2011, pursuant to the Broader Public Sector Accountability Act (Government of Ontario 2010).

In this article, I have endeavoured to assist hospitals and other healthcare providers to better understand the more significant differences between the directive and the guideline, with a particular emphasis on assisting such providers that have already implemented policies to comply with the prior guideline to determine what, if any, changes need now be made to such policies.

Background

On October 20, 2010, the Office of the Auditor General of Ontario released a special report titled Consultant Use in Selected Health Organizations identifying concerns related to the use of consultants and procurement practices by the Ministry of Health and Long-Term Care, local health integration networks (LHINs) and Ontario hospitals. In response to these concerns, Bill 122,
now the Broader Public Sector Accountability Act, was concurrently released and given royal assent on December 8, 2010.

As detailed in this article, the act is directed at improving compliance with BPS procurement directives and introduces new mandatory rules to increase financial accountability in the BPS. It also amends the Freedom of Information and Protection of Privacy Act (Government of Ontario 1990) by extending its application to Ontario hospitals (private and public) as of January 1, 2012. In addition, the Broader Public Sector Accountability Act (1) requires hospitals and LHINs to prepare and report on their use of consultants annually and to disclose information relating to expense claims on their public websites; (2) prohibits organizations funded by the Ontario government from using public funds to hire external lobbyists (Ontario Ministry of Health and Long-Term Care 2010); and (3) empowers the Management Board of Cabinet to issue directives governing the procurement of goods and services by certain designated BPS and publicly funded organizations, including hospitals. The Management Board of Cabinet has taken advantage of its designated authority to release the new directive (Ontario Ministry of Finance 2011).

**The code is not meant to supersede a hospital’s own code of ethics but, rather, to supplement it with specific standards of practice regarding supply chain.**

Purpose and Scope of the Directive

The purpose of the directive is to ensure that hospitals and other BPS organizations acquire publicly funded goods and services, including construction, consulting services and information technology, through a process that is “open, fair, and transparent” and to provide consistently managed procurement practices among the BPS (Ontario Ministry of Finance 2011: preamble, section 1). The directive also sets out the responsibilities of BPS organizations throughout each stage of the procurement process (Ontario Ministry of Finance 2011: preamble, section 1).

As I detail below, the new directive builds on and strengthens the procurement policies and procedures of the guideline by introducing mandatory requirements (MRs) related to (1) competitive acquisition of consulting services regardless of dollar value, (2) the approval authority framework for consulting services and (3) effective BPS contract management (Ontario Ministry of Finance 2010a.a.). The Supply Chain Code of Ethics within the directive remains relatively unchanged from its predecessor, and hospitals, if they have not already done so, must formally adopt the code in accordance with their government processes and supply chain activities (Ontario Ministry of Finance 2011: section 7.1). The code is not meant to supersede a hospital’s own code of ethics but, rather, to supplement it with specific standards of practice regarding supply chain (Ontario Ministry of Finance 2011: section 7.1). The procurement policies and procedures and the code are the crux of the new directive based on five overarching principles: accountability, transparency, value for money, quality service delivery and process standardization (Ontario Ministry of Finance 2011: preamble, section 3).

The directive has changed in scope (including its exemptions) and extended in application. It applies to all designated BPS organizations and sector groups specified under part I of the act. In Ontario, in addition to hospitals (including private hospitals that received funds in the previous fiscal year from the government of Ontario) and community care access corporations, these groups include the following:

- School boards
- Universities, colleges of applied arts and technology and post-secondary institutions
- Approved agencies designated as a children’s aid society
- Corporations controlled by one or more designated BPS organizations that exist solely or primarily for the purpose of purchasing goods or services for the designated BPS organizations (Note: The directive also applies to goods and services purchased jointly with other organizations [Ontario Ministry of Finance 2010a], e.g., shared services organizations.)
- Publicly funded organizations that received public funds of $10 million or more in the previous fiscal year from the province (Government of Ontario 2010: part I)

All of the above must comply with the directive as of April 1, 2011, with the exception of the last group listed, for which the directive applies starting January 1, 2012.

Entities that are exempt from the directive’s application include municipalities, local boards and boards of health as defined in the act, long-term care homes, organizations that undertake their activities for the purpose of profit to its shareholders and public bodies under the Public Service of Ontario Act, 2006 (Ontario Ministry of Finance 2010b).

Changes to and New Procurement Policies and Procedures MRs of the Directive

While most of the MRs have remained largely the same in principle (23 of 25), the language has been changed for almost every requirement. I have highlighted below both those changes that consist of new or almost entirely new additions to what previously existed in the guideline, and those changes that are more discrete but nevertheless have some significance. (For a helpful comparison between the guideline and directive, see Ontario Ministry of Finance 2010c).
New Requirements

Consultants: Approval Authority (MR 2)
While the requirement to have a delegation of authority schedule and to seek necessary approval for all procurements was included in the guideline, a new approval framework specifically for the procurement of consulting services has now been prescribed and is presented in Table 1 (Ontario Ministry of Finance 2011: section 7.2.2).

Consultants: Mandatory Competitive Procurement (MR 3)
The competitive procurement thresholds, like the guidelines, are based on the value and time of goods and services that are procured by BPS organizations. For goods, non-consulting services and construction, the requirement remains the same; an open competitive procurement must be conducted when the estimated total value is $100,000 or more. For consulting services, however, BPS organizations must competitively procure irrespective of value (Ontario Ministry of Finance 2011: section 7.2.3). The recommended means of competitive procurement is open when the value is $100,000 or more; however, when the value is less than this, either invitational or open competitive procurement suffices. Any exemptions must be in accordance with applicable trade agreements, and this applies to all types of goods and services (Ontario Ministry of Finance 2011: section 7.2.3).

Evaluation Criteria (MR 9) and Evaluation Process Disclosure (MR 10)
The MRs for evaluation criteria and evaluation process disclosure were included in the guideline, but their content has been significantly expanded in the directive. The new content includes the requirements for mandatory criteria to be kept to a minimum; to allocate maximum justifiable weighting to the cost component of the evaluation criteria; and to expressly disclose to proponents that submissions not meeting mandatory criteria will be disqualified (Ontario Ministry of Finance 2011: sections 7.2.9, 7.2.10, 7.2.16).

Contract Management (MR 22)
The contract management MR is entirely new. Its title is somewhat misleading, in that only part of the content relates to contract management per se: the rest of the requirement sets out minimum content for the contract itself. More specifically,

- with respect to contract management, organizations are required to manage procurements and the resulting contracts responsibly and effectively; to recover all overpayments in a timely manner; to manage and document supplier performance and address any performance issues; and to claim and reimburse all expenses in accordance with the BPS Expenses Directive (as set out in section 10 of the act [Government of Ontario 2010]); and
- with respect to contract content, effectively the MR obligates each organization to ensure that the contract (1) requires that each invoice be reasonably detailed, that each assignment be properly documented and that supplier performance be documented and deficiencies addressed; (2) includes, for services, objectives, background, scope, constraints, staff responsibilities, deliverables, timing, progress reporting, approval requirements and knowledge transfer requirements; (3) includes a dispute resolution process; and (4) includes provisions with respect to the reimbursement of expenses that are compliant with the BPS Expenses Directive (Ontario Ministry of Finance 2011: sections 7.2.22).

Changes to Existing Requirements
The following, more discrete, changes are also notable.

Posting Competitive Procurement Documents (MR 6)
The guideline required that calls for competitive procurements of construction contracts between $100,000 and $250,000 be made through an electronic tendering system and/or publication in a daily newspaper easily accessible to all Canadian suppliers or through the use of source lists such as vendors-of-

### Table 1

<table>
<thead>
<tr>
<th>Procurement Method</th>
<th>Procurement Value</th>
<th>Approval Authority</th>
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<tbody>
<tr>
<td>Invitational competitive</td>
<td>$0 up to but not including $100,000</td>
<td>Organization’s AAS for goods and non-consulting services</td>
</tr>
<tr>
<td>Open competitive</td>
<td>Any value</td>
<td>Organization’s AAS for goods and non-consulting services</td>
</tr>
<tr>
<td>Non-competitive*</td>
<td>$0 up to but not including $1,000,000</td>
<td>President, chief executive officer or equivalent</td>
</tr>
<tr>
<td></td>
<td>$1,000,000 or more</td>
<td>Board of directors or equivalent</td>
</tr>
</tbody>
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AAS = approval authority schedule.
*Exemption based only.
record or preferred suppliers lists. The directive has now eliminated the two alternatives to electronic tendering.

**Duration of Response Times (MR 7)**
Previously, the guideline set out that, at a minimum, the response time for posting competitive procurements should be 15 calendar days for goods and services valued at $100,000 or more. However, it also suggested (1) that each organization consider providing response times longer than 15 days in order to ensure that suppliers had a reasonable period of time to submit a bid and (2) that the timeline take into account the complexity

and resources, in the long term attaching the agreement both eliminates (or at least shortens) the negotiation cycle post-selection of the successful proponent and ensures that the contract optimally addresses the needs of the procuring organization.

**Records Retention (MR 23)**
The guideline required that the BPS organization had a process that defined how confidential information was to be stored and the location of the storage. Interestingly, the directive has changed the emphasis: it states that organizations must have a written policy for handling, storing and maintaining the suppliers’ confidential and commercially sensitive information.

**Bid Dispute Resolution (MR 25)**
Finally, there is the following change to the requirement that the competitive procurement documents include bid dispute resolution procedures, which comply with the applicable trade agreements (i.e., the Agreement on Internal Trade and the Ontario-Quebec Procurement Agreement). In addition to the guideline’s requirement that the process ensure that disputes are handled in a reasonable and timely fashion, the directive requires that each organization now also ensures that the process is ethical and fair.

**Conclusion: The Need for a Procurement Policy**
While most of the MRs have not changed substantially, hospitals should review the changes and revise previously implemented procurement policies to reflect these new requirements. The directive also serves as a timely reminder that any hospitals that have not yet enacted a procurement policy need to do so.

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of the procurement and the time needed by an organization to properly disseminate the information. The directive is more specific in that it states that organizations should also consider providing suppliers with a minimum response time of 30 calendar days when procurements are highly complex, and take into account the risk or dollar value of the procurement (Ontario Ministry of Finance 2011: sections 7.2.7).

**Non-discrimination (MR 14)**
The guideline permitted discrimination or preferential treatment in awarding a contract to a preferred supplier pursuant to a competitive procurement process, where justifiable pursuant to limited set of criteria. Such discrimination is no longer permitted.

**Executing the Contract (MR 15)**
Previously, the guideline contemplated that where there was an immediate need for goods or services and the organization and the supplier were unable to finalize the contract, a letter of intent, memorandum of understanding or an interim purchase order could be used. The directive provides for only an interim purchase order to be used in that circumstance.

**Establishing the Contract (MR 15)**
One of the most significant requirements of the guideline was the obligation to finalise a contract using the form of agreement that was released with the procurement document. This required each organization to include a draft agreement with each request for proposal, for example, and provided the tendering organization with better leverage with the successful proponent (in contrast to negotiating the contract post-selection of the proponent). In a change that, in my view, was poorly chosen, the directive now also contemplates “an alternative procurement strategy” wherein a form of agreement is not released with the procurement document. I would emphasize that, notwithstanding that the directive now permits such an alternative procurement strategy, it is still very much best practice to attach the template document to the procurement document. While it requires the up-front investment of time and resources, in the long term attaching the agreement both eliminates (or at least shortens) the negotiation cycle post-selection of the successful proponent and ensures that the contract optimally addresses the needs of the procuring organization.

**References**


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