Amendments to the BPS Procurement Directive effective January 1, 2024

December 20, 2023

A Thumbnail Sketch on what Ontario Public Hospitals "Need to Know"

A. Summary

This thumbnail sketch is directed to those procurement professionals already conversant with the Broader Public Sector (BPS) Procurement Directive as it applies to public hospitals and speaks to specific amendments for consideration at a high level.

Generally, as of Jan. 1, 2024, the minimum dollar threshold requiring a competitive procurement has been increased from $100,000 to $121,200, where $100,000 had previously applied. Overdue amendments to replace references to the "Agreement on Internal Trade" with the "Canadian Free Trade Agreement" and the "Canada-European Union Comprehensive Economic and Trade Agreement" have been made. The ongoing "Interim Measures" applicable to Ontario public hospitals continue to require the public hospital to apply notification processes to inform the Ministry of Health if a public hospital either: (i) seeks to enter into a procurement for an agreement of more than two years duration; or (ii) where an available vendor of record arrangement is available but is not being applied by the public hospital. Finally, there are provisions seeking to have public hospitals apply "Buy Ontario" measures where: (A) applicable trade agreement dollar limits have not been reached requiring their application; or (B) other exceptions are available for the procurement under such otherwise applicable trade agreements.

A review of the administrative processes under the "Interim Measures" and the "Buy Ontario" provisions is recommended to confirm their appropriate incorporation and application to the public hospital's current procurement practices.

B. Key amendments

The following items highlight certain fundamental (but not all) amendments:

1. Effective date

in August 2023, the Ministry of Public and Business Service Delivery issued a revised BPS Procurement Directive (the New Directive) with effect as of January 1, 2024 - it replaces all previous versions of the Directive.

2. Update on list of applicable trade agreements

The Agreement on Internal Trade (AIT) was replaced by the Canadian Free Trade Agreement (CFTA) in 2017. Additionally, Ontario also became subject to the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) in 2017. Accordingly, these agreements are reflected in the New Directive under section 8, together with the previously listed Trade and Cooperation Agreement between Ontario and Quebec (OQTCA).

3. Exemptions, exceptions and non-applications under trade agreements

There may be circumstances where a public hospital may wish to not use either an invitational or an open competitive procurement though may otherwise be required to do so under the BPS Procurement Directive.

The New Directive confirms the ability to elect to apply exemptions, exceptions, or non-applications provided for under applicable trade agreements to Ontario public hospitals conducting public procurements. Reference to the Agreement on Internal Trade (AIT) has been deleted from the New Directive because it is no longer applicable and has been replaced with the term “applicable trade agreements”.

4. Consulting service

For a procurement for Consulting Services valued at zero dollars up to but not including $121,200, an invitational procurement applies to public hospitals. In this process, at least three qualified vendors are invited to submit a written proposal. Unlike an open competitive process, this enables some, but not all suppliers to compete in a fair and open environment.

5. Non-consulting services, goods and construction

The New Directive also raises the threshold applicable to non-consulting services, goods, and construction. Organizations must now conduct an open competitive procurement process where the estimated value of procurement of goods or services is $121,200 or more.

6. Posting timelines

For the procurement of goods and services valued at $121,200 and up to $366,800, organizations must post the request for proposals for minimum of 15 calendar days.

Where the procurement is of high complexity, risk, and/or dollar value, and subject to applicable trade agreements, organizations must consider, but are not required to, provide a minimum response time of 30 days.

7. Non-competitive procurement

In exceptional circumstances, only one supplier may be able or capable of providing the goods or services. In these circumstances, under the New Directive, organizations must justify a non-competitive procurement using one of the limited tendering or non-application provisions in an applicable trade agreement.

8. Interim measures

Vendor of Record (VOR) arrangements are generally established with suppliers, by example by the Ontario Provincial government, to increase procurement efficiency and obtain consistent competitive prices for goods and services. The New Directive maintains that a properly established VOR arrangement can be used as an open competitive method of procurement for individual procurements that do not exceed the ceiling price of the VOR arrangement.

The New Directive mandates the use of existing VOR arrangements whenever possible and appropriate regardless of their value. Flexibility is provided, however, for public hospitals that determine not to use a VOR arrangement that is available to it or that do not wish to restrict its contract duration to two years. In these instances, the organization can be granted flexibility so long as the organization provides a procurement rationale report to the Ministry of Health at least 45 days before the procurement is released to the vendor community.

These interim measures apply to new procurements of goods and services (consulting and non-consulting) valued at $121,200. It does not apply where procurement relates to construction work or where procurement relates to goods being acquired for resale.

9. Building Ontario Businesses Initiative (BOBI)

The New Directive is the first of many steps to be taken by the Ontario government to solidify procurement policy changes introduced in 2022 to centralize the provincial procurement landscape.

Under the New Directive, public hospitals and other public sector entities set out in section 1(1) of the *Broader Public Sector Accountability Act*, 2010, such as publicly funded organizations that received public funds of $10 million or more in the previous fiscal year, must whenever possible, give preference to Ontario companies when soliciting goods and services. Entitled the “Building Ontario Business Initiative” (BOBI), the requirement aims to reduce barriers and provide companies in Ontario with greater access to public procurement opportunities.”[1]

Despite mandating preference to Ontario suppliers, applicable public entities must also comply with CFTA, CETA, and other non-discrimination obligations under trade commitments when conducting procurement which require that suppliers from jurisdictions outside Ontario be treated the same way as Ontario-based suppliers. Generally, restrictions based on the origin of goods and services or on the location of a supplier, contractor or sub-contractor are prohibited.

To avoid conflicting with these trade obligations the New Directive sets out that where below thresholds in applicable domestic trade agreements, BPS entities must procure goods and services from Ontario businesses wherever feasible, and likewise with respective thresholds in applicable international trade agreements. For those that are above these monetary thresholds, the New Directive provides a "set of strategies" that applicable entities must use wherever feasible. These include, among others, applying weighted domestic criteria in procurement evaluations (for example, demonstrating how they meet provincial environmental standards). A discussion of the utility of such strategies in the context of such trade agreements is beyond the scope of this thumbnail sketch.

Next steps

The New Directive will be replacing the existing version as of Jan. 1, 2024, and applicable public hospitals conducting public procurement will be expected to comply.

For guidance and counsel, please refer to BLG contacts below.

[1] Ontario Government and Consumer Services, "Province Launches Building Ontario Businesses Initiative", News Release, March 9, 2022.

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