

**Title:** Procurement

**Document Number:**  
FIN-1-004

**BACKGROUND**

In March 2008 Ontario’s Treasury Board of Cabinet directed that a Supply Chain Guideline be prepared and, as of 01 April 2009, be incorporated into the funding agreements of Broader Public Sector (BPS) organizations receiving more than \$10 million per fiscal year from the Ministries of Health and Long-Term Care (MOHLTC); Education and Training; and Colleges and Universities.

These organizations are referred to as “In-Scope Recipients.” The Guideline is also mandatory for shared service organizations (SSOs) owned or funded by In-Scope Recipients.

Procurement principles and processes in this document are consistent with the practices in the Broader Public Sector (BPS). As a condition of receiving MOHLTC funding, at a minimum, recipients must agree their procurement activities, directly associated with the total budget under the MOHLTC program, are in accordance with the guidelines contained herein.

The objective of these Procurement Policies and Procedures (PPP) is to ensure ethical, efficient and accountable sourcing, contracting and purchasing activities within the organization.

The BPS Procurement Directive (Directive) replaces the BPS Supply Chain Guidelines issued by the Ministry of Finance in 2009.

The purpose of the Directive is:

- To ensure publicly funded goods and services, including construction, consulting services, and information technology are acquired by BPS organizations through a process that is open, fair, and transparent;
- To outline responsibilities of BPS organizations throughout each stage of the procurement process; and
- To ensure procurement processes are managed consistently throughout the BPS.

**Application And Scope**

This Directive applies to all designated broader public sector organizations as provided for under section 12 of the *Broader Public Sector Accountability Act, 2010*. This Directive will be applied using a phased-in approach. For Hospitals and Shared Services Organizations, the date on which the Directive begins to apply is **01 April 2011**. See Appendix 1: Quick Guide to Part IV and Part V of the BPS Accountability Act, 2010.

The *Procurement Policies and Procedures* (PPP) govern how the organization conducts sourcing, contracting and purchasing activities, including approval segregation and limits, competitive and non-competitive procurement, purchasing, contract awarding, conflict of interest and bid protest procedures.

In an effort to make effective use of resources, Chatham-Kent Health Alliance (CKHA) through PROcure will take advantage of competitive bidding processes completed by strategic partners including group purchasing organizations such as Medbuy, St. Joseph’s Capital Buying Group (SJCBG) and the Ontario Government.

Medbuy shareholders, of which CKHA is one, are committed to participating in Medbuy agreements. PROcure will assist hospitals in the Medbuy contracting process.

When CKHA submits a capital purchase request to PROcure, PROcure will engage with SJCBG to assess whether a competitive process that meets the needs of PROcure and its members has been completed. PROcure will also review all Government vendors of record for suitable contract matches.

PROcure and its member organizations are active members of two Group Purchasing Organizations; Medbuy and St. Joseph Capital Buying Group. We are also fortunate to have been granted access to the government purchasing site and access to their contracts.

PROcure will look to Medbuy first for contracts, then SJCBG contract, then Provincial government contracts and to partner with other Shared Service organizations on contracts. If after review of these organizations, no one has initiated the RFP process, PROcure will go out to RFQ/RFP on behalf of CKHA for a particular item independently.

These Procurement Policy Guidelines are in addition to any law and policies to which Recipients may be subject and that, where such law or policy conflicts with this Guideline, Recipients are requested to consult with PROcure staff for guidance.

### **Principles**

This Directive is based on the five key principles that allow Organizations to achieve value for money while following a procurement process that is fair and transparent to all stakeholders:

**Accountability:** Organizations must be accountable for the results of their procurement decisions and the appropriateness of the processes.

**Transparency:** Organizations must be transparent to all stakeholders. Wherever possible, stakeholders must have equal access to information on procurement opportunities, processes and results.

**Value for Money:** Organizations must maximize the value they receive from the use of public funds. A value-for-money approach aims to deliver goods and services at the optimum total lifecycle cost.

**Quality Service Delivery:** Front-line services provided by Organizations, such as teaching and patient care, must receive the right product, at the right time, in the right place.

**Process Standardization:** Standardized processes remove inefficiencies and create a level playing field.

### **Key Definitions in this Directive**

“Goods and services” means any goods, construction, and services, including but not limited to IT and consulting services;

“Members of an Organization” means all trustees, members of the board of directors, senior executives, and employees of the Organization, or their equivalent;

“Organization” means every organization that is in scope for the purposes of this Directive;

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“Supply Chain Activities” means all activities directly or indirectly related to the Organization’s planning, sourcing, procurement, moving, and payment processes.

**Exemptions, Exceptions, And Non-Applications Under Trade Agreements**

Where an exemption, exception, or non-application clause exists under the *Agreement on Internal Trade* (AIT) or other trade agreement, Organizations may apply this clause when conducting procurement.

An Organization asserting that procurement is subject to an exemption, exception, or non-application clause under a trade agreement must formally establish applicability of this clause.

**Value Of Procurement**

When determining the value of procurement for approval purposes as outlined in this Directive, Organizations should not take into consideration applicable sales taxes.

Recipients must not subdivide projects, procurements or agreements to avoid any requirements of this and other applicable procurement-related trade agreements regarding competition, approvals or reporting.

Organizations must comply with the requirements set forth in this Directive.

**Mandatory Procurement Policies And Procedures**

**1.1 Mandatory Requirement #1: Segregation of Duties**

Organizations must segregate at least three of the five functional procurement roles: Requisition, Budgeting, Commitment, Receipt and Payment. Responsibilities for these roles must lie with different departments or, at a minimum, with different individuals.

Where it is not feasible to segregate these roles, i.e., for smaller Organizations, adequate compensating controls approved by an external auditor must be put in place.

**1.2 Mandatory Requirement #2: Approval Authority**

**1.2.1 Goods and non-consulting services**

Organizations must establish an approval authority schedule (AAS) for procurement of goods and non-consulting services. The AAS must identify, for each of the functional procurement roles identified in Section 1.1, authorities that are allowed to approve procurements for different dollar thresholds. The AAS must be approved by the board of directors of the Organization or its equivalent.

Prior to commencement, any procurement of goods and non-consulting services must be approved by an appropriate authority in accordance with the AAS of the Organization.

**1.2.2 Consulting services**

Prior to commencement, any procurement of consulting services must be approved in accordance with the Procurement Approval Authority Schedule for Consulting Services below.

Procurement Approval Authority Schedule (AAS) for Consulting Services		
Procurement Method	Procurement Value	Approval Authority
Invitational Competitive	\$0 up to but not including \$100,000	Organization’s AAS for goods and non-consulting services

Open Competitive	Any value	Organization's AAS for goods and non-consulting services
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All goods and non consulting services of \$25,000 or greater and all consulting services that go through a non competitive process must be approved by organizations board prior to commencement of procurement.

Organizations must not reduce the overall value of procurement (e.g., dividing a single procurement into multiple procurements) in order to circumvent the approval requirements of the organizational AAS or the Procurement AAS for Consulting Services.

**1.3 Mandatory Requirement #3: Competitive Procurement Thresholds**

Organizations must conduct an open competitive procurement process where the estimated value of procurement of goods or services is \$100,000 or more. The exemptions must be in accordance with the applicable trade agreements.

Organizations must competitively procure consulting services irrespective of value. The exemptions must be in accordance with the applicable trade agreements.

<b>Goods, Non-Consulting Services and Construction</b>		
<b>Total Procurement Value</b>	<b>Means of Procurement</b>	<b>Recommended/Required</b>
\$0 up to but not including \$25,000	Three quotes	Recommended
\$25,000 up to but not including \$100,000	Invitational competitive procurement (minimum of three suppliers are invited to submit a bid)	Required
\$100,000 or more	Open competitive process	Required
<b>Consulting Services</b>		
<b>Total Procurement Value</b>	<b>Means of Procurement</b>	<b>Recommended/Required</b>
\$0 up to but not including \$100,000	Invitational or open competitive process	Required
\$100,000 or more	Open competitive process	Required

Organizations must not reduce the overall value of procurement (e.g. dividing a single procurement into multiple procurements) in order to circumvent competitive procurement thresholds.

**1.4 Mandatory Requirement #4: Information Gathering**

Where results of informal supplier or product research are insufficient, formal processes such as a Request for Information (RFI) or Request for Expression of Interest (RFEI) may be used if warranted, taking into consideration the time and effort required to conduct them.

A response to RFI or RFEI must not be used to pre-qualify a potential supplier and must not influence the chances of the participating suppliers from becoming the successful proponent in any subsequent opportunity.

**1.5 Mandatory Requirement #5: Supplier Pre-Qualification**

The Request for Supplier Qualification (RFSQ) enables Organizations to gather information about supplier capabilities and qualifications in order to pre-qualify suppliers for an immediate product or service need or to identify qualified candidates in advance of expected future competitions.

Terms and conditions of the RFSQ document must contain language that disclaims any obligation of the Organization to call on any supplier to provide goods or services as a result of pre-qualification.

**1.6 Mandatory Requirement #6: Posting Competitive Procurement Documents**

Calls for open competitive procurements must be made through an electronic tendering system that is readily accessible by all Canadian suppliers. PROcure utilizes MERX.

**1.7 Mandatory Requirement #7: Timelines for Posting Competitive Procurements**

Organizations must provide suppliers a minimum response time of 15 calendar days for procurement of goods and services valued at \$100,000 or more.

Organizations must consider providing suppliers a minimum response time of 30 calendar days for procurements of high complexity, risk, and/or dollar value.

**1.8 Mandatory Requirement #8: Bid Receipt**

Bid submission date and closing time must be clearly stated in competitive procurement documents. Organizations must set the closing date of a competitive procurement process on a normal working day (Monday to Friday, excluding provincial and national holidays).

Submissions that are delivered after the closing time must be returned unopened.

**1.9 Mandatory Requirement #9: Evaluation Criteria**

Evaluation criteria must be developed, reviewed and approved by an appropriate authority prior to commencement of the competitive procurement process.

Competitive procurement documents must clearly outline mandatory, rated, and other criteria that will be used to evaluate submissions, including weight of each criterion.

Mandatory criteria (e.g. technical standards) should be kept to a minimum to ensure no bid is unnecessarily disqualified.

Maximum justifiable weighting must be allocated to the price/cost component of the evaluation criteria.

All criteria must comply with Section 1.2.14, Non-discrimination, of the Directive.

The evaluation criteria are to be altered only by means of addendum to the competitive procurement documents.

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Organizations may request suppliers to provide alternative strategies or solutions as a part of their submission. Organizations must establish criteria to evaluate alternative strategies or solutions prior to commencement of the competitive procurement process. Alternative strategies or solutions must not be considered unless they are explicitly requested in the competitive procurement documents.

**1.10 Mandatory Requirement #10: Evaluation Process Disclosure**

Competitive procurement documents must fully disclose the evaluation methodology and process to be used in assessing submissions, including the method of resolving tie score.

Competitive procurement documents must state submissions that do not meet the mandatory criteria will be disqualified.

**1.11 Mandatory Requirement #11: Evaluation Team**

Competitive procurement processes require an evaluation team responsible for reviewing and rating the compliant bids.

Evaluation team members must be made aware of the restrictions related to utilization and distribution of confidential and commercially sensitive information collected through the competitive procurement process and refrain from engaging in activities that may create or appear to create a conflict of interest.

Evaluation team members must sign a conflict-of-interest declaration and non-disclosure of confidential information agreement.

**1.12 Mandatory Requirement #12: Evaluation Matrix**

Each evaluation team member must complete an evaluation matrix, rating each of the submissions. Records of evaluation scores must be retained for audit purposes. Evaluators must ensure everything they say or write about submissions is fair, factual, and fully defensible.

**1.13 Mandatory Requirement #13: Winning Bid**

The submission that receives the highest evaluation score and meets all mandatory requirements set out in the competitive procurement document must be declared the winning bid.

**1.14 Mandatory Requirement #14: Non-Discrimination**

Organizations must not discriminate or exercise preferential treatment in awarding a contract to a supplier as a result of a competitive procurement process.

**1.15 Mandatory Requirement #15: Executing the Contract**

The agreement between the Organization and the successful supplier must be formally defined in a signed written contract before the provision of supplying goods or services commences.

Where an immediate need exists for goods or services, and the Organization and the supplier are unable to finalize the contract as described above, an interim purchase order may be used. The justification of such decision must be documented and approved by the appropriate authority.

**1.16 Mandatory Requirement #16: Establishing the Contract**

The contract must be finalized using the form of agreement that was released with the procurement documents.

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In circumstances where an alternative procurement strategy has been used (i.e. a form of agreement was not released with the procurement document), the agreement between the Organization and the successful supplier must be defined formally in a signed written contract before the provision of supplying goods or services commences.

**1.17 Mandatory Requirement #17: Termination Clauses**

All contracts must include appropriate cancellation or termination clauses. Organizations should seek legal advice on the development of such clauses.

When conducting complex procurements, organizations should consider, as appropriate, the use of contract clauses that permit cancellation or termination at critical project life-cycle stages.

**1.18 Mandatory Requirement #18: Term of Agreement Modifications**

The term of the agreement and any options to extend the agreement must be set out in the competitive procurement documents. An approval by an appropriate authority must be obtained before executing any modifications to the term of agreement.

Extending the term of agreement beyond that set out in the competitive procurement document amounts to non-competitive procurement where the extension affects the value and/or stated deliverables of procurement.

**1.19 Mandatory Requirement #19: Contract Award Notification**

For procurements valued at \$100,000 or more, Organizations must post, in the same manner as the procurement documents were posted, contract award notification. The notification must be posted after the agreement between the successful supplier and the Organization was executed. Contract award notification must list the name of the successful supplier, agreement start and end dates, and any extension options.

**1.20 Mandatory Requirement #20: Supplier Debriefing**

For procurements valued at \$100,000 or more, Organizations must inform all unsuccessful suppliers about their entitlement to a debriefing.

Organizations must allow unsuccessful suppliers 60 calendar days following the date of the contract award notification to request a debriefing.

**1.21 Mandatory Requirement #21: Non-Competitive Procurement**

Organizations should employ a competitive procurement process to achieve optimum value for money. It is recognized; however, that special circumstances may require Organizations to use non-competitive procurement.

Organization may utilize non-competitive procurement only in situations outlined in the exemption, exception, or non-application clauses of the AIT or other trade agreements.

Prior to commencement of non-competitive procurement, supporting documentation must be completed and approved by an appropriate authority within the Organization.

Recipients must create and retain written documentation to justify any exceptions to competitive procurement practice. (Refer to Appendix II attached - list of exceptions Agreement on Internal Trade.)

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With each use of non-competitive procurement process, including sole sourcing and single sourcing, written documentation must address all of the following matters:

- the rationale to support the exception,
- a description of the circumstances,
- a description of the requirements and the required timing; and,
- the alternatives considered and the criteria used to evaluate the alternatives.

Where the estimated total agreement value is \$25,000 or more for goods and non consulting services, recipients must provide a separate request in writing for an exception to competitive process from their Board.

### **1.22 Mandatory Requirement #22: Contract Management**

Procurements and the resulting contracts must be managed responsibly and effectively.

Payments must be made in accordance with provisions of the contract. All invoices must contain detailed information sufficient to warrant payment. Any overpayments must be recovered in a timely manner.

Assignments must be properly documented. Supplier performance must be managed and documented, and any performance issues must be addressed.

To manage disputes with suppliers throughout the life of the contract, Organizations should include a dispute resolution process in their contracts.

For services, organizations must:

- Establish clear terms of reference for the assignment. The terms should include objectives, background, scope, constraints, staff responsibilities, tangible deliverables, timing, progress reporting, approval requirements, and knowledge transfer requirements.
- Establish expense claim and reimbursement rules compliant with the Broader Public Sector Expenses Directive<sup>1</sup> and ensure all expenses are claimed and reimbursed in accordance with these rules.
- Ensure that expenses are claimed and reimbursed only where the contract explicitly provides for reimbursement of expenses.

### **1.23 Mandatory Requirement #23: Procurement Records Retention**

For reporting and auditing purposes, all procurement documentation, as well as any other pertinent information must be retained in a recoverable form for a period of seven years.

Organizations must have a written policy for handling, storing and maintaining the suppliers' confidential and commercially sensitive information.

### **1.24 Mandatory Requirement #24: Conflict of Interest**

Organizations must monitor any conflict of interest that may arise as a result of the Members' of the Organization, advisors', external consultants', or suppliers' involvement with the Supply Chain Activities.

Individuals involved with the Supply Chain Activities must declare actual or potential conflicts of interest. Where a conflict of interest arises, it must be evaluated and an appropriate mitigating action must be taken.

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### **7.25 Mandatory Requirement #25: Bid Dispute Resolution**

Competitive procurement documents must outline bid dispute resolution procedures to ensure any dispute is handled in an ethical, fair, reasonable, and timely fashion. Bid dispute resolution procedures must comply with bid protest or dispute resolution procedures set out in the applicable trade agreements.

#### **OTHER RELATED POLICIES**

Organizations must conduct procurement activities according to the law in Ontario, including contract law, the law of competitive processes, privacy legislation, accessibility legislation and any other legislation as may be applicable.

Organizations may also be subject to various trade agreements, including but not limited to the Agreement on Internal Trade (AIT) and the Ontario–Quebec Trade and Cooperation Agreement (Ontario–Quebec Agreement).

#### **DEFINITIONS**

Accountability - obligation of an employee, agent or other person to answer for or be accountable for, work, action or failure to act following delegated authority.

Agreement - formal written document that will be entered into at the end of the procurement process.

Approval Authority - authority delegated by the Organization to a person designated to occupy a position to approve on its behalf one or more procurement functions within the planto-pay cycle up to specified dollar limits subject to the applicable legislation, regulations and procedures in effect at such time.

Award - notification to a proponent of acceptance of a proposal, quotation or tender that brings a contract into existence.

Bid - a proposal, quotation or tender submitted in response to a solicitation from a contracting authority. A bid covers the response to any of the three principal methods of soliciting bids, i.e., Request for Proposal, Request for Tender and Request for Quotation.

Bid Protest - a dispute raised against the methods employed or decisions made by a contracting authority in the administration of a proposal, tender, or quotation process.

Chief Executive Officer - head of operations at Organizations.

Competitive Procurement - a set of procedures for developing a procurement contract through a bidding or proposal process. The intent is to solicit fair, impartial, competitive bids.

Conflict of Interest - a situation in which financial or other personal considerations have the potential to compromise or bias professional judgment and objectivity. An apparent conflict of interest is one in which a reasonable person would think that the professional's judgment is likely to be compromised.

Construction - construction, reconstruction, demolition, repair or renovation of a building, structure or other civil engineering or architectural work and includes site preparation, excavation, drilling, seismic investigation, the supply of products and materials, the supply of equipment and machinery if they are included in and incidental to the construction, and the installation and repair of fixtures of a building,

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structure or other civil engineering or architectural work, but does not include professional consulting services related to the construction contract unless they are included in the procurement.

Consultant - a person or entity that under an agreement, other than an employment agreement, provides expert or strategic advice and related services for consideration and decision-making.

Consulting Services - provision of expertise or strategic advice that is presented for consideration and decision-making.

Contract - an obligation, such as an accepted offer, between competent parties upon a legal consideration, to do or abstain from doing some act. It is essential to the creation of a contract that the parties intend that their agreement shall have legal consequences and be legally enforceable. The essential elements of a contract are an offer and an acceptance of that offer; the capacity of the parties to contract; consideration to support the contract; a mutual identity of consent or consensus ad idem; legality of purpose; and sufficient certainty of terms.

Designated broader public sector organization - an Organization to which section 12 of the *Broader Public Sector Accountability Act, 2010* applies.

Electronic Tendering System - a computer-based system that provides suppliers with access to information related to open competitive procurements.

Evaluation Criteria - a benchmark, standard or yardstick against which accomplishment, conformance, performance and suitability of an individual, alternative, activity, product or plan is measured to select the best supplier through a competitive process. Criteria may be qualitative or quantitative in nature.

Evaluation Matrix - a tool allowing the evaluation team to rate supplier proposals based on multiple pre-defined evaluation criteria.

Evaluation Team - a group of individuals designated/responsible to make award recommendation. The evaluation team would typically include representatives from the Organization and subject matter expert(s). Each member participates to provide business, legal, technical and financial input.

Goods - moveable property (including the costs of installing, operating, maintaining or manufacturing such moveable property) including raw materials, products, equipment and other physical objects of every kind and description whether in solid, liquid, gaseous or electronic form, unless they are procured as part of a general construction contract.

Goods and Services/Goods or Services - all goods and/or services including construction, consulting services and information technology.

Organizations - all organizations listed in Application and Scope, Section 2.

Information Technology - equipment, software, services and processes used to create, store, process, communicate and manage information.

Invitational Competitive Procurement - any form of requesting a minimum of three qualified suppliers to submit a written proposal in response to the defined requirements outlined by an individual/organization.

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Non-discrimination - fairness in treating suppliers and awarding contracts without prejudice, discrimination or preferred treatment.

Offer - a promise or a proposal made by one party to another, intending the same to create a legal relationship upon the acceptance of the offer by the other party.

Procurement - acquisition by any means, including by purchase, rental, lease or conditional sale, of goods or services.

Procurement Card (P-Card) - an organizational credit card program primarily used for low-cost, non-inventory, non-capital items, such as office supplies. The card allows procurement or field employees to obtain goods and services without going through the requisition and authorization procedure. P-cards may be set up to restrict use to specific purchases with predefined suppliers or stores, and offer central billings.

Procurement Policies and Procedures (PPP) - a framework and mandatory requirements to govern how Organizations conduct sourcing, contracting and purchasing activities, including approval segregation and limits, competitive and non-competitive procurement, conflict of interest and contract awarding.

Procurement Value - estimated total financial commitment resulting from procurement, taking into account optional extensions.

Purchase Order (PO) - a written offer made by a purchaser to a supplier formally stating the terms and conditions of a proposed transaction.

Request for Expressions of Interest (RFEI) - a document used to gather information on supplier interest in an opportunity or information on supplier capabilities/qualifications. This mechanism may be used when a BPS organization wishes to gain a better understanding of the capacity of the supplier community to provide the services or solutions needed. A response to an RFEI must not pre-qualify a potential supplier and must not influence their chances of being the successful proponent on any subsequent opportunity.

Request for Information (RFI) - a document issued to potential suppliers to gather general supplier, service or product information. It is a procurement procedure whereby suppliers are provided with a general or preliminary description of a problem or need and are requested to provide information or advice about how to better define the problem or need, or alternative solutions. A response to an RFI must not pre-qualify a potential supplier and must not influence their chances of being the successful proponent on any subsequent opportunity.

Request for Proposal (RFP) - a document used to request suppliers to supply solutions for the delivery of complex products or services or to provide alternative options or solutions. It is a process that uses predefined evaluation criteria in which price is not the only factor.

Request for Supplier Qualifications (RFSQ) - a document used to gather information on supplier capabilities and qualifications, with the intention of creating a list of pre-qualified suppliers. This mechanism may be used either to identify qualified candidates in advance of expected future competitions or to narrow the field for an immediate need. Organizations must ensure that the terms and conditions built into the RFSQ contain specific language that disclaims any obligation on the part of the Organization to call on any supplier to provide goods or services as a result of the pre-qualification.

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Request for Tender (RFT) - a competitive procurement process for obtaining competitive price proposals based on precisely defined requirements for which a clear or single solution exists.

Requisition - a formal request to obtain goods or services made within an Organization, generally from the end-user to the procurement department.

Segregation of Duties - a method of process control to manage conflict of interest, the appearance of conflict of interest, and errors or fraud. It restricts the amount of power held by any one individual. It puts a barrier in place to prevent errors or fraud that may be perpetrated by one individual.

Services - intangible products that do not have a physical presence. No transfer of possession or ownership takes place when services are sold, and they (1) cannot be stored or transported, (2) are instantly perishable, and (3) come into existence at the time they are bought and consumed.

Single Sourcing - procurement of a good or service from a particular vendor rather than through the solicitation of bids from other vendors who can provide the same item.

Sole Sourcing - procurement of a good or service that is unique to a particular vendor and cannot be obtained from another source.

Sub Contractor - individual or organization delegating specified tasks, or sub-projects, of a specific project for another organization through contractual agreements.

Supplier/Vendor - any person or organization that, based on an assessment of that person's or organization's financial, technical and commercial capacity, is capable of fulfilling the requirements of procurement.

Supply Chain Activities - all activities whether directly or indirectly related to organizational plan, source, procure, move, and pay processes.

Supplier Debriefing - a practice of informing a supplier why their bid was not selected upon completion of the contract award process.

Trade Agreements - any applicable trade agreement to which Ontario is a signatory.

### **Canadian Contract and Procurement Law**

Contract law is complex. This is a brief summary of certain aspects of contract and procurement law.

Five elements must be present for there to be an enforceable contract:

- a) There is an OFFER and an ACCEPTANCE;
- b) Both parties have the CAPACITY to contract;
- c) CONSIDERATION (value) has been agreed upon;
- d) There is INTENT by both parties to enter into a legally binding contract; and
- e) The purpose of the contract is LEGAL.

Effective procurement within the BPS is a balance between the principles of fair, open and transparent procurement; business considerations; and the obligations imposed by law. A completed procurement cycle results in an agreement between a BPS organization and a second party for the provision of materials,

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services or construction in exchange for some form of consideration. Common law with respect to contracts applies to both the final agreement and the competitive processes that lead up to the final agreement. There has been a long series of legal cases, including Supreme Court of Canada cases that have provided guidance on the basic contractual relationships. These relationships have been called the “Contract A”/ “Contract B” situation.

In the BPS, a Request for Tender (RFT), Request for Quotation (RFQ), and Request for Proposal (RFP) are all types of solicitation documents used to invite submissions from which a successful proponent is selected. The submission/receipt of a compliant tender, quotation or proposal may create a binding bid contract or “Contract A” between a BPS organization and the proponent. The only exceptions are where a submission is materially noncompliant or is withdrawn prior to closing.

The compliant submission is an acceptance of the purchaser’s offer (solicitation) to enter into a “Contract A” (the bid contract) and it is also an offer by the proponent to enter into “Contract B” (a performance contract to be awarded to the winner) based on its submission.

The existence of a “Contract A” means the proponents have accepted the terms contained within the competitive procurement documents and the rules cannot be changed without advising all potential proponents. Once the competitive procurement process has closed, nothing can be added, deleted or changed by either party (submissions are normally irrevocable after closing), except as may occasionally be provided for in the terms of the solicitation. If a change of any kind occurs after this time, it may be considered a breach of the “Contract A” (for example, if a submission fails to address a particular mandatory evaluation criterion and a BPS organization were to disregard that omission and award the contract to that proponent). There have been numerous cases over the years involving breaches of a “Contract A” by either party in a competitive procurement process, with the jurisprudence being failure to properly respect “Contract A” may place significant monetary or other risk on an organization.

This legal process is designed to protect all parties (the purchaser and the proponents). Once the purchasing organization issues the solicitation with its particular rules on how the competitive procurement process will be managed, it must abide by these rules, as must the proponents. If a rule needs to be changed for some reason, this can be done prior to the competitive procurement process closing date, with an addendum being issued to all potential proponents.

The “Contract B” is the actual performance contract. This is the document that specifies the services that will be performed or materials to be provided by the contractor; the payment process and amount; other specific schedules, such as risk management (insurance) and subcontracting; and the contract terms and conditions.

### **Law of Competitive Processes**

The law of competitive bidding, which is also referred to as the law of tender, applies to tenders (which result in bids or quotes). It has also been extended to apply to the RFP process. In Canada, the law of competitive bidding has arisen from a series of provincial and Supreme Court of Canada decisions, which have defined the following principles:

a) Upon the close of the solicitation, a “Contract A” generally arises between the purchasing organization and each of the proponents submitting a compliant bid or quote.

b) The terms of a “Contract A” are to be found in the solicitation documents, including the instructions, the form (e.g., RFT, RFQ or RFP) and customs of trade.

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c) If a purchasing organization deviates from the mandatory requirements of the solicitation documents, then the owner may be liable in breach of contract (i.e. breach of “Contract A”) to the proponents (including the unsuccessful proponents).

d) A purchasing organization should accept only compliant bids. A compliant bid is one that meets the requirements specified in the RFT or RFQ, or the mandatory requirements in an RFP. If a submission does not strictly meet a requirement, legal services should be consulted to determine whether the non-compliance is a material non-compliance or whether the submission can be deemed substantially compliant.

In an RFT or RFQ, the requirements are clearly defined, with price being the only variable, although the price can reflect total cost of ownership, and work schedule and delivery may also be considerations. An RFP is used to seek a solution to a problem, where price will not be the only consideration, and may not be a consideration at all. An RFP will include both mandatory (e.g. acceptance of terms and conditions) and desirable criteria, and each proposal that meets all of the mandatory criteria will result in the establishment of a “Contract A.”

Regardless of the form of competitive procurement document, unless the process is formally and properly amended, the BPS organization is legally required to comply with the process, particularly the evaluation process, as defined in the competitive procurement documents. Therefore, the BPS organization must comply with the selection criteria, including any weighting, that are described in the competitive procurement documents.

Requests for Information (RFI) and Requests for Expressions of Interest (RFEI) are generally not designed to result in the establishment of a “Contract A,” since there is usually no intention these information gathering processes will lead to the awarding of a “Contract B.” Requests for Supplier Qualifications (RFSQ) can be used either to gather information or to establish a pre-qualified supplier list, which may be used to directly award a performance contract. An RFSQ may therefore result in the formation of a “Contract A” in some situations.

#### **Related Material**

PROcure can provide copies of any of the following documents:

#### **BPS Directive (2011)**

[http://www.fin.gov.on.ca/en/bpssupplychain/documents/bps\\_procurement\\_directive.html](http://www.fin.gov.on.ca/en/bpssupplychain/documents/bps_procurement_directive.html)

#### **Supply Chain Guidelines (2009)**

<http://www.fin.gov.on.ca/en/ontariobuys/documents/scg.html>

#### **Agreement on Internal Trade (AIT) (May 2007)**

Government of Canada. (February 2009). [A consolidation of the Agreement on Internal Trade](#) (the original Agreement as modified by subsequent protocols of amendment). Retrieved April 8, 2009, from [http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)

#### **BPS Supply Chain Procurement Policy Guidelines (December 2007)**

BPS Supply Chain Secretariat, Ontario Ministry of Finance. (June 2008). *OntarioBuys Procurement Policy Guidelines*. Toronto: BPS Supply Chain Secretariat. (Available upon request.)

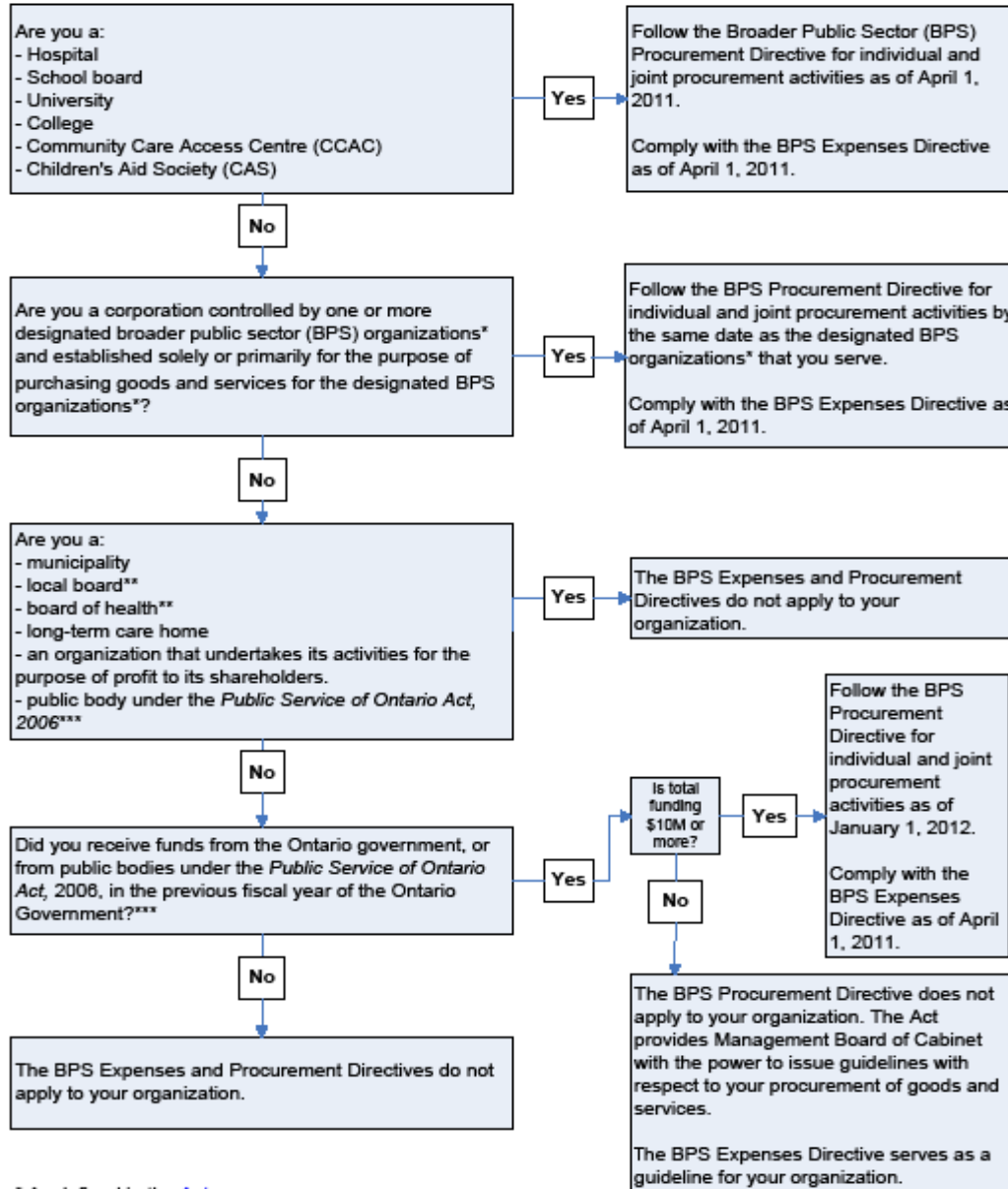
**City of London — Purchasing and Materials Management Policy (September 2003)**

City of London. (November 2003). *Purchasing and Materials Management Policy*. Retrieved April 14, 2009, from [http://www.london.ca/Tenders\\_and\\_RFPs/PDFs/Policy.pdf](http://www.london.ca/Tenders_and_RFPs/PDFs/Policy.pdf)

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# Appendix I:

## Quick Guide to Part IV (Expense Claims: Allowable Expenses) and Part V (Procurement Standards) of the *Broader Public Sector Accountability Act, 2010*



\* As defined in the [Act](#)

\*\* As defined under the "publicly funded organization" definition in the [Act](#)

\*\*\*Refer to the definitions of "public funds", "publicly funded organizations" and "agency of the Government of Ontario" under the [Act](#) and to [Regulation 146/10](#) under the *Public Service of Ontario Act, 2006* for a list of public bodies

Current as of: January 24, 2011



## Appendix II: List of Exceptions Agreement on Internal Trade

### 1.1. *Non-competitive Procurement*

Organizations should employ competitive procurement processes to achieve optimum value for money. It is recognized, however, that special circumstances may require Organizations to use non-competitive procurement. Organizations may use non-competitive procurement under the circumstances outlined in this section.

### 1.2. *Non-Application Of Trade Agreements*

Where a non-application clause exists under the Agreement on Internal Trade (AIT) or other trade agreement, Organizations may apply this clause as basis for conducting non-competitive procurement. An Organization asserting that procurement is subject to a non-application clause under a trade agreement must formally establish applicability of this clause.

The abovementioned non-application clauses include:

- Procurement of goods intended for resale to the public;
- Contracts with a public body or a non-profit organization;
- Procurement of goods and services purchased on behalf of an entity that is out of scope of the Directive;
- Procurement from philanthropic institutions, prison labour or persons with disabilities;
- Procurement of any goods the inter-provincial movement of which is restricted by laws not inconsistent with the trade agreements;
- Procurement of goods and services that is financed primarily from donations that are subject to conditions that are inconsistent with the Directive;
- Procurement of goods and services related to cultural or artistic fields and computer software for educational purposes;
- Procurement of services that in Ontario may, by legislation or regulation, be provided only by any of the following licensed professionals: medical doctors, dentists, nurses, pharmacists, veterinarians, engineers, land surveyors, architects, accountants, lawyers and notaries;
- Procurement of services of financial analysts or the management of investments by organizations who have such functions as a primary purpose;
- Procurement of financial services respecting the management of financial assets and liabilities (i.e. treasury operations), including ancillary advisory and information services, whether or not delivered by a financial institution;
- Procurement of goods and services for use outside Canada as well as construction work done outside Canada; and
- Health services and social services.

### 1.3. *Exceptions From Trade Agreements*

Where an exception clause exists under the Agreement on Internal Trade (AIT) or other trade agreement, Organizations may apply this clause as basis for conducting non-competitive procurement.

An Organization asserting that procurement is subject to an exception clause under a trade agreement must formally establish applicability of this clause.

### 1.4. *Single Sourcing of Goods, Non-Consulting, and Consulting Services*

Organizations may conduct non-competitive procurement of goods and non-consulting services in the circumstances listed below (also known as single source situations), provided that they do not do so for the purposes of avoiding competition between suppliers or in order to discriminate against suppliers:

- Where an unforeseeable situation of urgency exists and the goods or services cannot be obtained in time by means of open procurement procedures.

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**Failure to plan and allow sufficient time for a competitive procurement process does not constitute an unforeseeable situation of urgency.**

- Where goods or services regarding matters of a confidential or privileged nature are to be purchased and the disclosure of those matters through an open tendering process could reasonably be expected to compromise government confidentiality, cause economic disruption or otherwise be contrary to the public interest;
- Where a contract is to be awarded under a cooperation agreement that is financed, in whole or in part, by an international cooperation organization, only to the extent that the agreement between the entity and the organization includes rules for awarding contracts that differ from the obligations set out in the Directive;
- Where construction materials are to be purchased and it can be demonstrated that transportation costs or technical considerations impose geographic limits on the available supply base, specifically in the case of sand, stone, gravel, asphalt, compound and pre-mixed concrete for use in the construction or repair of roads;
- Where compliance with the open tendering provisions set out in the Directive would interfere with the entities' ability to maintain security or order or to protect human, animal or plant life or health; and
- In the absence of a receipt of any bids in response to a call for proposals or tenders made in accordance with the Directive.

**1.5. Sole Sourcing of Goods, Non-Consulting, and Consulting Services**

Where only one supplier is able to meet the requirements of a procurement, Organizations may conduct non-competitive procurement in the circumstances listed below (also known as sole source situations) provided that they do not do so for the purposes of avoiding competition between suppliers or in order to discriminate against suppliers:

- To ensure compatibility with existing products, to recognize exclusive rights, such as exclusive licences, copyright and patent rights, or to maintain specialized products that must be maintained by the manufacturer or its representative;
- Where there is an absence of competition for technical reasons and the goods or services can be supplied only by a particular supplier and no alternative or substitute exists;
- For the procurement of goods or services the supply of which is controlled by a supplier that is a statutory monopoly;
- For the purchase of goods on a commodity market;
- For work to be performed on or about a leased building or portions thereof that may be performed only by the lessor;
- For work to be performed on property by a contractor according to provisions of a warranty or guarantee held in respect of the property or the original work;
- For a contract to be awarded to the winner of a design contest;
- For the procurement of a prototype of a first good or service to be developed in the course of and for a particular contract for research, experiment, study or original development, but not for any subsequent purchases;
- For the purchase of goods under exceptionally advantageous circumstances such as bankruptcy or receivership, but not for routine purchases;
- For the procurement of original works of art;
- For the procurement of subscriptions to newspapers, magazines or other periodicals; and
- For the procurement of real property.

**1.6 Approval – Sole/Single Sourcing**

- Any Sole/Single Source purchased will be approved by the CEO
- Any Sole/Single Source purchases greater than \$100,00 will be approved by the Chair of the Board.

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- Any Sole/Single Source purchases will be brought to the attention of the Finance and Audit Resource committee.

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