

Compliance challenges with the BPS Procurement Directive

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In recent years, Ontario's public services sector has been troubled by a number of highly publicized procurement scandals. In response, the provincial government implemented measures, including the *Broader Public Sector Procurement Directive* (the "Directive"), to guide the procurement process of various broader public sector organizations, including hospitals. While some hospitals have been successful in adopting the Directive to establish a fair and effective procurement process, other hospitals – particularly smaller ones – have faced difficulties in implementing and complying with the Directive.

The Directive requires hospitals to comply with a Supply Chain Code of Ethics and 25 mandatory procurement requirements. The Supply Chain Code of Ethics relates to matters such as personal integrity, professionalism, accountability, transparency, compliance, and continuous improvement. The 25 mandatory requirements cover a wide range of topics, including the segregation of procurement duties, approval authority, timelines, evaluation criteria, exemptions for non-competitive procurements, conflicts of interest, and records retention.

Implementation and Compliance Difficulties

Although compliance is mandatory, Ontario's hospitals have not been universally following the Directive. In particular, some hospitals feel that they are "too small" to comply due to their limited resources. Other implementation and compliance challenges that hospitals face include the following:

Segregation of Duties. Requirement 1 of the Directive states that hospitals must segregate at least three of the following five procurement roles: requisition, budgeting, commitment, receipt, and payment. In addition, these roles must be performed by different departments or at least by different individuals. However, smaller hospitals sometimes do not have enough individuals to take on the divided responsibilities and must therefore implement adequate checks that are approved by an external auditor.

Conflicts of Interest. Requirement 24 specifies that hospitals must monitor potential conflicts of interest and, if a conflict arises, they must take "appropriate mitigating actions". According to the Directive's *Implementation Guidebook*, this requirement would disqualify a company from entering a bid if the company was previously retained to assist with the drafting of tender documents. This can be very problematic in highly specialized areas of medical care where the number of remaining bidders might be only a few companies – sometimes only one.

Threshold Circumvention. Requirement 3 outlines the type of procurement process required for various procurement value thresholds. Furthermore, this requirement specifies that hospitals must not circumvent thresholds by reducing the overall value of a

procurement contract (e.g. by splitting a single high-value contract into multiple lower-value ones). For example, if a hospital is continuously awarding contracts to the same bidder through an invitational procurement process, there is a risk that these individual contracts actually amount to a single contract with an aggregate value that requires a different means of procurement, such as an open competitive process.

Non-competitive Procurements. Requirement 21 specifies that non-competitive procurements are allowed only in special circumstances, such as situations involving an unforeseeable urgency or an absence of competition due to technical reasons. Since these are not clear-cut situations, the extent to which hospitals can rely on this exemption will depend on the specific circumstances of each procurement. Hospitals should therefore be cautious about relying on this exemption to justify non-competitive procurement decisions.

One Consequence of Non-Compliance

Even if the Directive lacks the force of law since it is not a statute or regulation, the case *Bot Construction Ltd. v. Ontario (Ministry of Transportation)*, involving a similar procurement directive, ruled that a directive can establish a government organization's duty to act fairly and transparently during a procurement process. Consequently, if a hospital fails to follow the Directive and thereby breaches its duty of fairness, a disgruntled bidder may apply to the court system for a judicial review of the alleged breach. If the bidder's application is successful, the court has the discretion to grant a remedy, such as an order for the hospital to re-evaluate the proposals or an order for a new procurement initiative. A hospital should follow the Directive to protect itself from the potential legal actions of resentful bidders.

Although some hospitals have encountered difficulties in fully implementing the Directive, they must overcome these challenges to fulfill their duty for a fair and transparent procurement process. Even if the Directive does not have the force of law, aggrieved bidders may seek legal remedies by an application for judicial review. This is one example of the consequences of non-compliance. It is therefore imperative for hospitals to carefully assess and, if needed, correct their procurement procedures and documents in order to satisfy the obligations prescribed by the Directive.

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