

deadline for implementation of Ontario's Supply Chain Guideline has arrived

Businesses that supply goods and services to Ontario's hospitals, school boards, colleges and related organizations should be aware that change may be coming soon to the procurement practices of these organizations. Beginning this month, any broad public sector ("BPS") organization that receives more than \$10 million per year from the Ministries of Health and Long-Term Care, Education, or Training, Colleges and Universities (the "In-Scope Participants") must comply with new procurement rules established under the "Supply Chain Guideline" (the "Guideline") issued by Ontario's Ministry of Finance through its OntarioBuys program.¹ Shared-service organizations that are owned or funded by In-Scope Participants are also subject to these rules, and smaller BPS organizations may adopt them voluntarily.

These new procurement rules have been incorporated since April 2009 into the contracts between In-Scope Participants and their funders, but they are only now becoming mandatory.

Suppliers to BPS organizations may therefore soon encounter new policies that affect their existing business relationships, and sole or single-source contracts may become more difficult to secure.²

the supply chain code of ethics

The first mandatory standard established by the Guideline is that In-Scope Participants must adopt a *Supply Chain Code of Ethics* "to define acceptable behaviours and standards that should be common for everyone involved with supply chain activities, such as planning, purchasing, contracting, logistics and payment." The Code requires that procurement be conducted in a fair and transparent manner, free from conflicts of interest. These requirements will probably not lead to major changes in the procurement *policies* of BPS organizations, but BPS staff may become more circumspect in their relations with suppliers.

the procurement policies and procedures ("PPP") standard

The second standard established by the Guideline will directly affect procurement policies at many BPS organizations. The standard requires In-Scope Participants

¹ The Guideline is available online at the OntarioBuys website: <http://www.fin.gov.on.ca/en/ontariobuys/documents/scg.html>.

² Sole source procurement is defined in the Guideline as a non-competitive process where only one supplier is available in the marketplace. Single-source procurement is defined as a non-competitive process where goods or services are procured from a single supplier although other suppliers actively also serve the market for those goods and services.

to adopt procurement policies and procedures (“PPP”) that reflect the general framework established in the Guideline and also meet 25 specific requirements.

The general PPP framework set out in the Guideline includes an expectation that BPS organizations participate in group purchasing initiatives (GPIs) with other organizations as a means of enhancing their buying power. This element of the framework is mandatory in the sense that the PPP standard as a whole is mandatory, but the Guideline provides no guidance or specific goal for the implementation of group purchasing. Nonetheless, BPS organizations might begin to assert that the Guideline requires group purchases and prohibits renewal of bilateral contracts with suppliers.

The Guideline does *not* prohibit bilateral contracts or non-competitive procurement processes, but its 25 mandatory requirements do include some limits on sole and single-source contracts. Specifically, the Guideline requires an open competitive procurement process for any contract of \$100,000 or more, through either a request for proposal (RFP) or a request for tender (RFT) process initiated by the purchasing organization. Exceptions are permitted only in very limited circumstances. Suppliers may also become “preferred suppliers” or “vendors of record” for BPS organizations through these open processes if such a status is available at the organizations they supply. For contracts of less than \$100,000 but more than \$10,000 no RFP or RFT is required, but the Guideline strongly encourages BPS organizations to obtain at least three competing bids.

Suppliers who are unaccustomed to competitive procurement processes in Canada should be aware that submission of a proposal or tender in response to an RFP or RFT could constitute a binding legal offer from the supplier to perform as proposed in the submission. A bidder’s mistakes will not be excused unless they were obvious on the face of the proposal or tender. Proponents must therefore review their submissions carefully to ensure that performance is feasible in light of all of the requirements established by the purchasing organization.

OntarioBuys is currently planning Version 2.0 of the Guideline, which will likely impose new rules on the procurement process, and McMillan LLP will monitor these developments closely. In the meantime, McMillan can help suppliers adjust to the initial version of the Guideline by reviewing draft submissions in response to RFPs issued by In-Scope Participants, reviewing the supply contracts attached to the RFPs that are potentially non-negotiable after the RFP response is submitted depending on the framework of the RFP and advising generally on the application of the Guideline.

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a cautionary note

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