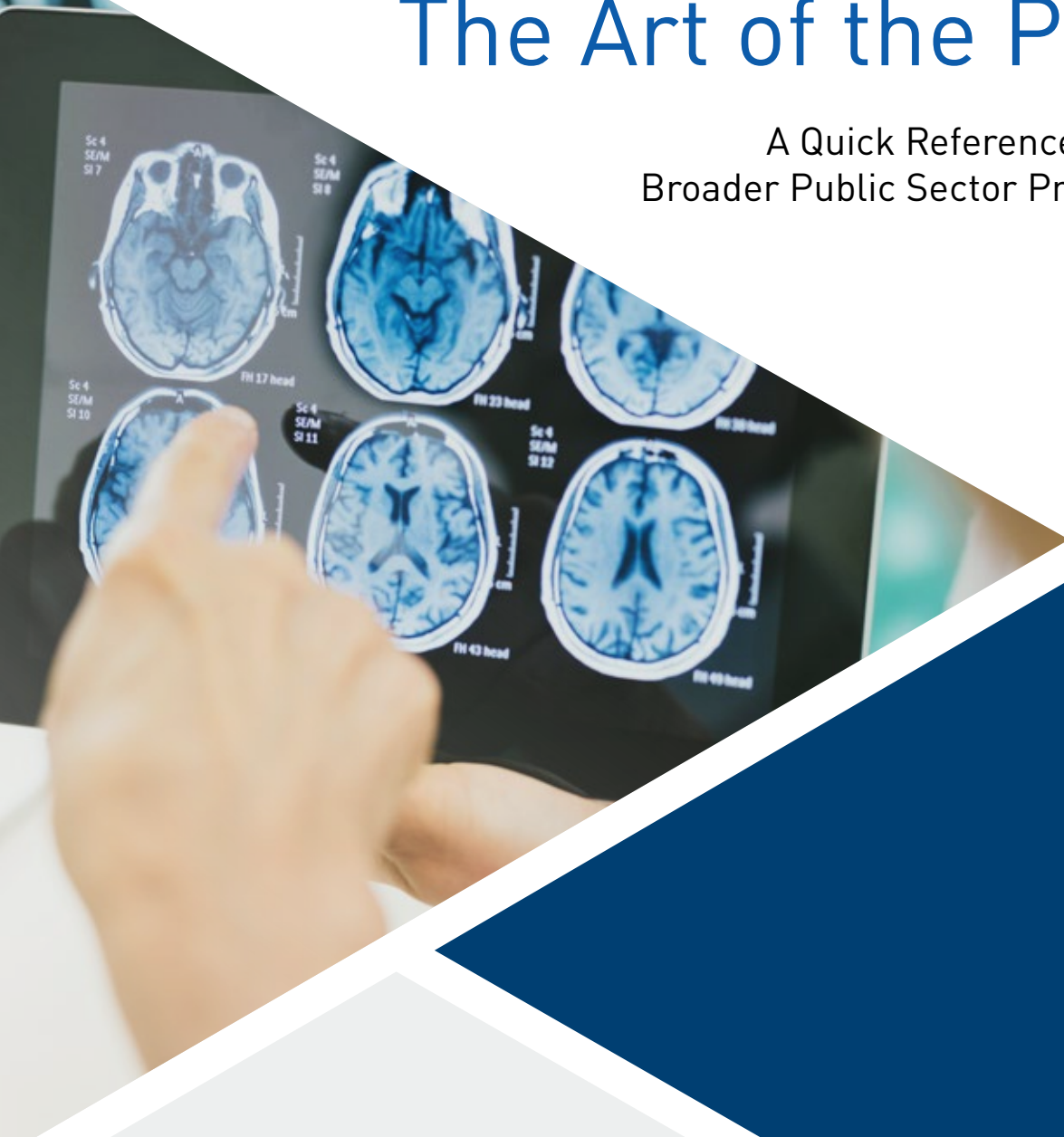


The Art of the Possible

A Quick Reference Guide to Ontario
Broader Public Sector Procurement Myths



CAHO

Council of Academic Hospitals of Ontario

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Disclaimer

This document is intended to help organizations facilitate validation and adoption of new health technologies or innovations. It outlines commonly perceived myths around the Ontario *Broader Public Sector Procurement Directive* (the Directive) and provides strategies to address these myths.

Organizations are encouraged to exercise due diligence and make informed decisions when using this document, taking into account their organization's procurement policies. The information in this document is not intended as, nor should it be construed as, legal opinion. It is the responsibility of individuals to ensure they are following their own organization's procurement policies and procedures, and to seek legal opinion for specific guidance on matters relating to procurement law, other relevant legislation or trade treaties.

Notwithstanding the content of this document, organizations must meet any applicable legal obligations established by the Ontario *Broader Public Sector Accountability Act, 2010* and the *Broader Public Sector Procurement Directive* as well as any Canadian and international trade agreements.

Introduction

CAHO as an Innovation Broker

The Council of Academic Hospitals of Ontario (CAHO) represents Ontario's 23 academic research hospitals that play a unique and vital role in the province's health care system. Collectively, we provide advanced patient care services, train the next generation of health care professionals, and conduct leading-edge research to discover tomorrow's care today. On the foundation of this work, we generate the expertise and evidence to drive change as system leaders, building a healthier, wealthier, smarter Ontario.

In 2017, CAHO was announced as an Innovation Broker for the Office of the Chief Health Innovation Strategist. This role, along with CAHO's historic work in the innovation adoption space, provides CAHO hospitals an opportunity to help address barriers to innovation adoption within their own organizations and across Ontario's health care system to improve patient care.

The Art of the Possible

Misinterpretations or "myths" around the Ontario [Broader Public Sector Procurement Directive](#) (the Directive) are major barriers to innovation adoption. In a 2016 survey across CAHO hospitals, 76% of respondents identified policies, directives and procurement rules as major barriers to innovation adoption within their organizations.

As part of our efforts to address these barriers, CAHO convened a small group of experts to develop a quick reference guide with one simple goal: to suggest what's possible when it comes to procurement in Ontario. The guide consists of common procurement myths and strategies to address or overcome them, while adhering to the Directive, applicable legislation and domestic and international trade agreements.

Using this Guide

This guide is for hospital executives and individuals with intermediate to advanced knowledge of procurement. It can be used as a reference tool for individuals coming across perceived barriers or misconceptions with respect to the Directive while they are considering an innovation to pilot and/or adopt at their organization. It is intended to provide quick and practical information and resources to address these challenges, while still adhering to the Directive.

The information presented in this document is advisory only. It is intended to support organizations in their innovation adoption journey and facilitate a culture of innovation.

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Directive Essentials

Myth #1

Organizations must pick the lowest cost option to be consistent with the Value for Money principle of the Directive.

What's really possible

Over time, organizations have perpetuated the myth that cost is the only metric through which the Directive defines value for goods or services being procured. In fact, the Directive is based on 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
- Transparency
- Value for Money
- Quality Service Delivery
- Process Standardization

The Value for Money principle of the Directive encourages organizations to “maximize the value they receive from the use of public funds and use an approach that aims to deliver goods and services at the optimum total lifecycle cost.” The cost of the goods or services is only one component in the consideration of Value for Money and it may also include such factors as the qualifications and experiences of the supplier, among others.

Under the Directive, proposals may be awarded based on an overall scorecard approach, using evaluation considerations/factors such as quality, technical or performance requirements, outcomes, price, etc. Organizations have discretion to allocate points available for various categories of the scorecard, with price being just one category that is assessed.

Myth #2

The Directive exclusively restricts organizations to using traditional procurement models and does not permit the use of innovation procurement techniques.

What's really possible

The Directive permits a variety of procurement models, depending on the outcome the organization is looking to achieve, as long as the approach is fair, open and transparent and in compliance to the organization's procurement-related trade obligations. Models such as negotiated Requests for Proposals (RFPs), Competitive Dialogue, Innovation Partnership, Reverse Auctions, and Best and Final Offer are all permissible procurement techniques.

The use of outcomes-based specifications in RFPs allows innovative solutions to be considered.

Myth #3

Organizations cannot procure innovative products or services because the Directive is inflexible.

What's really possible

As long as the procurement process is open, fair and transparent, organizations can procure innovative products or services according to their needs. Organizations are free to specify functions and/or desired outcomes in their Requests for Proposals to elicit a broad range of solutions that meet their needs.

Myth #4

The Directive forces organizations to go to market for all procurements.

What's really possible

The Directive does not force organizations to go to market for all procurements. For example, there are exemptions included in the trade agreements that organizations can use to justify the use of a non-competitive procurement process in specific circumstances. Procurements involving commercialization and revenue generation opportunities are complex and will require discussion with your executive team and legal counsel.

Myth #5

The Directive is an additional layer of unnecessary bureaucracy.

What's really possible

The Directive is not an additional layer of *unnecessary* bureaucracy. The Directive exists to ensure public funds are expended in an accountable manner that provides value for money. It mitigates risk by establishing the obligations of organizations in the procurement process, driving consistency, and providing direction for Health Service Providers to undertake procurement processes that are open, fair and transparent and compliant with domestic and international trade agreements.

Myth #6

The Directive is a guideline.

What's really possible

The Directive is not a guideline. Compliance with the Directive is required under the [*Broader Public Sector Accountability Act, 2010*](#) (the Act). The Directive replaced the *Broader Public Sector Supply Chain Guideline*. Hospitals are required to attest annually to compliance to the Act.

Engagement with Vendors

Myth #7

You are not allowed to talk to vendors about unsolicited proposals outside of the procurement process.

What's really possible

The Directive does not prohibit consideration of unsolicited proposals as long as the organization follows its established policies and procedures. Any discussion with the vendor about their unsolicited proposal should be used as market research to inform future procurements. It is important to have a policy to govern how unsolicited proposals are managed within an organization. The [Broader Public Sector Primer on Innovation Procurement](#) provides guidance to organizations to ensure unsolicited proposals do not bias the organization to a specific solution.

Myth #8

Alternative proposals are not compliant with the Directive.

What's really possible

Hospitals can encourage alternative proposals as long as this intention is stated upfront in the Request for Proposals (RFP) and there is a methodology to evaluate the alternative proposals that is fair and transparent. If health service providers are interested in receiving alternative proposals as part of a more traditional RFP process, they must clearly state whether alternative proposals will be invited or considered in the RFP.

Myth #9

Requests for Information or Requests for Expressions of Interest can be used to shortlist vendors.

What's really possible

The Directive states that Requests for Information (RFIs) and Requests for Expressions of Interest (RFEIs) cannot be used to pre-qualify or shortlist vendors and must not influence the chances of participating suppliers from becoming the successful proponent in any subsequent opportunity. RFIs help to refine specifications and gather information in advance of conducting procurement. Vendors must be allowed to respond to a Request for Proposals even if they have not responded to a RFI.

Myth #10

Any Conflict of Interest eliminates an internal stakeholder from participating in the Request for Proposals process.

What's really possible

The Directive stipulates that organizations must have procedures in place to evaluate and mitigate a perceived or real Conflict of Interest (COI).

If a COI exists, an internal stakeholder (e.g. physician) may be asked to excuse him/herself from the Request for Proposals evaluation. However, if that person is the domain expert, their role in the evaluation could be modified. Organizations need to be cognizant of the perceived COI in the vendor community. Refer to your organization's COI policy for more information.

Myth #11

An Advance Contract Award Notice is not permissible under the Directive.

What's really possible

Although the Advance Contract Award Notice (ACAN) is not specifically contemplated in the Directive, it can be used when an organization believes there are no other vendors in the marketplace that can provide the good or service required and meet related conditions. It is important to note that an ACAN is not a procurement. It is a process that mitigates the risk of a challenge to a non-competitive process.

The ACAN must be posted publicly to allow other vendors to indicate if they can provide the goods or services contemplated by the organization. If the organization receives responses to the ACAN and determines that there are other vendors that can provide the goods or services required, the organization would then need to initiate an open competitive procurement process to acquire those goods or services. If no valid responses to the ACAN are received, the organization may use the result as a justification for undertaking a non-competitive process in accordance with the relevant trade exemption.

Myth #12

Negotiations with vendors are not permitted.

What's really possible

Organizations have a legal duty to follow the processes that they set out in their procurement documents. An organization may negotiate with a successful proponent as long as the intent is clearly stated in the Request for Proposals (RFP) and the negotiation does not result in a material change to the scope of the RFP and the terms of the legal agreement.

Organizations should consider using procurement methodologies that contemplate negotiation before an award is made, such as, but not limited to, a negotiated RFP or Best and Final Offer. With these methodologies, negotiation (and the negotiation process) would be clearly stated in the procurement document.

Myth #13

Health Service
Providers are not
allowed to talk
to vendors.

What's really possible

Market engagement is an essential part of a successful procurement process.

Organizations can structure an engagement session(s) with vendors before initiating a procurement process to enable vendors to understand the needs of the organization or to encourage the development of innovative solutions in the market. Organizations may also structure an engagement session(s) during a procurement process in order to achieve a successful contract/outcome as long as the engagement is equitable and transparent.

However, an organization cannot engage with vendors regarding a procurement that is in process, unless such engagement is specifically contemplated in the Request for Proposals as noted in Myth #12.

Intellectual Property

Myth #14

Intellectual property considerations must be addressed before commencing a pilot.

What's really possible

Intellectual property (IP) should always be considered as part of the due diligence process. However, IP considerations may not have to be resolved before the pilot can begin.

Pilots

Myth #15

All pilots require open procurement.

What's really possible

An open procurement is not required to run a pilot such as a validation of technology or proof of concept. However, if an organization wants to purchase a good or service once the pilot is completed, an open procurement process may be required. In some instances, an Advance Contract Award Notice (ACAN) may establish that there is no competition (see Myth #11). It is important to ensure your processes are compliant with applicable trade agreements.

Consulting or engaging a Fairness Advisor is an option if the organization wants an additional layer of scrutiny. The Fairness Advisor provides the following:

- Mitigates the risks inherent in any public procurement project
- Monitors the entire procurement process for complex or potentially contentious public sector projects
- Reviews documentation, observes activities and verifies official records to confirm or attest that the procurement has been carried out in compliance with the relevant procurement principles, policies, documents and leading practice

Myth #16

Co-development always requires going to market if a hospital intends to purchase the solution.

What's really possible

Purchasing a co-developed solution is a complex process that requires multi-stakeholder discussion and usually requires organizations to go to market (see Myth #15). Examples where going to market may not be required include:

- Organizations are not paying for the good(s) or service(s)
 - If intellectual property is used in the transaction, organizations should consult their legal counsel and/or procurement experts
- The good or service is so unique that you can apply limited tendering provisions under trade agreements such as the *Canadian Free Trade Agreement*
- The organization has pursued a competitive process such as an Innovation Partnership

Resources

This guide is intended to provide quick and practical information to help organizations identify and overcome perceived myths of the Ontario *Broader Public Sector Procurement Directive*. Still have procurement questions? Leverage these resources, available on the Supply Chain Ontario website:

- [*The Broader Public Sector Procurement Directive*](#)
- [*The Broader Public Sector Accountability Act, 2010*](#)
- [*The Broader Public Sector Primer on Innovation Procurement*](#)
- [*The Broader Public Sector Procurement Directive Implementation Guidebook*](#)
- [*Canadian Free Trade Agreement \(CFTA\)*](#) (see chapter 5)
- [*Canada-European Union \(EU\) Comprehensive Economic and Trade Agreement \(CETA\)*](#) (see chapter 19)

For more information, contact:

- Your organization's internal procurement specialist or Shared Service Organization
- The CAHO Innovation Broker Task Force:
innovationbroker@caho-hospitals.com
www.caho-hospitals.com

If these resources do not provide the answer you are looking for, email your questions to BPSSupplyChain@ontario.ca.

Definitions

Advance Contract Award Notice (ACAN)

A public notice indicating to the supplier community that an organization intends to award a good, service or construction contract to a pre-identified supplier, believed to be the only one capable of performing the work, thereby allowing other suppliers to signal their interest in bidding by submitting a statement of capabilities. If no other supplier submits a statement of capabilities that meets the requirements set out in the ACAN, the contract can then be awarded to the pre-identified supplier. It is important to note that an ACAN is not a “competitive” process and does not constitute a “competitive” process for the purposes of the trade agreements.

Competitive Dialogue

A process that allows the procuring organization to thoroughly discuss each aspect of the procurement with suppliers prior to specifying the requirements and prior to an invitation to submit their full and final proposals.

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.

Innovation Partnership

The process of entering into a partnership with a selected supplier(s) to research, develop and purchase an innovative solution(s) to meet an identified need.

Innovation Procurement

The purchase of solutions that do not exist in the market, or need to be adapted or improved to meet specified needs and create value for users and the procuring organization. It often involves a new or significantly improved product (i.e., good and/or service), method, business practices or processes, to be purchased using an innovative procurement model or approach. (See [Broader Public Sector Primer on Innovation Procurement](#) under resources).

Intellectual Property (IP) Rights

According to the World Trade Organization (WTO), IP is a term generally given to knowledge and created works where ownership or a right to use may be legally protected. It includes proprietary information and knowledge, such as trade secrets, confidential information, scientific and technical discoveries, inventions, literary and artistic works, designs, symbols, names and images. Common forms of IP protection include: trade secrets, patents, copyright, trademarks, industrial design and plant breeder rights. They enable owners of innovations to earn recognition or financial benefit. The intention of protecting IP is to foster an environment in which creativity and innovation can flourish. Public procurement of innovation often involves exchange of proprietary information, trade secrets and discoveries of scientific and technical knowledge that could potentially lead to commercial development of new methods, procedures or products. It is important for procuring organizations to consider IP early on in the procurement process and make an informed decision on the approach to IP assets that will arise under the procurement contract.

Pilot

A feasibility study or experimental trial.

Request for Expressions of Interest (RFEI)

A document used to gather information about supplier interest in an opportunity or information about supplier capabilities/qualifications. This mechanism may be used when a Broader Public Sector organization wishes to gain a better understanding of the capacity of the supplier community to provide the services or solutions needed. A response to a 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 on how to better define the problem or need, or alternative solutions. A response to a 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 Proposals (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 Quotations (RFQ)

A document where an organization describes exactly what needs to be purchased and the evaluation is based solely on price.