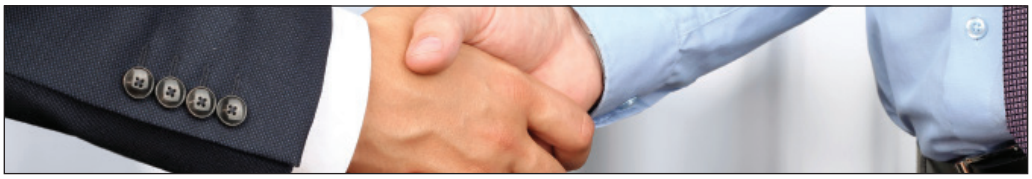
POSITION PAPER

Third Party Review Process for Procurement in Ontario

MEDEC

CANADA'S MEDICAL TECHNOLOGY COMPANIES
LES SOCIÉTÉS CANADIENNES DE TECHNOLOGIES MÉDICALES



The benefits of a third party review process are:

- ***Improves accountability and transparency for procurement decisions and processes***
- ***Maximize the value that HCPOs receive from the use of public funds***
- ***Ensures a fair process for suppliers***
- ***Improves patient care***

BACKGROUND

In recent years, many physicians and healthcare institutions in Canada have turned to buying groups, group purchasing organizations, and shared services organizations, (collectively, **"Health Care Procurement Organisations or HCPO's"**) to fulfill their procurement needs. According to the Broad Public Service Directive in Ontario, the purpose of the Directive for these organizations is[1]:

1. To ensure that 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;
2. To outline responsibilities of BPS organizations throughout each stage of the procurement process; and
3. To ensure that procurement processes are managed consistently throughout the BPS.

Further to the purpose of the BPS Directives, the 5 Principles of the Directive are[2]:

- Accountability
- Transparency
- Value for Money
- Quality Service Delivery
- Process Standardization

These goals are accomplished largely through the implementation of competitive procurement processes, such as issuing requests for proposals (**"RFPs"**), to which multiple vendors respond.

CURRENT ENVIRONMENT

Currently there is no third party mechanism in place to ensure that the purpose and principles of the Directive are complied with, which diminishes the effectiveness and original intent of the directives. When there is any issue or a challenge to the process or decisions of HCPO's, suppliers must challenge the very organization that made the decision in the first place.

The benefits of having a third party process for resolving disputes regarding the procurement activities of HCPOs in the health care sector are:

- Improves accountability and transparency for procurement decisions and processes
- Maximize the value that HCPOs receive from the use of public funds
- Ensures a fair process for suppliers
- Improves patient care

1. https://www.doingbusiness.mgs.gov.on.ca/mbs/psb/psb.nsf/Attachments/BPSProcDir-pdf-eng/$FILE/bps_procurement_directive-eng.pdf
2. https://www.doingbusiness.mgs.gov.on.ca/mbs/psb/psb.nsf/Attachments/BPSProcDir-pdf-eng/$FILE/bps_procurement_directive-eng.pdf

MEDEC recommends amending the Directive and its supporting documentation to provide for a specific process for resolving disputes regarding the procurement activities of HCPOs in the health care sector.

PROPOSAL

Through its Broader Public Sector Procurement Directive (the "Directive"), the Ontario government has demonstrated a commitment to improving accountability and transparency for procurement decisions and processes, and maximizing the value that broader public sector ("BPS") organizations, including HCPOs, receive from the use of public funds. However, beyond providing that "[c]ompetitive procurement documents must outline bid dispute resolution procedures" the Directive provides little guidance on how BPS organizations are to be held accountable for their decisions.

A mechanism which allows stakeholders to challenge the actions taken by an HCPO would serve to instill the desired transparency and accountability into the decision-making process. An example of where such a mechanism can be seen in the Canadian International Trade Tribunal (**"CITT"**) which, through its Procurement Review Process, allows a potential supplier concerned about the propriety of a procurement process to submit a complaint and obtain redress[3]. In this case, the CITT Procurement Review Process applies only to certain federal government procurements. The procurement decisions of HCPOs, which are typically funded by the provinces, are not subject to the purview of this process.

The CITT Procurement Review Process may be used as a best practice model to develop a legislatively-imposed dispute resolution process related to the procurement activities of HCPOs.

MEDEC recommends amending the Directive and its supporting documentation to provide for a specific process for resolving disputes regarding the procurement activities of HCPOs in the health care sector.

Appendix 1 (below) is a suggested dispute resolution procedure to be added to the Implementation Guidebook of the Directive. The suggested procedure provides a clear, consistent and fair process for resolving disputes regarding a HCPO's procurement activities. Where applicable, this dispute resolution procedure should be included in procurement documents issued by HCPO's.

3. For more information, see http://www.citt.gc.ca/en/procurement.

Appendix 1 – Sample Bid Dispute Resolution Procedure

10.3.8 BID DISPUTE RESOLUTION

Directive Mandatory Requirement #25: Bid Dispute Resolution

Competitive procurement documents must outline bid dispute resolution procedures to ensure that 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.

Organizations must establish dispute resolution procedures to address suppliers' concerns related to any aspect of the procurement process.

The following dispute resolution procedure should be adhered to by Organizations to ensure the transparency and accountability of the Organization through the implementation of a clear, consistent and fair process for resolving disputes regarding an Organization's Supply Chain Activities. Where applicable, this dispute resolution procedure should be included in Procurement Documents.

10.3.8.1 SUPPLIER REQUESTS FOR TRANSPARENCY

10.3.8.1.1 Supplier Requests for Transparency

Where an Organization is engaged in Supply Chain Activities, including, without limitation:

a) informal supplier or product research;
b) issuing a Request for Information (**"RFI"**) or Request for Expression of Interest (**"RFEI"**);
c) issuing a Request for Supplier Qualification (**"RFSQ"**);
d) issuing a Request for Proposals (**"RFP"**);
e) receiving bids or proposals;
f) evaluating bids or proposals;
g) awarding a contract; or
h) negotiating and executing an awarded contract;

A Supplier may make a written request for transparency with regards to:

i) the interpretation of the any procurement documents, including, without limitation, an RFI, RFEI, RFSQ, or RFP (collectively, **"Procurement Documents"**) or any underlying contract or award; or
ii) the way in which the procurement process has been managed

(a **"Request for Transparency"**).

10.3.8.1.2 Response Period

An Organization must respond to a Request for Transparency, in writing, within ten (10) days. Such response must constitute a good faith attempt to address the substance of the Request for Transparency with the aim of satisfactorily resolving the Supplier's issue. Until the Organization has responded to the Request for Transparency, the timeline for responding to any outstanding Procurement Documents ceases to run.

10.3.8.2 DISCUSSION

10.3.8.2.1 Good Faith Discussions

Where the issue is not satisfactorily resolved through a Request for Transparency (a **"Dispute"**), each of the Supplier and the Organization (each a **"Party"**, and collectively the **"Parties"**) will nominate a representative (the **"Nominee"**) to engage in good faith discussions, with the aim of resolving the Dispute within thirty (30) days following the response to the Request for Transparency (the **"Discussion Period"**).

10.3.8.2.2 Remedies

The parties agree that in determining a resolution, the Nominees may consider, without limitation, such form of resolution as they consider reasonable in the circumstances including cancellation, amendment or postponement of the RFP or any underlying contract or award.

10.3.8.2.3 No Abuse of Process

The parties agree that this process will only be used as a method to resolve genuine issues in good faith, and not to undermine or abuse an Organization's procurement process or to cause unnecessary delay to the award or implementation of a contract.

10.3.8.3 DETERMINATION BY UMPIRE

10.3.8.3.1 Appointment of Umpire

The Parties emphasize that they expect their Nominees to resolve the Dispute and that it would detract from the spirit of this process if the Nominees could not reach an agreement. However, in the event that, despite their best efforts to do so, the Nominees are unable to reach an agreement within the Discussion Period and such time period has not been further extended by the Nominees, then they shall unanimously name an independent third party (the "Umpire") to resolve the Dispute.

10.3.8.3.2 Qualifications of Umpire

The Umpire shall be a lawyer with no less than five (5) years of experience in the area of procurement law or a person of such other qualifications mutually agreeable to the Parties. Without limiting the generality of the foregoing the Umpire shall be at arm's length from the parties to the Dispute and shall not be a member of the audit or legal firm or firms who advise any Party to the Dispute, nor shall the Umpire be a person who otherwise is retained by such parties regularly. Should the Nominees be unable to agree on the name of the Umpire within thirty (30) days of the termination of the Discussion Period, then any Party to the Dispute will be free to request that the Arbitration and Mediation Institute of Canada (Toronto) ("AMIC") do so on behalf of the Nominees and shall provide notice to the other Nominee that it is taking such action.

10.3.8.3.3 Submissions

Within thirty (30) days of the appointment of the Umpire (the **"Submission Period"**), each Party to the Dispute shall deliver to the Umpire (and to the other Party), copies of a submission which

states, in sufficient detail, the Dispute to be settled and the facts and arguments upon which the Party intends to rely and, if relevant, the relief it claims is fair and equitable as it relates to those areas in Dispute. All submissions shall be made on a without prejudice basis.

10.3.8.3.4 Hearings at Discretion of Umpire

The Umpire shall not be obliged to hear oral evidence or to hold a hearing if, in his or her discretion, he or she considers it to be unnecessary but he or she may make such decision only after receiving submissions on the question or upon the expiry of the Submission Period.

10.3.8.3.5 Decision

Within thirty (30) days after the Submission Period, the Umpire will deliver to each Party his or her decision in writing (the **"Decision"**), and, unless the Parties otherwise agree, the Umpire's reasons will be set out in his or her Decision. The Umpire will send the Decision to the Parties as soon as practicable after the conclusion of the proceedings. The Decision shall be final and binding on the Parties to the Dispute.

10.3.8.3.6 Enforcement

The Parties to the Dispute consent to the Decision of the Umpire being entered in any court of competent jurisdiction for the purposes of enforcement.

10.3.8.3.7 Costs

The cost and expenses of the Umpire shall be borne equally by the Parties involved in the Dispute. Each party shall bear their own costs for preparing and submitting submissions regardless of the outcome of the decision of the Umpire.

10.3.8.4 CONFIDENTIALITY

10.3.8.4.1 Confidential Information

All meetings and hearings of or by the Nominees and the Umpire shall be in private and any party may be represented by legal counsel. This process and all other matters under this process, including, without limitation, all matters in dispute, all claims, submissions, evidence and findings, and the decision of any Umpire (collectively, the "Confidential Information") shall be kept confidential by the parties, the Nominees and the Umpire, and no Information regarding any of the foregoing will be released to any third party or otherwise made public without the written consent of all parties, except as otherwise contemplated herein and except for such Information if:

a) the Confidential Information is, or becomes, publicly available;
b) the Confidential Information was known to the recipient prior to disclosure to it by the other party or is independently developed by the recipient; or
c) the other party has provided its prior written consent to such disclosure by the recipient; or
d) the Confidential Information is required to be disclosed by the recipient by the order of any Court or tribunal of competent jurisdiction.

10.3.8.4.2 Marking of Confidential Information

Each Party shall use all reasonable efforts to either mark it's Confidential Information "Confidential" or "Proprietary" or ensure that it is accompanied by a notice indicating that such information is confidential. Verbal disclosure by a Party of its Confidential Information shall, if requested by the receiving Party, be followed by a written summary of the conversation marked "Confidential" and be delivered to the receiving Party within thirty (30) days of the conversation.

10.3.8.5 MISCELLANEOUS

10.3.8.5.1 No Impairment of Rights

This process does not limit or impair the rights of any Supplier to seek a review through other review processes or remedies of law through the judicial or other processes.

10.3.8.5.1 Extension of Term of Award

To the extent that the above described dispute resolution process delays the implementation of a contract rightfully awarded to a Supplier, the term of the contract shall be automatically extended by the duration of such delay.

ABOUT MEDEC

MEDEC is the national association representing the medical technology industry in Canada. Our members are committed to providing safe and innovative medical technologies that enhance patient care and advance patient outcomes. The medical technology industry in Canada employs over 35,000 Canadians in close to 1,500 corporate facilities, and has sales of nearly $7 billion per annum. We are committed to ensuring that Canada has a strong and vibrant medical technology industry.

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