

THE ONTARIO-QUEBEC PROCUREMENT AGREEMENT AND THE BROADER PUBLIC SECTOR

Frequently Asked Questions

These questions and answers were developed based on questions raised by Broader Public Sector (BPS) organizations at a series of information sessions on the Ontario-Quebec Procurement Agreement. This list will be updated periodically as new questions arise, or as clarification of the answers is necessary. For further information on the Agreement and how it applies to your organization, contact one of the following provincial ministries:

Ministry of Economic Development, (416) 325-6933 (general questions)
Trade and Tourism

Management Board Secretariat (416) 326-3813 (electronic advertising, general questions)

Ministry of Education and Training (416) 325-4015 (colleges & universities construction)
(416) 325-2015 (school boards construction)
(416) 326-5737 (goods and services)

Ministry of Municipal Affairs and Housing (416) 327-0017 (Central Region)
(613) 548-4304 (Eastern Region)
(519) 673-1611 (Southwestern Region)
(705) 560-0120 (Northeastern Region)
(807) 475-1651 (Northwestern Region)

Ministry of Health (416) 327-7078 (construction)
(416) 327-4531 (goods and services)

General:

Q. When does the Agreement take effect for the Broader Public Sector (BPS)?

A. The construction requirements of the Agreement took effect on July 1, 1995. The requirements for goods and services procurement will take effect May 1, 1997. For goods and services, there is an implementation phase-in period. BPS entities will have until January 1, 1998 to be using electronic advertising for all covered purchases.

Q. How has the province sought to ensure the Agreement does not create administrative burdens for BPS entities?

A. In negotiating the Agreement, the province was concerned that the Agreement not create undue administrative burdens for BPS entities. The Ministry of Economic Development, Trade and Tourism consulted widely with BPS organizations, and sought advice on what elements of an agreement would not create burdens. The Agreement achieves this in

several ways. The thresholds for BPS entities have been set at \$100,000 for goods, services and construction. This will limit the number of contracts that will be affected by the Agreement. As well, the province will ensure that an electronic advertising system is available to BPS entities to use. This system should reduce the costs of advertising for BPS entities. As well, only modest reporting is required for construction procurement, and when construction contracts are advertised electronically, no reporting is necessary.

Q. What if an entity does not comply with the Agreement? What penalties are associated with the Agreement?

A. For construction, compliance with the Agreement is a condition of provincial capital funding. If an entity does not comply with the Agreement, the entity may also face complaints from Quebec suppliers and the Quebec government about its practices. The Agreement provides a dispute resolution process for suppliers that feel they have not been treated fairly.

Q. What regulatory or legislative changes will the province make to implement the Agreement?

A. This Agreement is a political accord. The Ontario government has changed its practices and procedures to live up to its commitments in the Agreement. At this point, the province will not be passing legislation to implement the Agreement in the BPS. The Ministry of Municipal Affairs and Housing passed a regulation under the Municipal Support Grants Act requiring compliance with the Agreement. The Agreement will also be implemented through conditions attached to provincial capital funding. Ministries will monitor implementation of the Agreement, and will take actions they consider appropriate if concerns arise. Implementation will rely on the good will of BPS entities. The Agreement makes good business sense and it provides tools for BPS entities that could increase their purchasing efficiency.

Q. Are the requirements of provincial grant programs consistent with the Agreement?

A. Provincial grant programs are consistent with the Agreement. If an entity is aware of discrepancies between the Agreement and a particular grant program, inform the Ministry responsible for the program.

Q. What if BPS entities discover problems with the Agreement, or unforeseen situations that the Agreement does not address?

A. Ontario and Quebec have agreed to review the operation of the Agreement on a regular basis. If BPS entities find inconsistencies in the Agreement, or problems with its implementation, they should inform the province of these issues so that they can be raised with Quebec.

Q. When an agreement is reached to cover Broader Public Sector procurement under the Agreement on Internal Trade, will the Ontario-Quebec Procurement Agreement still exist?

A. Both Agreements will exist. If an entity complies with the Ontario-Quebec Procurement Agreement, they should not face additional requirements under the AIT. We expect the all-province agreement to be consistent with the Ontario-Quebec Procurement Agreement.

Q. If there is a Quebec supplier that consistently fails to meet its contractual commitments, can that supplier be banned from working in Ontario?

A. The purpose of the Agreement is to open competition to qualified suppliers. The Agreement does not preclude BPS entities from implementing a vendor performance policy and considering the work record of a supplier in evaluating bids. References from other organizations may indicate that a supplier, whether from Quebec or Ontario, is not reliable, and this might disqualify them from a specific competition. However, no supplier would be banned from trying to work in Ontario.

Procedures:

Q. Will BPS entities have to advertise in both English and French?

A. Broader Public Sector entities may continue to follow their existing practices regarding the language of advertising, subject to any French language service requirements. There is no requirement to translate advertisements and bid documents into French if English is the entity's language of operation.

Q. The agreement requires BPS entities to advertise opportunities for 15 days - are those calendar days or business days?

A. Calendar days.

Q. If a municipality's purchasing by-law requires tenders to be advertised for a minimum of seven days, should it be amended?

A. BPS entities should amend their purchasing by-laws and procedures to be consistent with the Agreement.

Q. Does the Agreement require BPS entities to have public opening of tenders?

A. No. However, after the awarding of a contract, bidders are entitled to information upon request. If a bidder asks for information, they should be given the name of the winning bidder and the total bid price, along with the scoring of the winning bidder and their bid.

Bidders are also entitled to receive the names and addresses of all suppliers that bid on the contract.

Q. Will BPS entities still be able to require a bid security deposit or charge a fee for bid documents?

A. Yes. As long as the deposit or fee is administered in a non-discriminatory way. That is, a Quebec supplier should be subject to the same requirements as an Ontario supplier.

Q. What if a bidder submits a question on a tender? How would additional information get out to all suppliers?

A. If there are any amendments or clarifications made to tender documents, all suppliers that received the original documents should receive notice of the changes. Ontario and Quebec have agreed that the time of the issuance of an addendum to a tender call must allow seven days before the tender's closing for a supplier to respond. If the addendum is issued within seven days of the tender's closing, the closing date should be extended accordingly.

Q. What process is required to prequalify suppliers? Are BPS entities still allowed to use their existing processes?

A. BPS entities may still prequalify suppliers, as long as the process followed is open and the evaluation of suppliers is non-discriminatory. The entity may establish its own criteria for determining which suppliers are qualified to provide a good or service. The prequalification process should be advertised in accordance with the Agreement. If an entity is prequalifying suppliers for a specific procurement, the RFQ has to be advertised each time. If an entity is maintaining a list of qualified suppliers for construction, the entity must advertise annually the opportunity for a supplier to get on the list.

Q. What information do BPS entities have to provide to bidders about the award of a contract?

A. If bidders request it, they are entitled to receive the following information after the award of a contract: the name and address of the successful bidder; the successful total bid price; the names and addresses of the other bidders; and the scoring of the successful bid and their bid.

Q. Does this Agreement override the requirements of freedom of information and protection of privacy legislation?

A. This Agreement does not override the requirements of such legislation. A BPS entity will not be required to give out information that would contravene legislation. However, the

type of information that entities are required to provide is not commercially sensitive and should not present a problem.

Q. Will BPS entities have to provide information to all bidders about the awarding of a contract?

A. The Agreement only requires BPS entities to provide bidders with information upon request.

Q. If a bidder only asks for some of the information they are entitled to receive about a contract award, is an entity required to give them all the information?

A. The Agreement outlines what information should be available to a supplier upon request. There is nothing to force an entity to give a bidder more information than is requested. However, in keeping with the spirit of openness and non-discrimination, BPS entities should consider giving the additional information to a bidder. This information is meant to help the bidder understand how to improve future bids. If an entity refuses to disclose any of the information which the supplier is entitled to receive, this could be grounds for a complaint under the Agreement.

Q. Would it be considered discrimination to require suppliers to follow a fair wage policy, or some similar requirement?

A. No. The Agreement allows purchasers to limit access to procurement opportunities to suppliers that comply with such programs of good corporate conduct. However, these requirements must be specified in advance and all suppliers must be treated in the same manner.

Thresholds and Coverage:

Q. What are the thresholds in the Agreement?

A. The thresholds for goods, services and construction procurement by Broader Public Sector entities are all \$100,000.

Q. Do the thresholds apply to the annual value of a contract, or to its total value? If an entity has a three year contract over \$100,000, but in each of the three years they spend less than \$100,000, does the Agreement apply?

A. The Agreement would apply in this situation. The key is the total value of the contract that will be advertised, not the amounts that will be paid each year. If it is advertised as one contract that will last three years, and the estimated value exceeds the threshold, BPS entities should follow the Agreement.

Q. Are local preferences allowed below \$100,000?

A. The Procurement Agreement requires that contracts above \$100,000 be awarded in a non-discriminatory manner. That means there should be no local preferences. For goods and services, the Agreement states that Broader Public Sector entities should make best efforts to follow non-discriminatory practices for purchases below the threshold.

Q. The City of Montreal has a local preference policy for procurement below \$100,000. What will the provincial government do about this?

A. The requirement to maintain the spirit of the Agreement below the \$100,000 threshold does not take effect until May 1, 1997. The Ontario government expects that Quebec will inform its Broader Public Sector entities about the requirements of the Agreement.

Q. In some cases, it is difficult to get an accurate estimate of a project's total cost. How should a BPS entity deal with a contract estimated at \$90,000 that may end up exceeding the \$100,000 threshold?

A. Where the estimated cost of a project or purchase is just under the threshold, and there is a possibility that the contract might exceed the threshold, Broader Public Sector entities should consider following the Agreement. The Agreement applies to procurement over the thresholds. However, below the thresholds, Broader Public Sector entities are encouraged to operate within the spirit of the Agreement.

Q. What happens if a BPS entity estimates a project well below the threshold, but when the full costs come in, the project exceeds the threshold?

A. If an entity can demonstrate that the project estimate was below the threshold, they should not face any problems under the Agreement. Regardless of the Agreement's requirements, however, if bids on a project come in significantly over what the entity has estimated, the entity may want to review the estimate and the project specifications. In some cases, it might be advisable to re-tender the project. If the entity chooses to do this, they should comply with the Agreement.

Q. Some entities will advertise for a specific good or service, and the contract may be awarded to several suppliers. The total value may exceed the threshold, but the values of the individual contracts could be under the threshold. Would this be covered by the Agreement?

A. If the opportunity is advertised or tendered as a single opportunity, and its total value exceeds \$100,000, the Agreement would apply.

Q. Do the Agreement's thresholds apply to the value of a project or purchase net of taxes?

A. The thresholds apply to the value net of taxes.

Q. What if an entity has a one year contract with a value below the thresholds, but with the possibility of two one year extensions that would take the total value above the thresholds - would this be covered?

A. If a contract will be structured to allow for extensions and it is clear that this would take the total value of the contract over the threshold, the entity should follow the Agreement. Existing multi-year goods and services contracts would not be affected.

Q. Would an entity have to follow the Agreement for reaching a standing agreement with a supplier where no specific volumes or amounts are involved?

A. If at all possible, the entity should try to estimate the value of the standing agreement. If the estimated value exceeds the threshold, the entity should follow the requirements of the Agreement. If it is not possible to estimate the value, the Agreement does require entities to respect the spirit of the Agreement below the thresholds.

Buying Groups:

Q. Are co-operative buying groups covered?

A. Yes. The Agreement requires Broader Public Sector entities to ensure that any buying groups to which they belong, follow the requirements of the Agreement.

Q. In some cases, a buying group includes BPS entities, as well as other organizations that are not covered by the Agreement. How would the Agreement apply to these groups? Would the uncovered organization have to comply with the Agreement?

A. Regardless of which member of the group handles the advertising for a particular group purchase, if the value of the purchase exceeds the thresholds of the Agreement, covered entities are to ensure that the group follows the requirements of the Agreement.

Electronic Advertising:

Q. When will details be available about the electronic advertising system?

A. An announcement will be made in the fall of 1996 about the successful bidder in the competition to establish the new national electronic advertising system. Once that

announcement has been made, more information will be available to the BPS about the system's features and services.

Q. What will be the cost of electronic advertising to BPS entities?

A. It is expected that there will be minimal costs for BPS entities. In fact, savings may accrue from reduced advertising and document distribution expenses.

Q. What if an entity or supplier does not have the technology to access the electronic advertising system?

A. The system provider is expected to offer different ways for entities and suppliers to access the system if they do not have the technology. For example, entities may be able to fax their advertisements to the system provider for electronic posting.

Q. Will the electronic advertising system involve document distribution or simply advertising opportunities?

A. BPS entities will only be required to advertise electronically. They may still wish to handle document distribution. However, the electronic advertising system will provide a range of services, and entities may choose to have the system provider handle document distribution as well.

Q. Will BPS entities only be allowed to use electronic advertising?

A. No. For the construction requirements, BPS entities may use electronic advertising, a daily newspaper or source lists. For goods and services, BPS entities will be required to use electronic advertising. However, entities may choose to use other methods of advertising in addition to electronic advertising.

Q. Will advertising on the internet be acceptable?

A. Yes, providing it meets the tests of equal accessibility for suppliers in both provinces. A mandatory requirement of the RFP for the new system was that the contractor provide for links to the internet from the system.

Q. In some cases it would be very difficult to transmit tender documents electronically (e.g. blueprints). Will BPS entities still be able to distribute their own documents?

A. BPS entities will still be able to distribute their own tender documents. However, new technologies may make it possible to distribute documents such as blueprints electronically.

Q. Will BPS entities be required to use the provincial electronic advertising system? Would another system be acceptable?

A. The provincial government is working to ensure an electronic advertising system is in place that would meet the needs of BPS entities. This system should provide BPS entities with a range of services, and it will satisfy the requirements of the Ontario-Quebec Procurement Agreement. It will also provide suppliers with one-window access to a large number of contract opportunities. However, the province will not force BPS entities to use this system. If another system is available that would provide a similar service to both BPS entities and suppliers, and which is equally accessible to suppliers of both provinces, it would be acceptable. It is likely, however, that existing systems will be able to connect to the service provider offered by the provinces.

Q. Doesn't electronic advertising discriminate against those suppliers that do not have the right technology? How will suppliers have access to information about advertised opportunities?

A. More and more, we are moving toward electronic commerce and an increasing number of suppliers have the necessary technical capabilities for this. However, the electronic advertising system provider will have to recognize that not all suppliers have the same technical capabilities. There will be a range of ways in which suppliers can access the information on the electronic advertising system to accommodate their capabilities.

Construction:

Q. Are there limits on how long an entity can maintain the same source lists?

A. If a BPS entity chooses to use source lists, they must advertise the opportunity for suppliers to be put on the lists annually.

Q. Can an entity limit the number of suppliers on a source list?

A. The Agreement does not allow a BPS entity to set an arbitrary limit on the size of a source list. However, entities are free to limit the number of suppliers through a prequalification process. If an entity uses source lists, qualification requirements cannot be discriminatory.

Q. Many construction contracts require addenda. In these cases, what time is required to be given to suppliers to address the changes?

A. Ontario and Quebec have agreed that the time of the issuance of an addendum to a tender call must allow seven days before the tender's closing for a supplier to respond. If the addendum is issued within seven days of the tender's closing, the closing date should be extended accordingly.

Q. Would it be considered as bias to require firms to prove they have met Ontario's legal and regulatory requirements (e.g. registered with the Workers Compensation Board)?

A. Quebec contractors will have to conform to Ontario's laws and regulations when they work in Ontario. It would not be considered bias to require firms to prove they will comply with Ontario law.

Q. When BPS entities require contractors to be bonded, they usually ask for local bonding. Would this be considered a local presence requirement?

A. Yes.

Q. What daily newspapers are acceptable for advertising construction contracts?

A. BPS entities may choose to advertise in any daily newspaper. The paper does not need to be a national paper, but could be any local daily paper or the Daily Commercial News. The only requirement is that entities must designate a specific newspaper they will use for advertising, and inform their Ministry contact of their choice.

Q. Isn't advertising in a daily newspaper still discriminatory? Does it really increase suppliers' access?

A. BPS entities may choose to advertise in a daily newspaper for their construction procurement. Entities will be asked to designate which paper they will use, and inform their Ministries of this. This will make it easier for suppliers to find opportunities in particular areas. Certainly, newspaper advertising is not as easily accessible as electronic advertising. For this reason, both provinces will be encouraging their BPS entities to use electronic advertising in order to achieve greater transparency and openness.

Q. Who do we report to? Are there standard formats for reporting?

A. BPS entities will report to the ministries they deal with on a regular basis - Municipal Affairs and Housing, Education and Training, and Health. These ministries will inform BPS entities of the format for reporting. Reporting will likely be handled within the annual financial reports made to these ministries. BPS entities will be required to provide the following information: the total number and total value of construction contracts over the threshold; the total value of all construction activity.

Q. How would the Agreement apply to a design/build contract with an engineer or architect?

A. Professional engineering and architectural consulting services are excluded from the Agreement. However, the other elements of the project would be subject to the Agreement. If an entity hires a professional services firm as a construction project manager, this would be subject to the Agreement.

Q. If an entity hires a contractor to handle a large construction project, and that contractor hires subcontractors, how would the Agreement apply?

A. The Agreement does not allow BPS entities to discriminate in the selection of subcontractors or to direct the general contractor to discriminate against certain subcontractors based on their province of origin. Where the contractor is responsible for hiring the subcontractors with no involvement by the BPS entity, the Agreement would not apply. However, the entity might encourage the general contractor to maintain the spirit of the Agreement.

Q. In some situations, developers construct roads and sewers and the municipality assumes them. How would this be covered by the Agreement?

A. The Agreement applies to contracts initiated by BPS entities. It does not apply to private developers.

Goods and Services:

Q. Can a BPS entity specify requirements for the type of servicing they would require on a particular system or piece of equipment?

A. The Agreement allows an entity to establish whatever specifications or requirements are necessary when they purchase goods or services, as long as the requirements are clear and non-discriminatory. In some cases, servicing within a certain time period is necessary in order for an entity to continue to perform a function. Requiring a supplier to provide service within a specified time period is a reasonable requirement.

Q. If BPS entities use the provincial standing agreements to obtain goods or services over the thresholds, do they have to follow the requirements of the agreement?

A. If an entity accesses one of the provincial standing agreements for a particular good or service, no further procurement activity by the BPS entity is necessary. The Province is responsible for ensuring that standing agreements are tendered according to the rules of the Agreement.

Q. Would it be discriminatory to require a supplier to keep a local inventory?

A. If having a local inventory is necessary in order to ensure the purchaser can receive the product or service within a specified time period, this may be a reasonable requirement. However, it might be possible for a supplier to meet the specified time period without keeping a local inventory in some cases. If this is possible, requiring a local inventory may be discriminatory, but specifying time requirements for receiving new stock is not. The key is whether there is a good business rationale for the requirement.

Q. Quebec does not use the CSA system. Would it be discriminatory to require CSA approval for covered products?

A. No.

Q. Would the purchase of dairy products be covered by the Agreement?

A. The Agreement does not apply to the purchase of agricultural goods subject to provincial supply management.

Q. Are purchases of utilities (gas, electricity, water) covered by the Agreement?

A. The Agreement does not apply to the purchase of goods or services provided by a statutory monopoly. In the case of electricity, Ontario Hydro is a statutory monopoly, so electricity would not be covered.

Q. Recently, municipalities were required to purchase their transit buses from Orion, an Ontario-based company. How will the Agreement apply to municipal bus purchases?

A. The Ministry of Transportation has informed municipalities asking about assistance that they must demonstrate competitive tendering for bus contracts. Along with other goods, bus purchases will be covered by this Agreement.

Q. Can a BPS entity still maintain standing agreements or orders with a supplier?

A. Yes. RFPs for new standing agreements which exceed the thresholds must follow the requirements of the Agreement.

Q. The Agreement does not apply to the purchase of goods for resale (e.g. university bookstore, hospital cafeteria). What if only a portion of the goods purchased are for resale?

A. It depends on what portion of the goods are for resale. If the value of the portion of the goods that the entity will use itself exceeds the threshold, the requirements of the Agreement should be followed.

Q. What are the reporting requirements for goods and services?

A. There are no reporting requirements for entities related to goods and services.

Dispute Settlement:

Q. What happens in a dispute under the Agreement? Would it affect the awarding of a contract?

A. The Agreement encourages the settlement of disputes at the local level to the greatest extent possible. Whether a dispute would affect the awarding of the contract depends on the BPS entity's bid protest procedures.

If a Quebec supplier believes the BPS entity has not addressed his complaint and has not lived up to the Agreement, that supplier may ask the Quebec government to try to resolve the dispute. Discussions among the two provincial governments and the entity involved would follow, in an effort to resolve the complaint. If no resolution is possible, the provinces may appoint a panel to review the issue. A challenge to the process through the dispute settlement mechanism from an out of province supplier does not delay or stop the awarding of the contract.

Q. What is disputable under the Agreement? What are the limits on suppliers' complaints?

A. The dispute settlement process will look at whether a BPS entity's procurement in question was carried out in accordance with the Agreement. The dispute settlement process outlined in the Agreement only applies to purchases over the thresholds - that is, greater than \$100,000. Suppliers may raise a complaint about their treatment by an entity. If they think an entity has discriminated against them, they may have grounds for a complaint under the Agreement. A supplier may also complain if the entity did not follow procedures required by the Agreement.

Q. What is the penalty if a contract reaches a dispute panel? Could the awarding of the contract be overturned?

A. A supplier's first recourse is to the dispute settlement process of the purchasing organization. If the supplier is not satisfied with the result of this process and still believes they have not been treated fairly, they may ask the provincial government for assistance. If the two provinces decide to appoint a panel, the panel would focus on whether or not the entity's procurement in question was carried out in accordance with the Agreement. If the panel finds that the entity's procedures are inconsistent with the Agreement, it may recommend changes. This will bring some political pressure onto the entity to change its practices in future procurement. However, a panel report or recommendation cannot delay or overturn the awarding of a contract.

Q. What is the time frame for a complaint? Can a supplier come along several months or years after a contract award and raise a complaint?

A. The timeframe for a complaint depends to a certain extent on the dispute settlement process of the entity involved. An entity may choose to set a limit on when it will consider complaints about specific contracts. However, the entity's policies must be non-discriminatory in the treatment of Quebec suppliers, and provide a reasonable time for raising complaints. It could be possible for a supplier to complain to the province about the entity's process for hearing complaints. Any complaints should be made within a reasonable time following a contract decision.

Q. Could this Agreement be used in court?

A. The Ontario-Quebec Procurement Agreement is a political accord. It is not law. Therefore, contravention of the Agreement would not be grounds for court action. However, the Agreement might be considered by the courts in dealing with broader legal issues related to a particular contract dispute.