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# Coffee Talk

## Health Industry Seminar Series



Build, Renovate, Expand  
Risk Management in Construction & Procurement

**Karima Kanani**

[kkanani@millerthomson.com](mailto:kkanani@millerthomson.com)

416.595.7908

**Rosa Mauro**

[rmauro@millerthomson.com](mailto:rmauro@millerthomson.com)

416.597.4389

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# Case Example

- You intend to engage in construction to expand facilities
- Project is being funded by MOHLTC
- You retain a consultant to prepare and issue the tender documents to secure a contractor
- You engage in a competitive procurement process
- Tender documents are issued with CCDC contract form and Supplementary Conditions
- You engage legal to prepare the contract for signature
- Legal advises that the terms issued with the tender contain provisions contrary to your interest and fail to address key funding agreement requirements
- no contract amendments can be made without agreement of contractor

**CAN THIS BE PREVENTED?**



# Agenda

1. Procurement Rules and Process
2. Roles of Key Stakeholders
3. Preparing and Administering Key Procurement Documents
4. Funding Implications

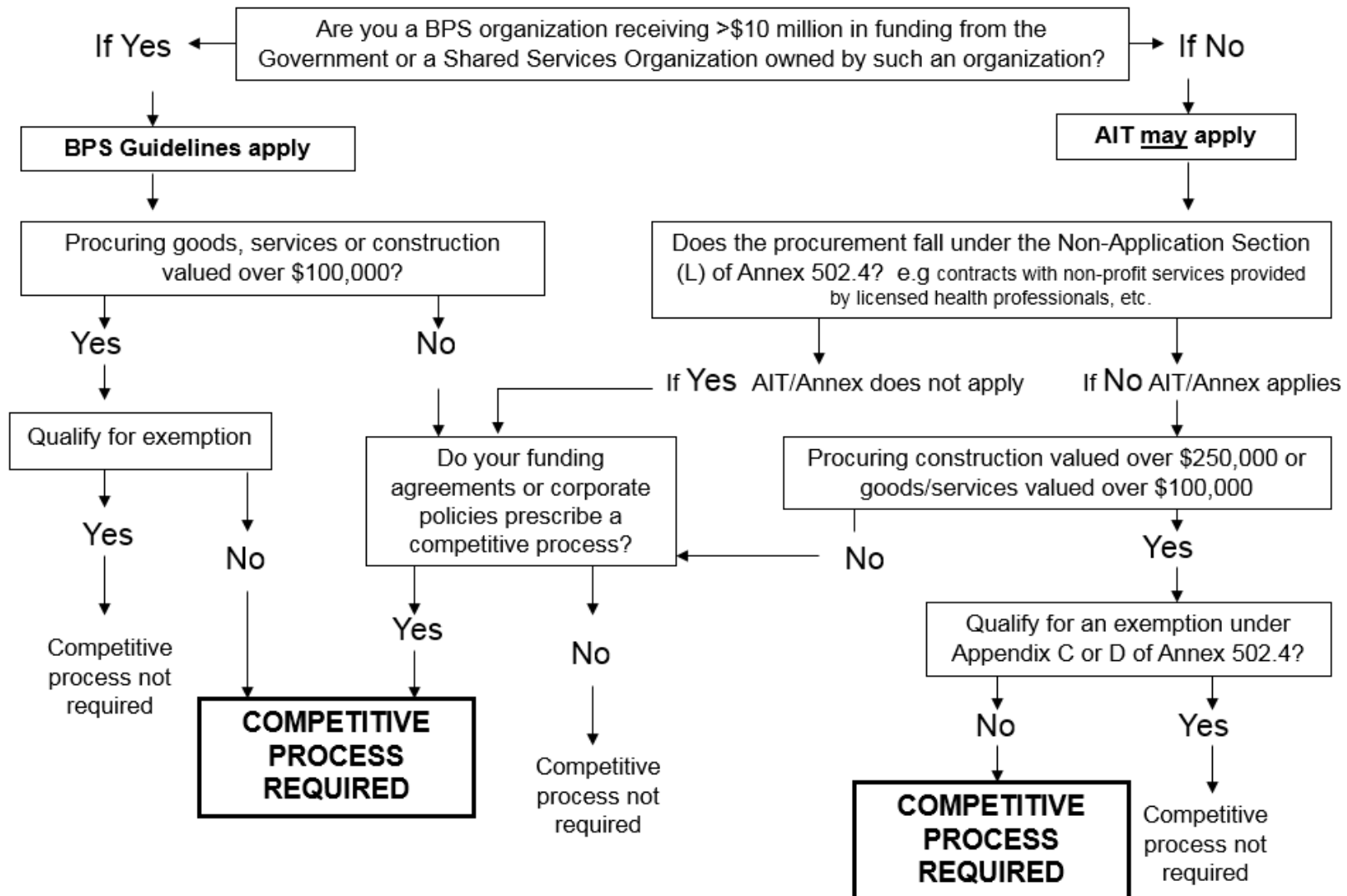


# The Procurement Rules

- Under AIT competitive procurement where construction > \$250, 000
- Under BPS competitive procurement where construction > \$100, 000
- Funding agreements and corporate policies may have more stringent competitive procurement requirements



## IS A COMPETITIVE PROCUREMENT PROCESS REQUIRED?





# The Procurement Process

- At its most basic form, a procurement process is a process by which one party (usually an Owner) obtains competitive proposals/bids for particular mandate (i.e. a project or service) in order to select the best vendor.
- However, the procurement process requires a lot of planning and thought in order to manage internal and external risk.



# Overview of Procurement Process





# BPS Procurement Directive

- How does BPSAA work?
  - Defines those covered (i.e. Hospitals)
  - Provides for issuance of “Directives”
- BPS Procurement Directive
  - Governs the procurement of goods and services
  - Applies to all types of procurements:
    - Tenders, bids, proposals, quotes
    - RFPs, RFTs, RFQs, RFSQs





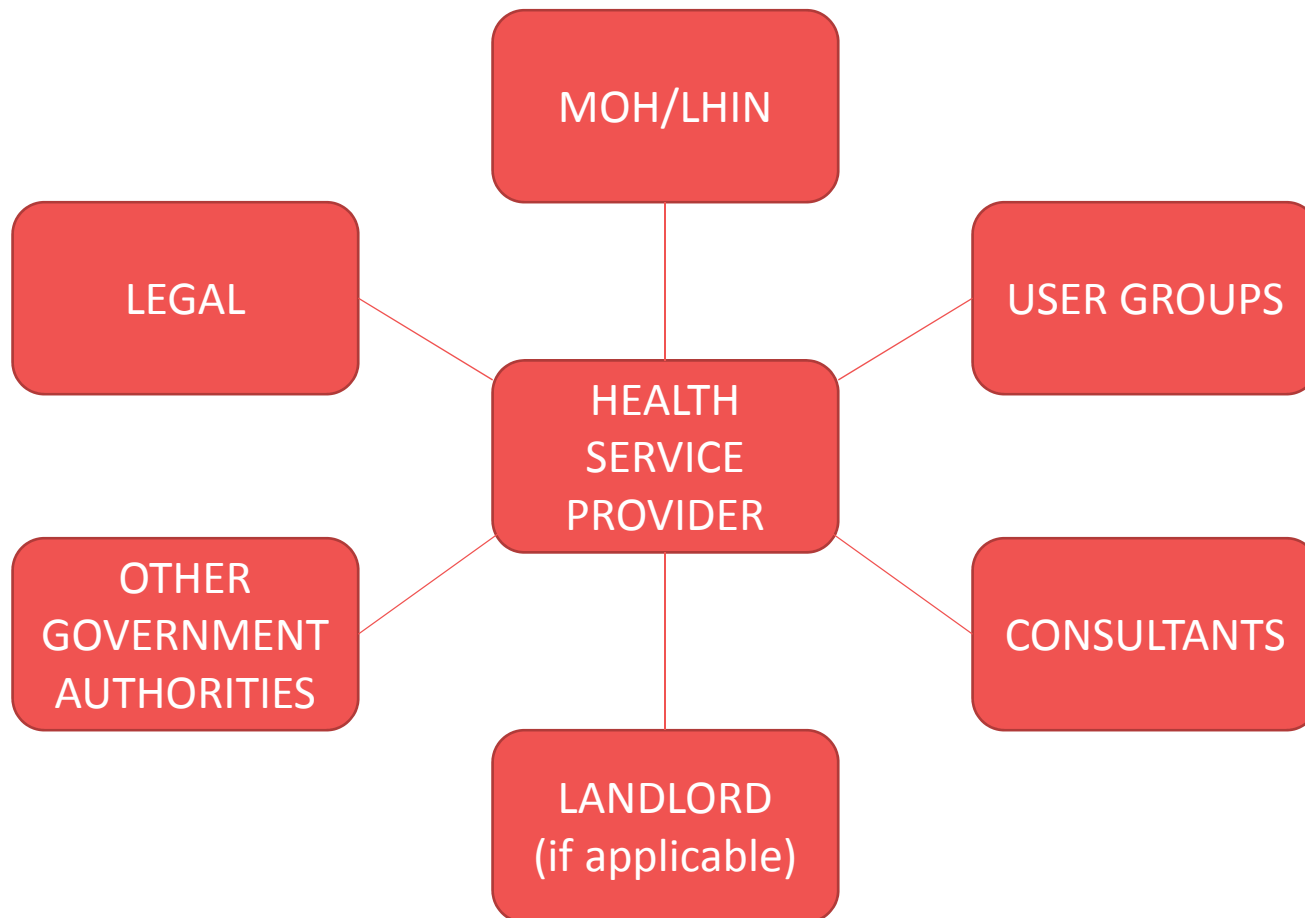
# BPS Procurement Directive

- 2 Major components:
  - Adopt “Supply Chain Code of Ethics”
  - Follow 25 Mandatory Requirements
    - Competitive procurement process requirements
    - Competitive procurement document requirements
    - Contract requirements

**MUST ENSURE COMPLIANCE**



# ROLES OF KEY STAKEHOLDERS





# Stakeholders

- Health Service Provider
  - Governance – Board risk management/financial oversight and approval
  - Management – development/procurement office implements the project and seeks Board approval at governance decision points



# Stakeholders

- MOH/LHIN
  - MOH capital planning approvals for owns fund and ministry-funded projects
  - Capital funding agreements
  - Failure to comply with competitive procurement requirements constitute breach of funding agreements with sanctions



# Stakeholders

- User Groups
  - Needs assessment
  - Fair, transparent, efficient procurement



# Stakeholders

- Consultants
  - Consultants are technical experts
  - Prepare specifications and drawings and address technical/design risks
  - Limits of liability for consultant work
  - “Crossing the line”

# Stakeholders

- Legal
  - Advisors on legal compliance with procurement requirements and laws
  - Draft and negotiate legally enforceable binding contracts
  - Support due diligence and enterprise risk assessments of procurement process issues and contract terms



# Stakeholders

- Other Government Authorities
  - Examples
    - Municipal zoning and subdivision
    - Environmental record of site condition





# Stakeholders

- Landlord (if applicable)
  - Lease terms/consents required for land use and development



# Procurement Planning

- Budget/Funding Arrangement
- Approvals
- Scope of Work (consulting vs. non-consulting)
- Type of Procurement (i.e. RFQ, RFQu, RFP, RFT, EOI)
- Pricing Structure
- Form of Contract (i.e. CCDC, OAA)

**Risk assessment in all stages of  
procurement planning**



# Procurement Planning - Process

- RFP
  - Flexible
  - Unenforceable
  - Issuer/seller can walk
- BID
  - Structured
  - Enforceable
  - Issuer/seller obligations



# Procurement Planning - Process

- Make a conscious decision between an RFP and a BID
- If intention is a non-binding process then avoid language suggesting irrevocability and use of the words “bid”, “tender”, “bidder”
- Either way state your intentions and be clear



# Procurement Planning - Documents

- Procurement documents combination of:
  - technical documents (e.g. specifications and drawings); and
  - legal documents (e.g. instructions to bidders, bid form, contract)



# Preparing and Administering Key Procurement Documents

- Key procurement documents include:
  - Instructions to Bidders
  - Bid Form/Price Form
  - Form of Contract



# Instructions to Bidders

- Content is determined by type of procurement elected
- was there a pre-qualification process? if not, do you include technical and financial submission requirements.
- Importance of assessing technical capabilities of bidders – low price is not always best



## Bid Form/Price Form

- Price Form/Financial Submission should be consistent with pricing language in the form of contract
- consider cash allowances/contingencies for unknowns
- cost certainty – funding agreement may not permit or account for cost overruns





# Form of Contract

- Industry standard forms such as CCDC documents
- Designed to be contractor friendly, and don't address all project-specific matters
- Requires modification via development of supplementary conditions
- Different forms of supplementary conditions available, developed by contractor industry associations
- Supplementary conditions can include any additional or amended terms desired by owner



# Form of Contract

- BPS Directive Requirements:
  - Mandatory Requirement #15: Executing the Contract
  - Mandatory Requirement #16: Establishing the Contract
  - Mandatory Requirement #17: Termination Clauses
  - Mandatory Requirement #22: Contract Management



# Form of Contract

- The contract must be finalized using the form of agreement that was released with the procurement documents
- Very little room to make unilateral changes to contract terms after successful bidder identified



# Funding Implications

- Funding agreement imposes obligations that need to be flowed through to the construction contract in order to comply
- Failure to do so could result in breach of the funding agreement resulting in potential for significant financial/legal liability



# Funding Implications

- Examples:
  - MOH audit rights
  - MOH consent/approval requirements
  - MOH right to terminate
  - Insurance requirements



# Summary

- Procurement project planning is key to effective risk management/mitigation
- Consider at the outset the roles and appropriate involvement of stakeholders in the procurement process
- Ensure legal compliance of your process and secure legal advice on contract terms early and before issuing procurement documents
- Be proactive and deliberate in how you run your procurement process; pitfalls can be avoided



## Questions?

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[kkanani@millerthomson.com](mailto:kkanani@millerthomson.com)

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