FTR Now

Government Introduces Public Sector Accountability Legislation

Date: November 5, 2010

On October 20, 2010, the Ontario government introduced Bill 122, the *Public Sector Accountability Act, 2010.* The basic purpose of the new *Act* is to regulate the spending of public funds by the broader public sector in a variety of areas, including the use of lobbyists, expense accounts and procurement. In addition, the Bill would amend the *Freedom of Information and Protection of Privacy Act* to extend its coverage to hospitals (this aspect of the Bill will be addressed in a companion *FTR Now,* "Government to bring Hospitals under the *Freedom of Information and Protection of Privacy Act*").

In this *FTR Now,* we will review the proposed spending rules, and how they might affect your organization.

APPLICATION OF THE *ACT*

The *Act* defines "broader public sector organizations" as organizations that fall within one of two categories: (1) designated broader public sector organizations; and (2) publicly funded organizations.

Starting with the second category, "publicly funded organizations" are those which received public funds from the government in the previous fiscal year. "Public funds" focus on funding that is received by way of grants, transfer payments, taxes (for school boards) or other funding arrangements. The concept does not include money paid for goods and services, money paid under a fee for service arrangement or money provided by way of loan or loan guarantee.

"Designated public sector organizations" include hospitals, school boards, universities, children's aid societies, community care access corporations, certain corporations controlled by designated public sector organizations, publicly funded organizations that receive $10 million or more in funding, and prescribed organizations.

In addition to the broader public sector, the *Act* would apply to government agencies (which would include colleges) and certain government-owned corporations, such as Ontario Power Generation and Hydro One.

Key exclusions from the application of the *Act* include municipalities, local boards as defined in the *Municipal Act and the City of Toronto Act,* boards of health, for-profit organizations (subject to, as yet, unpublished regulations), and long-term care homes.

LOBBYISTS

Lobbyists are individuals engaged by organizations to lobby the government on the organization's behalf. The *Act* would prohibit a variety of organizations from using public funds to pay for the services of lobbyists, unless the lobbyist is employed in-house. These include government agencies, designated broader public sector organizations, Hydro One, Ontario Power Generation, Ontario Power Authority and the Independent Electricity System Operator.

In addition, all of these organizations, except for designated broader public sector organizations, would also be prohibited from paying for lobbyists from revenues generated by the organization.

Of note, the *Act* would terminate agreements between the affected organizations and lobbyists 30 days after these provisions of the *Act* come into force, if the lobbyists' services are being paid for from public funds or other prohibited revenues. The *Act* would also place limits on what services the lobbyist could be paid for during this 30-day period.

CONSULTANT REPORTING

Hospitals and local health integration networks would have new reporting requirements imposed on their use of consultants. The Minister of Health and Long-Term Care would be given the authority to issue directives as to the information that is to be included in the reports, to whom the reports are to be submitted, and the form, manner and timing of the reports.

The *Act* would give the Lieutenant Governor in Council the authority to establish, by regulation, similar rules for other broader public sector organizations.

EXPENSE CLAIM REPORTING

Hospitals and local health integration networks would also have new posting obligations with respect to the posting of expense claim information on their public websites, in accordance with directives issued by the Minister of Health and Long-Term Care.

The directives would designate the individuals whose expense claim information is to be posted (including senior managers and board members), specify which information is required to be posted and in what form and manner, indicate the timing and frequency of the posting requirements, and specify the duration of the posting requirements.

The *Act* would give the Lieutenant Governor in Council the authority to establish, by regulation, similar rules for other broader public sector organizations.

EXPENSE CLAIMS – ALLOWABLE EXPENSES

The *Act* would give Management Board of Cabinet the authority to issue directives establishing rules as to what would constitute an allowable expense for broader public sector organizations. The directives could cover such matters as which employees can claim expenses, what types of expenses are permitted and how much, what documents are required to support a claim, and what procedures must be followed. The *Act* also contemplates the creation of guidelines to assist other broader public sector organizations.

Where an expense claim did not meet the requirements of the rules established under these sections, the designated broader public organization would not be permitted to reimburse it.

PROCUREMENT

The *Act* would also give Management Board of Cabinet the authority to issue directives establishing rules for the procurement of goods and services by designated broader public sector organizations. The *Act* contemplates that the Directives may incorporate existing government policies or directives. In addition, Management Board of Cabinet may create guidelines on procurement for publicly funded organizations.

COMPLIANCE REPORTS

Hospitals and local health integration networks would be required to prepare attestations that would attest to their compliance with the various requirements imposed on them under the *Act.* Again, the *Act* would give the Minister of Health and Long-Term Care the authority to create directives respecting the attestations, including content, form, timing, etc.

The *Act* would permit the Lieutenant Governor in Council to create regulations requiring attestations to be filed by other broader public sector organizations.

ENFORCEMENT

Bill 122 contains a variety of enforcement provisions intended to ensure that the broader public sector complies with the new requirements, and we review some of the key ones here.

The obligations imposed on organizations under the *Act* will be deemed to be part of any funding agreements, service accountability agreements (for hospitals) or accountability agreements (for local health integration networks), and would have to be complied with as part of those agreements.

For senior managers in hospitals and local health integration networks, the obligations placed on their employer organizations by the *Act* would be deemed to be requirements of their employment agreements. Moreover, the board of a hospital or local health integration network could reduce the compensation of a senior management employee who fails to meet the requirements of the *Act.*

The *Act* would also override any contract that was found to be in violation of the *Act*'s requirements, even if the contract was entered into before the *Act* came into force. Furthermore, the *Act* would impose significant restrictions on a person's ability to claim damages, lost profits, lost wages, etc., as a result of the application of the *Act*.

CONCLUDING THOUGHTS

As of the date that this *FTR Now* was published (November 5, 2010), the government has signaled its intent to fast-track Bill 122 through the legislative process by passing a "time allocation" motion, which will have the basic effect of limiting debate on the Bill and ensuring its quick passage. Committee hearings are expected during the week of November 22nd, and the Bill will likely be passed in early December.

The new *Act* will have a significant impact on broader public sector organizations that are subject to its provisions, and will likely require these organizations to undertake a thorough review and revision of policies and practices relating to lobbyists, consultants, procurement and expenses to ensure compliance with the new requirements that are in the works. Moreover, all broader public sector organizations subject to the *Act* will have to carefully review any contractual arrangements with lobbyists to determine if any will be terminated within 30 days of the *Act* coming into force, and what would be the effect of such a termination.

Please feel free to contact your regular Hicks Morley lawyer for further information on the Bill and its impact on your organization.

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