

**North America**

# Canada hits leniency applicants with public tenders ban

Stefano Berra • Thursday, 29 November 2012 (3 hours ago)

Canada's government has barred leniency applicants that are convicted of cartel and bid-rigging violations from participating in future federal public tenders.



Canada's Competition Bureau's leniency policy risks being affected by the public tenders ban

The Canadian Department of Public Works and Government Services passed the measure earlier this month. The department says all companies found guilty of cartel or bid-rigging infringements will be excluded from its tenders, which represent a majority of Canada's C\$16 billion-a-year federal government procurement.

“Given the significance that anti-competitive crimes have on the integrity of the procurement process, participation in programmes such as the Competition Bureau's leniency programme will no longer provide an exemption to the integrity provisions,” says the department.

The Canadian government began excluding cartelists from public procurement contracts in 2010, but until now it exempted companies that participated in the bureau's leniency programme.

Even though the measure does not apply to immunity applicants, which under Canada's Competition Bureau's leniency programme are not required to plead guilty to antitrust violations and are not convicted, the change will affect all leniency applicants that are second and third in line.

The measure is also retroactive. It prevents companies that applied for leniency in past investigations, before the new rules were enacted, from participating in future tenders. This will affect companies such as Corporate Research Group, a real estate manager which took part in the bureau's leniency programme and in July received a C\$125,000 fine after pleading guilty to a criminal charge of bid-rigging for federal government contracts.

The ban now also includes parent companies that control subsidiaries which were found guilty of antitrust violations.

Martin Masse, at McMillan in Ottawa, who specialises on both antitrust and public procurement law, says the need to enhance integrity in public procurement is understandable, but the new policy “may actually hurt enforcement efforts, rather

than help them”.

“This measure will have an impact on the leniency programme of the bureau and its effectiveness,” he says. “The prospect of being effectively debarred from federal public tenders would be a huge disincentive for any company involved in federal contracting to come forward as a leniency applicant. It can potentially undermine the effectiveness of the programme as an enforcement tool.”

Masse adds that applying the measure to companies that secured leniency in the past is particularly worrying.

“These companies pleaded guilty and cooperated based on an understanding that they would be eligible for future federal bids,” he says. “Now they are facing consequences that were not foreseen at the time. You want the leniency programme to be predictable and transparent, but this measure erodes this.”

What’s more, the application of the new policy could produce unexpected anti-competitive effects, Masse adds.

“Now if you are involved in some sort of cartel activity you can use this measure to your advantage in an anti-competitive way,” he says. “You can go in as an immunity applicant and everyone else that you denounce would be effectively removed from the market as a competitor in federal tenders.”

The bureau did not respond to a request for comment by press time.