

# CANADA'S UPDATED INELIGIBILITY AND SUSPENSION POLICY FOR FEDERAL PROCUREMENT REVEALS STRICTER ELIGIBILITY REQUIREMENTS AND MORE FLEXIBLE ENFORCEMENT REGIME

Posted on July 19, 2024

**Categories:** [Insights](#), [Publications](#)

In an effort to strengthen the integrity of its procurement processes, the Government of Canada has implemented a new version of the [Ineligibility and Suspension Policy](#) ("**Policy**"). The new version introduces flexibility to periods of ineligibility, but also broadens disclosure obligations and grounds for debarment of suppliers. In addition, the government has launched a new Office of Supplier Integrity and Compliance to provide ethical oversight of federal procurement and administer the Policy.

Both domestic and international businesses that engage in procurement processes with the Canadian Government will need to assess the implications of the updated Policy and make necessary adjustments to their internal procedures to ensure compliance and maintain their eligibility to participate in federal procurement processes.

The new version of the Policy only applies to contracts entered as of May 31, 2024.

## 1. Background

Since 2016, Public Services and Procurement Canada ("**PSPC**") has maintained, as part of its procurement Integrity Regime, an Ineligibility and Suspension Policy outlining conditions under which a supplier may face disqualification or suspension from bidding on or holding federal government contracts. Suppliers are required to certify that they, or any affiliates, have not been convicted of, or pled guilty to, a broad range of both domestic and foreign offences. Suppliers must also provide written notification concerning any charges, convictions, or other pertinent circumstances related to the Policy concerning the supplier itself, its affiliates, and its primary subcontractors. The consequences for non-compliance with disclosure requirements can be severe, because companies that are convicted or provide false or misleading certification can be debarred. As under the previous Policy, the consequences of debarment are that the supplier will be publicly listed as an ineligible supplier and will generally not be able to bid on or hold federal government contracts for up to 10 years.

## 2. Expanded Grounds for Ineligibility and Suspension

The latest Policy expands the grounds for suspension or debarment of a supplier. A supplier can now be suspended or debarred not only for offences pursuant to the Criminal Code, the Competition Act, Income Tax Act, Excise Tax Act, Corruption of Foreign Public Officials Act, Controlled Drugs and Substances Act, and Lobbying Act, but also for:

- Violating the [Code of Conduct for Procurement](#).
- Receiving an unsatisfactory performance assessment according to PSPC's [Vendor Performance Management Policy](#) that the Registrar of Ineligibility and Suspension (the "Registrar") determines to be "serious, repetitive or otherwise egregious".
- Engaging in prohibited or excessive campaign contributions as outlined in the Canada Elections Act.
- Breaching occupational safety or wage and hour regulations specified in the Canada Labour Code.
- Facing charges, convictions, determinations, or agreed statements of fact related to actions or oversights within Canada or another jurisdiction, deemed by the Registrar as akin to specific federal civil or criminal offenses.
- Being convicted of fraud under the Criminal Code (this expands the Policy to cover fraud convictions generally, whereas the previous Policy only covered fraud against the Crown)
- Being convicted of environmental violations leading to listing on the Environmental Offenders Registry.
- Experiencing suspension, debarment, or conviction, or pleading guilty to certain civil or criminal offenses as an individual owner, trustee, director, manager, or senior official.
- Contracting with an ineligible first-tier subcontractor.
- Being debarred by a provincial, international, or foreign government or organization.
- A determination by the Registrar that the supplier lacks business integrity or honesty in a manner that seriously and directly affects the present responsibility of the supplier or contracting with the supplier may bring the procurement system into public disrepute.

Of particular note is that suppliers may risk suspension or debarment as a result of the actions of their affiliates (which is broadly defined, and includes predecessors and persons exercising "significant influence" over the supplier) where the affiliate has engaged in an offence, in Canada or internationally, and the Registrar determines that the supplier directed, authorized or otherwise enabled the underlying actions or omissions that relate to the offence. While the previous Policy allowed for suspension or debarment where an affiliate was convicted of criminal or corrupt conduct in any jurisdiction, the revised Policy expands the discretion of the Registrar to order suspension or debarment based on an affiliate's conduct, even where that has been no foreign conviction, where the Registrar determines that the conduct of the affiliate in a foreign jurisdiction would likely lead to a conviction in Canada if the conduct in question had occurred in Canada.

Additionally, if a supplier's first-tier subcontractor becomes ineligible, the supplier is obliged to terminate the subcontract within one business day of when the supplier knew or ought to have known of the subcontractor's ineligibility. If the supplier fails to terminate the subcontract it may also be debarred. The government may also require a supplier to verify the status of all proposed first-tier subcontractors, to which the supplier must provide the verification results within five business days of the request.

### **3. Updated Enforcement Regime: Role of Registrar and Flexible Ineligibility Periods**

Companies found to have engaged in conduct constituting grounds for suspension or debarment may be ineligible to contract with the federal government.

Under the previous version of the Policy, PSPC made determinations of ineligibility and the default ineligibility period was 10 years – effectively a death sentence for companies holding significant federal government contracts – with some opportunity to reduce the period to 5 years. Under the latest Policy, the Registrar now has the discretion to make determinations of, and set periods of, ineligibility.

In determining the ineligibility period for a supplier, the Registrar will assess the seriousness of the conduct engaged in against steps the supplier has taken to ensure similar conduct does not occur in the future. The updated Policy includes the following factors the Registrar may take into account:

- Factors relating to the seriousness of the conduct:
  - the supplier's role in the conduct;
  - the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
  - the extent of senior management involvement;
  - gains realized by the supplier as a result of the offence;
  - the cost to public authorities of the investigation and prosecution of the offence;
  - known membership in or associations with organized crime and money laundering groups; and
  - whether the supplier has repeatedly violated the Policy, or was previously warned about such behaviour.
- Factors relating to steps taken to prevent future prohibited conduct:
  - voluntary disclosure of involvement in the offence;
  - whether the supplier has completed a thorough investigation of the circumstances that led to the debarment and cooperated with the investigating authorities;
  - steps taken to address the wrongdoing, including addressing any criminal, civil or administrative sanctions and paying compensation for damage;
  - appropriate disciplinary action against the individuals involved in the conduct;

- whether the supplier had compliance measures and internal control systems in place at the time the conduct took place;
- the adoption and implementation of a credible and effective compliance program that demonstrates the supplier's commitment to complying with the law;
- whether the supplier has implemented or agreed to implement remedial measures, including through personnel changes and the adoption of new procedures and training and having regard to any measures that might be recommended by the Registrar or the investigating authority; and
- whether the supplier's management appears to recognize and understand the seriousness of the conduct and is committed to taking serious steps to ensure that it does not recur.

While the grounds on which a supplier can be debarred are significantly increased, the approach taken by the new Policy also introduces significant flexibility and discretion of the Registrar in determining periods of ineligibility. Whereas previously there was a mandatory 10-year ineligibility period following debarment, the Registrar now has discretion in determining an appropriate ineligibility period, up to 10 years.

The Registrar may also enter into an administrative agreement with a supplier whereby the supplier's ineligibility is suspended for 12 months while the supplier introduces measures to remediate the circumstances leading to ineligibility.

Further, the powers and discretion of the Registrar are expanded in its new power to provisionally suspend the eligibility of a supplier where the Registrar determines that the alleged misconduct and acts or omissions of the supplier, pose immediate and significant risk to the Government of Canada.

The revised Policy also creates a new Office of Supplier Integrity and Compliance with a mandate to identify suppliers of concern, take appropriate action to mitigate the risk posed by suppliers of concern and promote ethical business practices. The Office of Supplier Integrity and Compliance is the body charged with administering the updated Policy and replaces the previous Integrity Regime.

#### **4. Key Takeaways**

The updated Policy significantly expands the scope of conduct that can result in suspension or debarment from contracting with the federal government, while also granting flexibility and discretion to a new Registrar to deal with supplier misconduct. The inclusion of a wider array of domestic and international offences that may lead to suspension or debarment and the expanded risk of a supplier being found in breach of the Policy because of an affiliate's conduct indicate significant strengthening of, and increased scrutiny on, the federal procurement process.

Suppliers to an agency or department of the Government of Canada, along with their legal counsel, should

carefully review the Policy and implement appropriate procedures to ensure compliance throughout the entire procurement process, including at the time of bidding, during the bid evaluation process, and throughout the period of the resulting contract. Contracts between government suppliers and their first-tier subcontractors should ensure that necessary information about a subcontractor's continuing compliance with the Policy (*i.e.* eligibility to contract) will be provided throughout procurement processes and during contract performance. Companies suspecting that they, or their suppliers, are possibly in breach of the new requirements should promptly contact their legal counsel to assist in their understanding of the requirements.

by [Guy Pinsonnault](#), [Jamieson D. Virgin](#), [Timothy Cullen](#), [Gray Morfopoulos](#), and [Tayler Farrell](#)

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2024