

FEDERAL GOVERNMENT TIGHTENS PROCUREMENT INTEGRITY PROVISIONS

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With very little publicity or warning, on March 3rd, 2014 Public Works and Government Services Canada (PWGSC) announced significant amendments to the Integrity Provisions¹ which are incorporated in all solicitations administered by PWGSC in relation to federal government procurement and real property transactions². The Integrity Provisions are important. PWGSC handles the vast majority of federal government public procurements in Canada. The Integrity Provisions impose rigorous certification provisions which, if not complied with, can result in PWGSC deeming a bid to be non-compliant or result in the cancellation of an awarded contract.

The changes to the Integrity Provisions have far ranging implications to all firms bidding on solicitations administered by PWGSC:

- the list of offenses which result in debarment has been expanded;
- in addition to convictions, suppliers must now certify that they (including their affiliates), have not received absolute or conditional discharges in relation to the expanded list of offenses;
- suppliers must now also certify that they (including their affiliates), have not been convicted in other jurisdictions of offenses that have similar elements to the Canadian offenses listed in the Integrity Provisions; and,
- suppliers are required to impose matching integrity commitments on their subcontractors.

The news for suppliers is not all bad. In some areas, the changes provide helpful clarification. The new Integrity Provisions also limit the certification time period to convictions (or discharges) obtained in the last 10 years. In addition, they clarify and expand the situations in which PWGSC may disregard these provisions.

Expanding the Scope of Offenses Covered

Prior to this announcement, the Integrity Provisions only imposed certification requirements on bidders and their affiliates who were convicted of the following offenses³:

- Frauds against the government under the *Criminal Code of Canada*
- Offenses under the Financial Administration Act
- Payments of a contingency fee to a person to whom the Lobbying Act applies
- Money laundering
- Criminal offenses under the Competition Act, including price-fixing and other conspiracies, bid-rigging, and false or misleading representations
- Participating in activities of criminal organizations
- Income and excise tax evasion
- Bribing a foreign public official
- Selling or purchasing office
- Selling defective products to the government
- Offences in relation to drug trafficking

The following additional offenses have been added to the list of convictions that render companies and individuals ineligible to bid on PWGSC procurements:

- Extortion
- Bribery of public officials
- Criminal breach of contract
- Falsification of books and documents
- Fraudulent manipulation of stock exchange transactions
- Bribery of judicial officers
- Secret commissions
- Prohibited insider trading
- Forgery and other offenses resembling forgery

The addition of the new offenses may be a response to criticisms that the former list was somewhat arbitrary and did not include all of the offenses that were directly related to bribery and the corruption of public officials. On the other hand, it is surprising that PWGSC has added provisions of the *Criminal Code* relating to insider trading and manipulation of stock exchange transactions, which have little or nothing to do with a supplier's conduct in the procurement setting.

Discharges

Under the new requirements, bidders must now also certify that they and their affiliates have not received an absolute or conditional discharge in relation to any of the listed offenses. Extending debarment to persons who have been discharged runs contrary to well-developed law enforcement principles. Discharges are not

convictions; they are discretionary measures which allow the Court to dispose of a criminal matter without saddling an accused person with a permanent criminal record. A discharge will be purged automatically one year after receipt of an absolute discharge or three years after receipt of a conditional discharge (provided the conditions are fulfilled)⁴. The requirement that a bidder reveal a discharge, after it has been purged from his or her record, seems inconsistent with the underlying purpose of the purging of the record of the offense.

Application to "Similar" Foreign Offenses

The new version of the Integrity Provisions adds a requirement that the bidders certify that neither the bidder, nor any of the bidder's affiliates, has been convicted of (or received an absolute or conditional discharge) under any foreign offense that PWGSC regards as having "similar constitutive elements" to the listed Canadian offenses. However, PWGSC has provided no guidance as to when or how it will determine whether a foreign offense has "similar constitutive elements" to the listed offenses.

This requirement may have significant implications for multinational suppliers. The definition of "affiliates" is broad: it includes parent companies, subsidiaries and directors, so long as they have control of each other, or if they are under the common control of a third party. Indicia of control include: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, or common use of employees. The requirement to ascertain whether any affiliate has been convicted of any offenses anywhere in the world that meet this uncertain standard could prove to be a considerable barrier to submitting bids to PWGSC.

Imposition of Integrity Provisions on Subcontractors

The new Integrity Provisions impose the condition that bidders ensure that their subcontracts include integrity provisions that are "no less favourable to Canada than those imposed in the resulting contract"⁵. The PWGSC commentary states that the effect of the new policy is that "contractors are now required to apply the integrity provisions to subcontractors". In other words, PWGSC will expect that bidders have language in all subcontracts that requires their subcontractors to certify that they (and their affiliates) have not been convicted of (or received an absolute or conditional discharge) in relation to the listed offenses nor any similar foreign offenses. This will add a further compliance burden for both prospective bidders and their planned subcontractors.

Expiry of Debarment

One bit of positive news for bidders under the policy notification is that the certification requirement is limited to convictions (or absolute or conditional discharges) that occurred in the last 10 years. For convictions

occurring more than 10 years ago, bidders must certify that preventative measures have been taken to avoid reoccurrence of the offenses.

Exceptions to the Use of the Integrity Provisions

While PWGSC is imposing stricter conditions on bidders, it has added flexibility to disregard the Integrity Provisions in two ways. While the former version of the Integrity Provisions contained a Public Interest Exception, the new version specifies that Canada's right to enter into a contract with an otherwise non-compliant bidder is in PWGSC's "sole discretion" for any public interest reason, including when "no one else is capable of performing the contract" (whether because of debarments or other reasons). However, when all bids are found non-compliant, PWGSC may only invoke the Public Interest Exception where the bidder has self-identified the relevant offense. As a result, bidders will have to consider whether to incur the time and cost of preparing a bid in order to take advantage of the possibility that they would become eligible for an award with the Public Interest Exception.

The new policy also contains a "catch all" provision which allows PWGSC, before a solicitation is issued, to "elect to procure outside the present process". There does not seem to be any precondition for doing so and no guidance has been provided as to when this option may be invoked.

Retroactive Effect

The implementation of the new Integrity Provisions comes 16 months after PWGSC last updated the Integrity Provisions to effectively debar *Competition Act* leniency applicants from federal procurement⁶. That policy change applies retroactively to companies who already participated or who have exited from the Leniency Program (see [Leniency Applicants Now Debarred from Federal Procurement](#)). The most recent changes to the Integrity Provisions have similar retroactive effects. At the time that entities (or their affiliates) negotiated guilty pleas or received discharges in respect of the broader list of domestic or similar foreign offenses, they would have expected to be able to continue to do business with the Canadian government. Expanding the scope of the debarment provisions, and applying them to decisions to plead guilty which occurred anytime in the last 10 years, is effectively changing the rules of the game in mid-stream.

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¹ The Integrity Provisions are part of the Standard Instructions to Bidders which are incorporated into all Solicitations by PWGSC. These are found in PWGSC's Standard Acquisition Clauses and Conditions Manual ("SACC Manual"). See for example the conditions added to Solicitations for goods and services at <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2003/17>.

² Public Works and Government Services Canada, Policy Notification PN-107U1, <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107U1> (in force effective March 1, 2014).

³ For a limited number of offenses, the bidder is required to certify not only that the bidder and its affiliates had not been convicted, but also that no other person convicted under the offenses will receive any benefit under contract resulting from the bid's solicitation.

⁴ *Criminal Records Act*, RSC 1985, c C-47 s 6.1.

⁵ Notably, there is no requirement that bidders certify that they have included integrity provisions in their subcontracts, which leaves open what consequences would flow if this condition is not met.

⁶ See *Leniency Applicants Now Debarred from Federal Procurement*, McMillan Bulletin, November 2012 <http://www.mcmillan.ca/leniency-applicants-now-debarred-from-federal-procurement> (Recipients of immunity from prosecution under the Immunity Program under the Competition Act (Competition Bureau, June 7, 2010) remain eligible to bid on PWGSC solicitations.)

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.

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