

# FOR BETTER OR WORSE? CANADA UPDATES PROCUREMENT INTEGRITY REGIME

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After considerable lobbying by suppliers and business groups, the federal government has unveiled the new government-wide procurement Integrity Regime promised in Budget 2015.<sup>1</sup> The new Integrity Regime takes the form of an Ineligibility and Suspension Policy and associated integrity provisions that will be incorporated into federal solicitations and contracts/leases.<sup>2</sup> The new Integrity Regime applies within Public Works and Government Services Canada ("PWGSC") immediately and will be rolled out across all departments and agencies in the coming months.<sup>3</sup>

The new Integrity Regime follows on the heels of major changes to the Federal Integrity Framework that McMillan reported last year.<sup>4</sup> The 2014 changes to the Integrity Framework heightened certification requirements for suppliers and carried serious consequences for non-compliance. These were strongly criticized by business community groups such as the Canadian Council of Chief Executives and the Canadian Chamber of Commerce.<sup>5</sup> In particular, the criticism was aimed at the retroactive effect of the 2014 changes and the fact that Canadian suppliers could be debarred from federal government contracts because of the activities of affiliates.

Canadian government suppliers assessing the new Integrity Regime will notice both familiar and new provisions. Under the Ineligibility and Suspension Policy, certain aspects of the 2014 Integrity Framework have been softened, but most have been maintained. For example, bidders are no longer subject to automatic debarment because of convictions of affiliated companies; however, this improvement is tempered by the fact the Minister of Public Works may still debar bidders for the activities of affiliates if the bidder controlled the affiliate or otherwise had an involvement in the affiliate's activities that led to the conviction. The Ineligibility and Suspension Policy also introduces new features such as a process for suppliers to obtain advanced determinations of ineligibility, a limited right of review of an ineligibility or suspension decision and an option for suppliers to take corrective action pursuant to an administrative agreement with the government in order to suspend a period of ineligibility.

## What The New Regime Says: Key Changes/Additions To The Government Integrity Framework

### *Broad Application*

The application of the Integrity Regime to all federal procurement avoids the uncertainty that existed as to what department and what solicitation the former Integrity Framework applied. The application to all Government of Canada departments and agencies over the coming months provides welcome consistency.

### *Listed Offences and Certification Requirements*

The new Integrity Regime maintains both the broad list of Canadian offences that result in debarment and the foreign offences requirement, which were introduced in March 2014; however, the certification requirements have been amended. Previously, multinational suppliers wishing to bid on federal contracts in Canada were required to self-evaluate to determine whether, in the preceding 10-year period, they, or their affiliates, had been convicted of or received an absolute or conditional discharge in relation to listed Canadian offences or similar foreign offences. Under the new rules, the certification requirement varies depending on the type of offence.<sup>6</sup>

Suppliers must certify they, or an affiliate, have never been convicted of or pleaded guilty to the following offences:<sup>7</sup>

- Frauds against the government under the *Criminal Code of Canada*
- Offences under the *Financial Administration Act*

Suppliers must certify they, or an affiliate, have in the past three years not been convicted of or pleaded guilty to the following offences, or similar foreign offences:<sup>8</sup>

- Payments of a contingency fee to a person to whom the *Lobbying Act* applies
- Money laundering
- Criminal offences under the *Competition Act*, including price-fixing and other conspiracies, bid-rigging, and false or misleading representations
- Extortion
- Bribery of public officials
- Criminal breach of contract
- Falsification of books and documents
- 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
- Bribery of judicial officers
- Secret commissions
- Prohibited insider trading
- Forgery and other offences resembling forgery
- Fraudulent manipulation of stock exchange transactions

Despite these changes, the Integrity Regime continues to have retroactive effect: companies still have to certify in relation to conduct that occurred well before the Integrity Regime was in place. Although reducing the certification period from 10 years to 3 years for most offences means the retroactive effect will expire 3 years from now, there is no longer a 10 year cap on certification for committing frauds against the government or offences under the Financial Administration Act. The new Regime also fails to provide clear guidance as to when a foreign offence will be deemed "similar" to a Canadian offence, a problem identified in the Integrity Framework.<sup>9</sup>

#### *Period of Ineligibility*

As with the certification requirement, the applicable period of ineligibility now varies depending on the offence. The government has stiffened the penalty for suppliers who commit certain offences under the new regime. Suppliers will be ineligible to bid on government contracts for an indefinite period of time if they, or an affiliate, are convicted of or pleaded guilty to committing frauds against the government or offences under the *Financial Administration Act*. Suppliers convicted of any other listed offence in the past three years remain ineligible to bid on government contracts for a period of ten years.

This ten-year ban can be reduced by five years if the supplier demonstrates it has cooperated with authorities or undertaken remedial action(s) to address wrongdoing and it enters into an administrative agreement so its progress can be monitored.<sup>10</sup> The possibility of having a ten year debarment period reduced to five years is an obvious improvement and brings Canada in line with US practice, where remedial action often leads to the reestablishment of bidding rights. Another improvement is limiting debarment to actual convictions and not conditional or absolute discharges. Discharges, at law, are different from convictions and the failure of PWGSC to recognize this distinction in the prior Framework was surprising.

#### *New Suspension Power and Uncertain Consequences for Immunity Applicants*

Perhaps the most troublesome and uncertain development in the new Integrity Regime is the provision

allowing the Minister of Public Works to suspend a supplier for a period of up to 18 months.<sup>11</sup> A conviction is not necessary for a suspension. It can be triggered if a supplier is charged with a listed offence or admits to committing a listed offence. Suspending a supplier for being charged runs contrary to the presumption of innocence, a cornerstone of rule of law in Canada. The discretion of the Minister to impose a suspension is very open ended; a suspension is renewable for as long as necessary.

At this juncture, two things are unclear about the suspension provision. First, whether the charging of an offence or admission to a listed offence need be on a going forward basis or if it can be applied to charges or admissions having occurred in the past. Second, what consequence the provision may have on entities that have obtained or seek to obtain immunity from the Public Prosecution Service of Canada in relation to bid rigging or other criminal offences under the *Competition Act*.

With respect to the second, the fundamental principle behind the Competition Bureau's immunity program is that it rewards entities who come forward and admit wrongdoing. Given the nature of such conspiracies, without immunity, a number of anti-competitive cartels would never come to the attention of antitrust enforcers. For this reason, the Competition Bureau and PWGSC concluded a Memorandum of Understanding in May 2013 that, among other things, provides

*PWGSC will not disqualify from future bidding any party to whom the Director of Public Prosecutions has granted immunity from prosecution under the Bureau's Immunity Program, unless such party has been convicted of any offence listed in Section 01(8) of PWGSC's Standard Instructions (Standard Acquisitions Clauses and Conditions Manual), as may be amended from time to time.*<sup>12</sup>

Under the new Integrity Regime, a company or individual admitting to conduct in exchange for immunity could face a suspension from doing business with the Canadian government. Until the MOU addresses the Minister of Public Works' new suspension power, potential immunity applicants will definitely have to think twice before coming forward, particularly if a large part of the potential applicant's business is supplying the federal government.

#### *Impact of Affiliates' Transgressions*

A key change benefiting suppliers under the new integrity regime is that suppliers are no longer automatically ineligible because of the actions of their affiliates.<sup>13</sup> Going forward, there must be evidence a supplier or potential supplier "directed, influenced, authorized, assented to, acquiesced in or participated in the commission or omission of the acts or offences that would render the affiliate ineligible for award under the Ineligibility and Suspension Policy". Although this change can be viewed as an improvement, suppliers should recognize that the assessment of a supplier's involvement is a highly fact specific one that leaves significant

discretion in the hands of the Minister to continue to impose debarment for the activities of foreign affiliates.

### *Contracting with Ineligible Subcontractors*

A new wrinkle is the addition of conditions in relation to the hiring of subcontractors. Suppliers who rely on subcontractors who are convicted of or pleaded guilty to a listed offence for which no pardon or equivalent is granted, and for which no prior written approval to use the ineligible subcontractor is provided by the Minister, are ineligible to bid on government contracts for a period of five years.<sup>14</sup> This new requirement is more demanding for bidders than its predecessor.

The former Integrity Framework contained some very general language that merely required a bidder to ensure that it imposed conditions on its subcontractors that were equivalent to those found in the Framework. As a result, so long as subcontracting arrangements contained a certification requirement that was equivalent to the certification requirement imposed on bidders in the Integrity Framework, the condition was met. Moreover, there was no specific consequence for failing to abide by the provision included in the language.

Under the new Integrity Regime, bidders now face potential debarment if they knowingly put forward a subcontractor that has, itself, been debarred. It is unclear what standard will be applied in relation to this obligation. While the new Integrity Regime creates a list of suspended and ineligible entities, it is not clear whether merely checking the list is sufficient. For example, the new Regime appears to allow suppliers to subcontract with affiliates of an entity whose name figures on the list of debarred entities. What is unclear is whether suppliers will be required to verify if the subcontractors, even though not listed, may have participated in the acts leading up to the conviction. Given the consequences, suppliers should exercise extreme caution. In addition to checking the List of Suspended and Ineligible Suppliers, they should also obtain a warranty from all subcontractors that they have not been deemed ineligible, or that they have not been convicted of the offences listed in the Integrity Regime.

### *Administrative Agreements*

Suppliers who are suspended or are ineligible to bid on government contracts may now be able to pause the period of ineligibility/suspension by entering into an administrative agreement with PWGSC.<sup>15</sup> The agreements may be used in instances where:

- an ineligible supplier has its ineligibility period reduced;
- in lieu of suspending a supplier;
- a public interest exception (see below) is invoked with an ineligible supplier; or
- a decision is made to continue with an existing contract with a supplier that became non-compliant with

the integrity regime.

Possible conditions of an administrative agreement could include the:

- separation of employees from management or programs;
- implementation or extension of compliance programs;
- employee training and other information;
- outside auditing;
- access to contractor records;
- other remedial or compliance measures.<sup>16</sup>

Third-party compliance monitoring, paid for by the supplier, may be required as part of the agreement.

#### *Public Interest Exception*

The government has maintained the public interest exception that allows suppliers who would otherwise be ineligible to do business with the government for reasons such as: no other supplier is capable of performing the contract; emergency; national security; health and safety; and economic harm. Suppliers must enter into an administrative agreement before the government can rely on the public interest exception, in order to safeguard the integrity of the solicitation for which the exception is required.

#### *Review and Appeal of Suspension/Debarment*

Under the new Integrity Regime, suppliers or potential suppliers who are determined to be ineligible or are suspended may now apply to the Minister for a review of the decision, insofar as the ineligibility or suspension relates entirely to whether a supplier directed, influenced, authorized, assented to, acquiesced in or participated in the commission or omission of the acts or offences.<sup>17</sup> The new Ineligibility and Suspension Policy also makes it clear that the decision to debar a supplier is a decision of the Government of Canada which can be challenged in Federal Court. Under the former Integrity Framework, the right to challenge, even to the Court, was unclear. Under the new Integrity Regime, decisions such as whether or not to continue existing contracts, whether or not to reduce the debarment period, whether or not a bidder should be debarred for affiliate behaviour and whether or not the public interest exception should be invoked are all judicially reviewable.

#### *Advanced Determinations*

Suppliers may now request advanced determination as to their ineligibility from the Minister through written submissions and other supporting information. The Minister may request additional information from the

supplier or a third party monitor before making a determination as to the supplier's eligibility. Before deeming a supplier to be ineligible, the Minister must issue a Notice of Intention to Declare Ineligible or Suspend. A decision of the Minister to issue a Notice of Ineligibility/Suspension is final, subject to the new limited right of review or a challenge in Federal Court.<sup>18</sup> Those suppliers deemed ineligible will be placed on a list maintained by a Registrar.

## CONCLUSION

Reaction to the new Integrity Regime is likely to be very mixed. At a high level, some of the big ticket changes appear to favor suppliers and enhanced competition in government contracts. Like everything else, the devil is in the details. It appears that many changes do not go as far as they would first appear and there are many other areas where the federal government has imposed much stricter obligations on suppliers than existed under the former Integrity Framework.

by Martin Masse, A. Neil Campbell and Timothy Cullen

<sup>1</sup> [\*Government of Canada News Release\*](#) and [\*Economic Action Plan 2015\*](#).

<sup>2</sup> [\*Government of Canada's Integrity Regime\*](#).

<sup>3</sup> [\*Government of Canada News Release\*](#).

<sup>4</sup> McMillan Bulletins: [\*Federal Government Tightens Procurement Integrity Provisions\*](#) and [\*Canadian Government Suppliers: Getting in Trouble Abroad May Cause Problems At Home\*](#).

<sup>5</sup> [\*Globe and Mail article\*](#).

<sup>6</sup> See [\*Part C of the PWGSC Integrity Regime: Ineligibility and Suspension Policy\*](#), for offences by statute.

<sup>7</sup> For which they have not received a pardon.

<sup>8</sup> For which they have not received a pardon.

<sup>9</sup> McMillan Bulletin: [\*Canadian Government Suppliers: Getting in Trouble Abroad May Cause Problems At Home\*](#).

<sup>10</sup> See [\*Part D\(I.\) and \(VII.\) of the PWGSC Integrity Regime: Ineligibility and Suspension Policy\*](#).

<sup>11</sup> See [Part D\(VI.\) of the PWGSC Integrity Regime: Ineligibility and Suspension Policy.](#)

<sup>12</sup> [PWGSC/Competition Bureau MOU, May 30, 2013, Schedule 1\(4\).](#)

<sup>13</sup> See [Part C of the PWGSC Integrity Regime: Ineligibility and Suspension Policy.](#)

<sup>14</sup> See [Part D\(IV.\) of the PWGSC Integrity Regime: Ineligibility and Suspension Policy.](#)

<sup>15</sup> Administrative agreements cannot suspend permanent ineligibility for suppliers, or suppliers with affiliates, that are convicted of or plead guilty to committing frauds against the government or offences under the *Financial Administration Act*.

<sup>16</sup> See [Part E\(VIII.\) of the PWGSC Integrity Regime: Ineligibility and Suspension Policy.](#)

<sup>17</sup> See [Part E\(V.\) of the PWGSC Integrity Regime: Ineligibility and Suspension Policy.](#)

<sup>18</sup> See [Part E\(II.\) of the PWGSC Integrity Regime: Ineligibility and Suspension Policy.](#)

#### **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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