

LENIENCY APPLICANTS NOW DEBARRED FROM FEDERAL PROCUREMENT

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Canadian newspapers have been replete with headlines involving allegations of corruption and conflict-of-interest in the handing out of public contracts. It is against this backdrop that Public Works and Government Services Canada ("PWGSC"), the entity charged with the vast majority of federal government public procurements in Canada, has issued a new Policy Notification, which expands the integrity provisions applicable to federal contracts. The key change is to remove an exemption previously available to participants in the Competition Bureau's Leniency Program. In doing so, PWGSC may have undermined one of the most important tools for combating criminal conspiracies and bid-rigging.

Competition Bureau leniency program

The Leniency Program is designed to encourage business organizations and individuals to come forward and provide information in relation to criminal cartel behaviour in situations where full immunity has already been granted to another party. The Bureau's Leniency Bulletin includes an expectation that applicants will plead guilty to at least one offence and provide full cooperation with the Bureau's investigation of other parties. It also sets out the factors the Bureau will take into account when making its leniency recommendation to the Public Prosecution Service of Canada (which ultimately negotiates the plea agreement with the leniency applicant).

The Leniency Program is an important complement to the Bureau's Immunity Program because it attempts to induce early cooperation from parties who can corroborate the evidence provided by an immunity applicant and it reduces the number of parties to be prosecuted on a contested basis. The key to a successful Leniency Program, as identified by the former Commissioner of Competition, is that it be "transparent and predictable" and that it offer significant incentives for parties to cooperate.

PWGSC's updated integrity provisions

The Policy Notification issued by PWGSC on November 9, 2012 (see <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107>) updates similar Policy Notifications issued in July 2012 and October 2010. The October 2010 Policy Notification imposed a requirement that bidders

certify that they had not been found guilty of a variety of offences, including the bid-rigging provisions under the *Competition Act*, in order to be eligible to bid for federal public contracts. However, bidders who had pled guilty to such an offence, but who had participated in the Bureau's Leniency Program, were exempted from the certification requirement. The thinking at the time was that this recognized the importance of the Bureau's Leniency Program to the effective enforcement of the criminal cartel provisions of the *Competition Act*.

In the most recent Policy Notification, however, PWGSC removed the leniency exemption, and limited the exemption to companies having received a pardon:

"Effective immediately, the Department will not enter into a contract or real property transaction, or accept bids from companies convicted of listed offences unless they received a pardon, or capacities restored by Governor-in-Council".

PWGSC noted that, for existing contracts with companies currently in the Leniency Program, it would honour its contractual agreements. However, any company currently in the Leniency Program would be ineligible to bid for future contracts. In addition, PWGSC is moving to have current standing offers and supplier arrangements amended to include this revised integrity provision.

conflicting policy objectives

While the PWGSC emphasis on integrity issues is understandable, the Policy change will likely erode the Competition Bureau's Leniency Program in sectors that make significant sales to the federal government. Effectively debarring a company which is participating in the Leniency Program threatens the viability of any company doing a substantial amount of business with the federal government. This will reduce the incentives to come forward and participate in the Leniency Program.

The Policy Notification may also have unintended consequences. It will create an even greater incentive than already exists for companies to participate in the Competition Bureau's Immunity Program (which is unaffected by the Policy Notification). In addition to avoiding prosecution, an immunity applicant may be motivated to attempt to get the competitors it has conspired or rigged bids with disqualified from future bids (unless and until they are pardoned). This leaves it with better prospects for future contract wins, and if the conspirators represent a significant portion of the competitive bidders for a particular product or service, could result in PWGSC not receiving competitive bids going forward.

Also troubling is the fact that the Policy applies retroactively to companies who are already participating in or have exited from the Leniency Program. At the time of entry into the Leniency Program and negotiation of their guilty plea such companies expected to be able to continue to do business with the federal government. Changing the rules of the game, after the leniency applicant has held up its end of the bargain by cooperating with the Competition Bureau and pleading guilty, runs contrary to the Bureau's view that Leniency Program

can only be effective if it is "transparent and predictable".

By effectively debarring companies participating in the Bureau's Leniency Program, PWGSC also seems to be doing an end run around its own debarment process (the Vendor Performance Corrective Measure Program, or "VPCMP"). The VPCMP establishes a series of defined steps and internal appeals that must be followed prior to PWGSC imposing debarment on a specific contractor. The November 2012 Policy Notification now allows PWGSC to effectively debar bidders without consideration of their individual cases or without providing them with an opportunity to be heard.

In summary, in its attempt to enhance the integrity of the federal government's contracting policy, PWGSC has undermined an important enforcement tool of the Competition Bureau and seemingly instituted a policy that is incompatible with its existing debarment policy. For companies involved in cartel activity in affected sectors the messages are to come in for immunity but be cautious about seeking leniency.

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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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