

"SELLER BEWARE?": NEW ANTI-FORCED LABOUR PROVISIONS IN FEDERAL GOVERNMENT CONTRACTS

Posted on January 10, 2023

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It is not often that the world of federal procurement policy intersects with that of international trade in goods. The recent policies concerning forced labour prohibitions in Canada have produced such an intersection.^[1] These developments have not garnered much attention and are thus reviewed in this bulletin.

Canada's customs laws prohibit the importation of goods produced by forced labour. Internationally, China has been the target of repeated forced labour customs enforcement in the United States.

Public Services and Procurement Canada ("PSPC") has now published a Policy Notification, [PN-150](#), which advised of a set of new contract clauses put in place, effective November 11, 2021, to allow the Government of Canada to terminate a contract if a good has been produced in whole or in part by forced labour or human trafficking.

PSPC has introduced seven new contracting clauses to be used by contracting officers in **all new federal contracts for goods**.

The Notice specifies that these clauses do not apply to the bid solicitation process, Standing Offers or Supply Arrangements. Changes to the Standing Offers and Supply Arrangements standard clauses are expected to be introduced later. However, it should be noted that the current instructions for Standing Offers and Supply Arrangements require compliance with the Code of Conduct for Procurement, which, as of August 2021, required vendors to comply with Canada's prohibition on forced labour.^[2]

The new clauses in essence permit the federal government of Canada to terminate contracts without penalty, as a result of the following new standard provisions:

1. new obligation on the contractor to not deliver or sell goods to Canada manufactured wholly or in part by forced labour;
2. new option for Canada to terminate a contract if the CBSA has classified the goods pursuant to the *Customs Tariff*;
3. new option to terminate a contract if there are reasonable grounds to believe that the good has been

- produced in whole or in part with the use of forced labour;
4. new option to terminate a contract if the Contractor has been convicted of a human trafficking offence in Canada or abroad;
 5. provision for a Contractor to make representations to PSPC before PSPC terminates a contract.

Reasonable grounds for making a determination described in point 3 above may include: Findings or Withhold Release Orders issued by the United States Customs and Border Protection, under the *US Trade Facilitation and Trade Enforcement Act* of 2015, or credible evidence from a reliable source, including but not limited to non-governmental organizations.

If PSPC's Registrar of Ineligibility and Suspension ("**Registrar**") agrees that reasonable grounds exist, the Registrar will issue a Notice of Concern ("**NoC**") to the Contractor, at the same time alerting the Contracting Authority to the process.

The NoC will provide the supplier with the grounds for the concern and a reasonable period of time within which the supplier may respond in writing with any information it believes to be relevant. Time lines will be strictly adhered to because the contract is already in place and being administered.

Where Canada intends to terminate the Contract under this section, namely for default under any of the preceding clauses, Canada will inform the Contractor and provide the Contractor an opportunity to make written representations before making a final decision. Written representations must be submitted within 30 days from receiving a notice of concern unless Canada establishes a different deadline.

The Registrar will give the Contractor notice of its concern regarding the applicable anti-forced labour clause and give the Contractor a reasonable opportunity to provide written Representations. It will be up to the Contractor to determine what, if any, representations to provide to the Registrar. If applicable, the contracting officer will send a termination notice under the Default by Contractor Clause that takes effect immediately, without giving the supplier a cure period, for example, to replace the goods (with something that is not produced in whole or in part by forced labour) within a specific time frame. Alternatively, a termination notice could be sent with a cure period. If, in consultation with their client, the contracting officer determines that the goods are critical, then the contracting officer would have the option to send a termination notice with a cure period, or alternatively, not issue a termination notice and amend the contract to change the delivery date.

The forced labour prohibitions in Canada are largely untested. However, they can be a serious and unexpected obstacle for bidders on government contracts or the existing holders of such contracts.

McMillan's international trade law and procurement groups advise clients how to navigate these risks and provides mitigation analysis and strategies. Please contact the authors for any questions or further information.

[1] Previously covered in McMillan bulletins: [Combatting Forced Labour in Supply Chains from a Canadian Customs Perspective](#) (December 2021); [Canada Poised to Increase Regulation of Forced Labour in Supply Chains](#) (June 2022).

[2] [Code of Conduct for Procurement s.10](#).

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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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