Canada's integrity regime

The current arrangement may have the opposite effect to its intended aim

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Combating corruption in public procurement is a top enforcement priority of the Canadian government. Canada's Competition Bureau (the Bureau) plays a major role in this effort, through its investigation and prosecution of cartel offences under the Competition Act (the Act). Another key weapon in this battle is the Canadian government's integrity regime, which is designed to ensure that the government does not do business with unethical suppliers. The integrity regime accomplishes this goal by disqualifying suppliers from bidding for federal government contracts if convicted of, or charged with, certain enumerated offences, including offences under the Act.

The integrity regime (then known as the "integrity framework") was first adopted in November 2012, in apparent response to the conviction in July 2012 of a supplier of real estate advisory services for bid-rigging on a federal government contract. The regime has gone through several iterations since then, the last version having been issued in April 2016.

The integrity regime has been criticised on multiple grounds, including the severity of the ineligibility penalties it imposes, the criteria used for determining ineligibility and the difficulties faced by parties in certifying that they have not engaged in conduct that disqualifies them from bidding on government contracts.

As discussed below, however, one of the most telling criticisms of the integrity regime is that it may have the unintended consequence of undermining the Bureau's own anticartel efforts in the public procurement sphere. As such, at least insofar as enforcement of the Act is concerned, the integrity regime may prove to hinder rather than help the fight against corrupt procurement practices.

Overview of integrity regime

The integrity regime is administered by Public Works and Government Services Canada (PWGSC), the procurement arm of the Canadian federal government. The integrity regime consists primarily of the ineligibility and suspension policy (the Policy) and directives issued pursuant to the Policy. The Policy sets out the circumstances under which PWGSC may disqualify a supplier from contracting with the federal government and the process for determining ineligibility.

Broadly speaking, a supplier will be automatically ineligible to contract with the federal government if it is convicted of certain domestic offences set out in the Policy. In the case of the Act specifically, a supplier will be automatically ineligible if it has been convicted in the preceding three years of any of the following cartel offences: conspiracies between competitors in Canada (section 45); participating in a foreign conspiracy directed at Canada (section 46); bid-rigging (section 47); and conspiracies between financial institutions (section 49). A supplier will also be ineligible if convicted in the previous three years of various deceptive marketing offences (sections 52 and 53). The period of ineligibility is 10 years, with the possibility of obtaining a reduction of up to five years pursuant to a negotiated "administrative agreement" with PWGSC (see below).

A supplier may also be declared ineligible for five years if it entered into a subcontract with an ineligible supplier, or for 10 years if it provided a false or misleading certification or declaration in relation to its purported eligibility to contract with the federal government (see also below).

In addition to automatic ineligibility, PWGSC may (in its discretion) determine a supplier to be ineligible in the following circumstances:

- the supplier was convicted in the preceding three years for an offence in a jurisdiction other than Canada that, in PWGSC's opinion, is similar to an offence listed in the Policy (ineligibility of 10 years);
- an affiliate of the supplier was convicted in the preceding three years for a domestic offence listed in the Policy, or for a similar offence in a jurisdiction other than Canada and, in PWGSC's opinion, the supplier directed, influenced, authorised, assented to, acquiesced in or participated in the commission of this offence (ineligibility of 10 years); and
- in the opinion of PWGSC, the supplier breached a term or condition of an administrative agreement entered into pursuant to the Policy (results in an extension of the period of ineligibility beyond that in the agreement).

PWGSC also has the authority to suspend a supplier for 18 months if the supplier has been charged with or admits guilt to certain offences listed in the Policy (including the enumerated offences under the Act), or is charged with or admits guilt to a similar offence in a jurisdiction other than Canada.

PWGSC will make determinations of supplier ineligibility based on its own initiative, upon receiving a request from a supplier to determine if it is ineligible, or upon receiving a request from another federal department, agency or entity to make this determination about a supplier. Prior to making a formal determination of ineligibility, suppliers will be given the opportunity to present evidence and make written submissions within a timeframe specified by PWGSC.

Subject to very limited rights of review (available only where the supplier was rendered ineligible due to the conduct of an affiliate), PWGSC's determination of ineligibility is final and binding on a supplier. That said, and as alluded to above, a supplier may at any time request to have its ineligibility period reduced by way of an administrative agreement. In order for such a request to be considered, the supplier will be required to demonstrate that it co-operated with law enforcement authorities or has undertaken remedial actions to address the conduct that led to its ineligibility. In addition, the supplier will be required to agree to conditions designed to ensure that it conducts business with the Canadian government on an ethical basis, including corrective measures

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and compliance obligations such as employee training, external audits and disclosure of books and records.

Finally, as part of any procurement process with the federal government, the Policy requires suppliers to certify that:

- they are not aware of a determination of ineligibility or suspension issued by PWGSC against them;
- they have not been convicted of or charged with any of the domestic offences set out in the Policy that could involve ineligibility or suspension, nor have any of their affiliates or proposed subcontractors; and
- they have provided a complete list of all foreign criminal charges and convictions, if any, pertaining to themselves, affiliates or subcontractors, that may be similar to one of the listed domestic offences in the Policy.

Implications for cartel enforcement

The first and most obvious implication of the integrity regime for cartel enforcement in Canada is that it adds yet another layer of possible sanctions to those already set out in the Act.

The penalties for engaging in cartel offences under the Act are currently among the highest for any criminal offences in Canada. Parties convicted of entering into criminal conspiracies, for example, are liable to imprisonment for a term not exceeding 14 years, or to a fine not exceeding C$25m (per count), or to both. Similarly, parties convicted of bid-rigging are liable to imprisonment for a term not exceeding 14 years, or to a fine in the discretion of the court, or to both.

With the advent of the integrity regime, parties that do business with the government, or that plan to bid for government contracts, must now face the additional potential consequence of debarment for up to 10 years if convicted of a cartel offence. On the face of it, this is a very important additional deterrent to illegality and, consequently, an important incentive to compliance with the Act.

Still, there are concerns that the integrity regime's impact on cartel enforcement in Canada may not be entirely positive. Specifically, questions have been raised about whether the integrity regime will discourage parties from participating in the Bureau's immunity/leniency programmes, which are critical elements in the Bureau's ability to detect and prosecute cartels. The success of these programmes depends upon cartel participants being incentivised to come forward and co-operate in return for either full immunity from prosecution or a reduction in penalties. The unintended consequence of the integrity regime is that it may create the exact opposite incentives.

The biggest problem stems from the integrity regime's automatic disqualification of parties convicted of cartel offences under the Act. The Regime makes no exception or allowance in this regard for parties who participate in the Bureau's leniency programme, which is premised on parties entering into a non-contested guilty plea in exchange for a reduced criminal penalty. In other words, the integrity regime treats parties who agree to co-operate with the Bureau and voluntarily plead guilty in the same (harsh) fashion as parties whose convictions are the product of a contested trial. Indeed, given the Bureau's recent record of losing contested cartel trials (see *CLI* 10 May 2016), co-operating parties may actually be in a worse position than non-cooperating parties, since their agreement to plead guilty will automatically lead to ineligibility of some duration.

Our understanding is that the Bureau discussed these concerns with PWGSC, which may have been a factor in PWGSC's adoption of administrative agreements as a possible avenue for parties to reduce the 10-year period of ineligibility. As noted above, this possibility is available to parties who have co-operated with law enforcement authorities and who have undertaken remedial actions to address their conduct, all of which are features of the Bureau's leniency programme. Still, there is no guarantee that PWGSC will consent to such an administrative agreement in any given case, and the agreement will only secure a reduction in the ineligibility period, not its elimination, in any event.

There is even some question about the impact of the integrity regime on the Competition Bureau's immunity programme. This programme offers complete immunity from prosecution for a party that is first to disclose a potential cartel offence to the Bureau. Successful immunity applicants are not required to plead guilty and so are not subject to automatic disbarment for being convicted of an offence under the Act. Indeed, in a 2013 memorandum of understanding (the 2013 MOU) between the Bureau and PWGSC, it is expressly acknowledged that PWGSC will not disqualify from future bidding any party that has been granted immunity under the Bureau's immunity programme.

However, as noted above, the integrity regime now also permits PWGSC to temporarily suspend (for 18 months) any party that "admits guilt" to an enumerated offence in the Policy, including the cartel offences under the Act. This authority was given to PWGSC as part of amendments to the Regime that were made after the 2013 MOU was signed. Although immunity applicants are not convicted of offences, they arguably admit to such conduct in the context of their discussions and co-operation with the Bureau. Could PWGSC seize upon such an admission to suspend an applicant under the Bureau's immunity programme? One would hope not but the 2013 MOU does not expressly address or curtail this possibility.

Conclusion

Although the Bureau, like other competition authorities, touts the benefits of applying for immunity or leniency, the reality is that there are often important factors arguing against co-operation. These include the low likelihood of conviction in contested proceedings in Canada and the prospect of follow-on civil class actions (especially for leniency applicants who must plead guilty to an offence).

In a classic example of the law of unintended consequences, the integrity regime may be an additional factor discouraging co-operation with the Bureau. Because of the way the integrity regime operates, potential leniency (and even immunity) applicants whose businesses involve contracting with the federal government must now consider whether they are better off not co-operating with the Bureau, so as to avoid (or postpone) the impact of ineligibility/suspension on their businesses.

It would be ironic if a measure designed to buttress Canada's effort to prevent corruption in the public procurement process actually served to undermine that goal, by compromising the Competition Bureau's efforts to combat the exact conduct which the integrity regime is meant to target. As things now stand, however, that is precisely what could happen.