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Federal Public Contracts Now Governed by New, More Flexible Integrity Provisions

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On July 3, 2015, the federal government implemented a new integrity regime (New Regime) governing suppliers' capacity to enter into procurement contracts and real property transactions with Public Works and Government Services Canada. The New Regime will be rolled out to all federal departments and agencies over the coming months.

Compared with its predecessor, which provided for an automatic 10-year debarment of suppliers convicted of certain offences, the New Regime allows for more flexibility and discretion in the determination of the ineligibility periods. Most notably,

- the 10-year ineligibility period can be reduced by up to 5 years, under administrative agreements, “if the supplier has cooperated with legal authorities or addressed the causes of the misconduct that led to [its] ineligibility”;
- the conviction of a supplier's affiliate for a Listed Offence does not trigger ineligibility unless the supplier has influenced or participated in the commission of the offence;
- the laying of charges against a supplier may trigger its ineligibility for a period of up to 18 months or for as long as necessary “pending completion” of criminal proceedings; and
- suppliers can request an advanced determination of eligibility through voluntary disclosure to the Minister of Public Works and Government Services in order to start the ineligibility period and the application of corrective measures as soon as possible, if appropriate.

PWGSC's tenders that were ongoing as of July 3, 2015, will be amended to reflect the New Regime. As for suppliers that were ineligible under the former integrity framework, PWGSC will reassess their eligibility under the New Regime. The standard integrity clauses introduced by the New Regime will be adopted for new contracts and will not affect existing contracts.

Scope of Application

Unlike the former integrity framework, which applied only to PWGSC and a few other departments, the New Regime applies to supply, construction, real property and service contracts with all federal departments and agencies, except certain specified contracts, such as the following:

- contracts related to military missions;
- contracts “in relation to the carrying out of [...] works or the provision of services on foreign soil and concluded on foreign soil”;
- financial, insurance and employment contracts;
- goods or property leases with a purchase option; and
- contracts that are ancillary or incidental to a main contract that was in force before July 3, 2015.

The New Regime also allows the Minister to define monetary thresholds, but none have been announced yet.

Ineligibility Triggers and Periods

The ineligibility period varies according to the nature of the offence committed by the supplier.

A supplier that has been found guilty of certain designated frauds on the government is *permanently ineligible*, at least until a pardon is obtained (which is consistent with paragraph 750(3) of the *Criminal Code*).

A *10-year ineligibility period* applies to a supplier convicted of an offence under one of the following statutory provisions in the last three years (referred to as “Listed Offences” together with the offences of fraud on the government):

1. **Criminal Code:** section 119 (bribery of judicial officers), section 120 (bribery of officers), section 346 (extortion), sections 366 to 368 (forgery and other offences resembling forgery), section 382 (fraudulent manipulation of stock exchange transactions), section 382.1 (prohibited insider trading), section 397 (falsification of books and documents), section 422 (criminal breach of contract), section 426 (secret commissions), section 462.31 (laundering proceeds of crime), sections 467.11 to 467.13 (participation in activities of criminal organization);
2. **Competition Act:** section 45 (conspiracies, agreements or arrangements between competitors), section 46 (foreign directives), section 47 (bid rigging), section 49 (agreements or arrangements of federal financial institutions), section 52 (false or misleading representation), section 53 (deceptive notice of winning a prize);
3. **Income Tax Act:** section 239 (false or deceptive statements);
4. **Excise Tax Act:** section 327 (false or deceptive statements);
5. **Corruption of Foreign Public Officials Act:** section 3 (bribing a foreign public official), section 4 (accounting), section 5 (offence committed outside Canada);
6. **Controlled Drugs and Substance Act:** section 5 (trafficking in substance), section 6 (importing and exporting), section 7 (production of substance); or
7. **Lobbying Act:** section 5 of the *Lobbying Act* (consultant lobbyists' obligation to declare lobbying activities).

Likewise, a 10-year ineligibility period applies to a supplier that, in the last three years, has been found guilty of a foreign offence similar to a Listed Offence – except an offence under section 5 of the *Lobbying Act* – in the following circumstances:

- the court before which the supplier appeared acted within the court's jurisdiction;
- the supplier appeared during the court's proceedings or submitted to the court's jurisdiction;
- the court's decision was not obtained by fraud;
- the supplier was entitled to submit to the court any defence that it could have submitted to a Canadian tribunal; and
- the supplier was not pardoned for the offence.

Even after the 10-year ineligibility period has expired, rehabilitation may be subject to a third-party certification, at the supplier's own expense, confirming that the supplier has addressed the actions and behaviour that led to the conviction. In other words, a third-party certificate may be required before the supplier becomes eligible to contract with the federal government again.

Finally, a *5-year ineligibility period* applies to a supplier that has knowingly subcontracted part of a public federal contract to an ineligible subcontractor, unless the supplier has obtained prior authorization from the federal government to contract with an otherwise ineligible subcontractor.

Ineligibility becomes effective on the supplier's receiving notice of ineligibility from the Minister. It may be terminated or avoided upon the supplier's obtaining and, where applicable, fulfilling the conditions attached to the following:

- an absolute or conditional discharge;
- a pardon under the royal prerogative of mercy or section 748 of the *Criminal Code*;
- a record suspension granted under the *Criminal Records Act*; or
- a foreign measure that is similar to a discharge, a pardon or a record suspension.

Ineligibility Caused by an Affiliate's Offences

As under the former integrity framework, ineligibility could also be triggered if an affiliate¹ was found guilty of a Listed Offence and had not secured a record suspension. However, the New Regime confines this "ineligibility by affiliation" to suppliers that have influenced or participated in the commission of the affiliate's offence.

Suspension

Debarment under the former integrity framework was triggered only by a criminal conviction. Under the New Regime, the Minister is now authorized to temporarily suspend, for a period of up to 18 months, the eligibility of a supplier that has been charged with or has admitted to having committed a Listed Offence. Such period can be extended "for as long as necessary, pending completion of a criminal proceeding". It can also be shortened or put on hold by the Minister in accordance with an administrative agreement (see below).

Public Interest Exception

The federal government can enter into a contract with an ineligible supplier – except a supplier found guilty of certain frauds on the government for which no record suspension has been secured – on public interest grounds, including when any of the following applies:

- there is a pressing emergency and delay would be injurious to the public interest;
- the supplier is the only person capable of performing the contract;
- the contract is essential to maintain sufficient emergency stocks in order to safeguard against possible shortages; or
- not entering into the contract with the supplier would have a significant adverse impact on the health, national security, safety, security or economic or financial well-being of Canadians or the functioning of any portion of the federal public administration.

Mitigation of Ineligibility Through Administrative Agreements

A novel feature introduced by the New Regime is the possibility of entering into "administrative agreements" with the Minister to mitigate ineligibility. For example, administrative agreements can be used to obtain the following:

- a reduction of the 10-year ineligibility period by up to 5 years if the supplier demonstrates that it has "co-operated with law enforcement authorities" or "addressed the causes of the misconduct"; or
- a reduction or cancellation of a temporary suspension triggered by the laying of charges under a Listed Offence.

In addition, when a supplier becomes ineligible pending the execution of a contract, the Minister can decide to enter into an administrative agreement with the supplier rather than rescinding the contract. Finally, an administrative agreement must be implemented when the federal government decides, for reasons of public interest, to award a contract to an ineligible supplier.

Administrative agreements, in general, will impose corrective measures and compliance obligations on the supplier, including employee training, external audits and disclosure of books and records. The Minister may, for instance, request that the supplier be subject to "third

party compliance monitoring". The third-party monitor or auditor must be independent and may be required to report regularly to the Minister.

Voluntary Disclosure

A supplier can voluntarily disclose information to the Minister and request an "advanced determination" of its eligibility on that basis. The Minister may make further enquiries and request that a third party validate or otherwise confirm the information voluntarily disclosed by the supplier.

PWGSC hopes that the voluntary disclosure process will encourage suppliers to proactively disclose misconduct and trigger the ineligibility period rather than run the risk that the ineligibility may be triggered during a bidding process or the execution of a contract.

Online Ineligibility List

The names of ineligible suppliers are published on PWGSC's website, except for individuals whose names are listed in a directory with limited access.

Remedies Against the Minister's Decisions

The Minister's decisions regarding a supplier's eligibility can be challenged on judicial review. Determinations that a supplier is ineligible because it has participated in an affiliate's offence can also be re-examined internally by the Minister.

Conclusion

Although the New Regime offers a more flexible and discretionary alternative to its predecessor, it is not as lenient as stakeholders would have hoped. For instance, no provision was made for discretionary debarment, such as in Québec, where suppliers may avoid automatic debarment by terminating the individuals responsible for the offences.

¹ Affiliates are individuals or legal entities, such as corporations, subsidiaries, partnerships, directors, agents and key employees if one of the following conditions applies:

- one controls or has the power to control the other; or
- a third party has the power to control both.

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