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Canadian Integrity Regime Amendments: Serious Implications for Certification and Reporting Obligations for Federal Government Contracts

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On April 4, 2016, the Canadian federal government amended its Integrity Regime, which governs the qualification of suppliers to enter into contracts with Public Works and Government Services Canada (PWGSC) and a number of other federal departments and agencies. The amendments are intended to address feedback from stakeholders following extensive revisions to the Integrity Regime last year. (See our discussion of the July 2015 revisions to the Integrity Regime.)

Summary

The April 2016 amendments contain greater detail and clarify certain aspects of the Integrity Regime, including the following:

- **Scope of Application.** The amendments expand the types of contracts that are exempt from the Integrity Regime, including goods, services and construction contracts, subcontracts and real property agreements with a transaction value below $10,000.
- **Subcontractors.** The amendments narrow certain suppliers' obligations to "first-tier subcontractors" – that is, subcontractors with whom a supplier has a direct contractual relationship – and set out processes whereby suppliers may contract with ineligible or suspended first-tier subcontractors in limited circumstances.
- **Anti-avoidance Provisions.** The amendments also introduce anti-avoidance provisions to prevent entities from circumventing ineligibility through certain types of corporate reorganizations, divestitures or other types of transactions.

Concerns

Perhaps most significantly, however, suppliers to the Canadian government should be aware of certain new aspects of the certification and reporting obligations, and the corresponding penalties for failing to satisfy such obligations.

Certification

Generally, the Integrity Regime requires each bidder and supplier to certify that none of the domestic criminal offences and other circumstances described in the PWGSC's *Ineligibility and Suspension Policy* (the Policy) that will or may result in a determination of ineligibility or suspension, apply to it, its affiliates and its proposed first-tier subcontractors. Given that being charged with a relevant offence, not just conviction, may result in ineligibility, the certification appears to extend to charges that are being contested by a bidder or supplier.

The importance of providing accurate certifications has been enhanced by the April 2016 amendments, which state that if, in the opinion of PWGSC, a supplier has provided a false or misleading certification or declaration to PWGSC in relation to the Policy, the supplier is automatically ineligible for 10 years, with no possibility of reduction of this period.

This automatic penalty raises concern because some aspects of the Policy may make it difficult for companies to ensure strict accuracy of their certifications. For example, the Policy's broad and open-ended definition of "affiliate" may create uncertainty and risk of false certification insofar as it includes entities under common control "in fact" and incorporates an undefined concept of "deemed control". The April 2016 amendments attempt to offer some clarification by providing that indicia of control are not limited to common ownership, but include common management, identity of interests (such as found in the members of the same family), shared facilities and equipment, or common use of employees. As a result, consideration may have to be given to whether a joint venture partner may be considered an affiliate for the purposes of the Policy, even when it is clearly not considered an affiliate in corporate law. Although some of the new additions to the definition of affiliate are similar to the definition in the U.S. *Federal Acquisition Regulations*, unlike the Canadian regime, consequences for affiliate conduct under the U.S. regulations appear to be discretionary rather than automatic.

The Policy also does not address the extent to which a supplier will or will not be held accountable where it relies on representations by an affiliate or by a first-tier subcontractor that the affiliate or subcontractor has not been convicted of or charged with a relevant domestic offence. (Note that entering into a subcontract with an ineligible first-tier subcontractor is, under the April 2016 amendments, itself grounds for an automatic five-year period of ineligibility, with no possible reduction of this period.)

The April 2016 amendments further require that each bidder and supplier submit and certify as part of its bid "a complete list of all foreign criminal charges and convictions pertaining to itself, its affiliates and its proposed first-tier subcontractors that, to the best of its knowledge and belief, may be similar to one of the listed offences in the Policy". Compiling a complete list of such charges and convictions may be challenging, given not only the broad definition of affiliate, discussed above, but also the potential uncertainty with respect to foreign offences that qualify as "similar" to the listed Canadian offences. However, unlike the certificate for domestic offences, the certification with respect to foreign offences is expressly qualified as to the certifier's best "knowledge and belief". (The Policy does not indicate the extent to which PWGSC expects bidders and suppliers to investigate affiliates and subcontractors to provide this foreign offence certification.)

In any event, suppliers to the Canadian government would be well advised to ensure that internal reporting mechanisms track foreign offences that may be similar to the Canadian offences listed in the Policy, including some that can cover conduct beyond collusion, corruption or bribery, such as the misleading advertising offence under the *Competition Act*.

Ongoing Reporting

The April 2016 amendments also add a continuing reporting requirement that each successful bidder and supplier must inform PWGSC within 10 business days of "any charge, conviction, or other circumstance relevant to the Policy with respect to itself, its affiliates and its first-tier subcontractors". The short time to comply, coupled with the expansive scope of this obligation, may be onerous, particularly for large multinational companies with numerous foreign affiliates.

Suppliers will also need to be cognizant of reporting obligations in other jurisdictions, including relevant international bodies such as the World Bank, to the extent that supply contracts fall within the jurisdiction of those bodies.

Conclusion

The April 2016 amendments clarify some aspects of the Policy. At the same time, the amendments have introduced some inflexible rules and consequences for breaches of the certification requirement with respect to the conduct of affiliates and first-tier subcontractors. While it remains to be seen how PWGSC will apply these aspects of the Policy in practice, the Policy's lack of flexibility and its broad reach risk leading to outcomes that go beyond the need to ensure that the government conducts business with ethical suppliers. This would leave fewer qualified bidders for government contracts, and potentially result in less competitive prices and other terms for government contracts. The risk of firms inadvertently falling offside the Policy has clearly increased as a result of these latest amendments.

Read the full text of the Policy incorporating the April 2016 amendments.

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