



Government of Canada introduces new Integrity Regime

I - Introduction

Effective July 3, 2015, the Department of Public Works and Government Services Canada ("PWGSC") has overhauled its Integrity Provisions and introduced a new Ineligibility and Suspension Policy, which are collectively referred to as the "Integrity Regime".

The Integrity Provisions are the terms and conditions that are included in the standard documents used by the Government of Canada to solicit bids and to contract with suppliers. In short, the Integrity Provisions set out the ethical requirements that suppliers must meet in order to be eligible to do business with the Government of Canada.

The Ineligibility and Suspension Policy sets out the manner in which PWGSC will administer and apply the Integrity Provisions, including the process that PWGSC will use to determine ineligibility and the circumstances in which PWGSC may reduce any period of ineligibility. This Ineligibility and Suspension Policy also introduced the use of independent Third Party Monitors (such as independent legal counsel) to assess a supplier's involvement in ethical violations of its affiliates and to provide ongoing monitoring of a supplier's compliance with "administrative agreements", which may be used by

PWGSC to reduce a stipulated period of ineligibility or avoid suspension.

The central purpose of the Integrity Regime is to render suppliers ineligible to contract with the Government of Canada if they have been convicted of, or plead guilty to, specified offences. The offences range from criminal offences directly related to dealings with government (such as fraud against Her Majesty or bribery) to more general offences (such as drug trafficking or tax evasion) to offences under the *Competition Act* or similar foreign offences.

Also, the Integrity Regime renders suppliers ineligible to do business with the Government of Canada if their affiliates have been convicted of, or pleaded guilty to, specified offences, depending on the extent to which the supplier was involved in the actions that resulted in the affiliate's conviction or discharge.

The Integrity Regime extends its application not only to suppliers, but also prohibits the use of subcontractors that do not meet the requirements of the Integrity Regime.

II - Subject Contracts

The Integrity Regime applies to: a) contracts for goods and services; b) construction contracts; and c) real property transactions. Specific classes of contracts are not subject to Integrity Regime; such contracts include transfer payments, financial



contracts and transactions with other orders of government.

III - Offences that render a supplier ineligible to do business with the Government of Canada

A) Introduction

The circumstances that give rise to a determination of ineligibility vary depending on whether the offence resulted from the actions of the supplier or an affiliate. Also, the term of the period of ineligibility varies depending on the offence at issue.

B) Domestic Offences that Result in the Supplier being ineligible for an indeterminate period of time

A supplier is ineligible to enter into a contract with the Government of Canada if it has been convicted of, or has pleaded guilty to, an offence under:

- paragraph 80(1)(d) (False entry, certificate or return), subsection 80(2) (Fraud against Her Majesty) or section 154.01 (Fraud against Her Majesty) of the *Financial Administration Act*; and
- section 121 (Frauds on the government and Contractor subscribing to election fund), section 124 (Selling or Purchasing Office), section 380 (Fraud for fraud committed against Her Majesty) or section 418 (Selling defective stores to Her Majesty) of the *Criminal Code*.

In order to be eligible to be contract with the Government of Canada, a supplier that has been

convicted of the above noted offences must obtain a record suspension (i.e. a pardon) or have their capabilities restored by the Governor in Council. The ineligibility of a supplier to do business with the government of Canada stems from requirements set out in subsections 750(3) and (4) of the *Criminal Code*, which was in place well prior to PWGSC's promulgation of the Integrity Regime.

In addition, the Integrity Regime provides that a supplier is ineligible to contract with the Government of Canada if its affiliate has been convicted of, or has pleaded guilty to, any of the above noted offences and there is evidence that the supplier was involved in or acquiesced to the actions that resulted in the affiliates conviction or guilty plea. The Integrity Regime provides that a supplier will only become eligible to contract with the Government of Canada upon the affiliate obtaining a record suspension or restoration of capabilities pursuant to subsection 750(3) and (4) of the *Criminal Code*.

C) Domestic Offences that result in a 10 year ban

A supplier is ineligible to contract with the Government of Canada if it has, in the last three years, been convicted of, or has pleaded guilty to, the following offences:

- section 119 (Bribery of judicial officers, etc.), 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) or sections 467.11 to 467.13 (Participation in activities of criminal organization) of the *Criminal Code*;

- 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) of the *Competition Act*;
- section 239 (False or deceptive statements) of the *Income Tax Act*;
- section 327 (False or deceptive statements) of the *Excise Tax Act*;
- section 3 (Bribing a foreign public official), section 4 (Accounting), or section 5 (Offence committed outside Canada) of the *Corruption of Foreign Public Officials Act*; or
- section 5 (Trafficking in substance), section 6 (Importing and exporting), or section 7 (Production of substance) of the *Controlled Drugs and Substance Act*.

A supplier is ineligible to contract with the Government of Canada in circumstances where an affiliate of the supplier has been convicted of, or pleaded guilty to, any of the above noted offences within the last three years and there is evidence that the supplier was involved in or acquiesced to the actions that resulted in the affiliates conviction or guilty plea.

In these circumstances, a supplier would be ineligible to contract with the Government of Canada for a period of 10 years from the date that PWGSC issues its determination regarding ineligibility/suspension. As discussed below, the period of ineligibility may be reduced pursuant to an administrative agreement between the supplier and PWGSC.

D) Foreign Offences that result in ineligibility

The Integrity Regime also provides that a supplier is ineligible to contract with the Government of Canada if it has been convicted of, or pleaded guilty to, an offence in a foreign jurisdiction that involves the commission of an act or omission that would, in the opinion of Canada, be similar to any offence noted above and that:

- a) the foreign court had jurisdiction over the matter;
- b) the supplier appeared during the foreign court's proceedings or otherwise submitted to the foreign court's jurisdiction;



- c) the foreign court's decision was not obtained by fraud; and
- d) the supplier was entitled to defend itself in a manner that is consistent with Canadian standards.

The Integrity Regime provides that a supplier is ineligible to contract with the Government of Canada if its affiliate had been convicted of a foreign offence meeting the above noted requirements and the supplier was involved in or acquiesced to the actions that resulted in the affiliate's conviction or guilty plea.

In these circumstances, a supplier would be ineligible to contract with the Government of Canada for a period of 10 years from the date that PWGSC makes a determination regarding ineligibility/suspension. As discussed below, the period of ineligibility may be reduced pursuant to an administrative agreement between the supplier and PWGSC.

E) Supplier Ineligibility resulting from use of Ineligible Subcontract

The Integrity Regime prohibits a supplier from subcontracting work resulting from a government contract to subcontractors that have been convicted of, or have pleaded guilty to, any of the offences noted above unless the subcontractor has obtained a pardon or the supplier otherwise obtains prior written approval from PWGSC.

Should a supplier subcontract work to an ineligible subcontractor without PWGSC's prior written approval, PWGSC may determine that the supplier is ineligible to contract with the Government of Canada for a period of five years.

With respect to subcontractors, it is therefore essential that suppliers include provisions in their contracting documents with subcontractors requiring certifications that the subcontract is not ineligible pursuant to the Integrity Regime. In addition, suppliers can carry out due diligence, which could include requiring criminal record checks or review of PWGSC's database listing ineligible suppliers.

IV - Definition of Affiliate and Determination of Involvement in Affiliate's Improper Conduct

A) Definition of Affiliate

The definition of "affiliate" is very broad. Affiliate is defined as being "a person, including, but not limited to, organizations, bodies corporate, societies, companies, firms, partnerships, associations of persons, parent companies or subsidiaries, whether party or wholly-owned, as well individuals, directors, officers and key employees if: a) one controls or has the power to control the other; or b) a third party has the power to control both."

With the new Integrity Regime, the Government of Canada has taken a more nuanced approach to rendering suppliers ineligible to do business with the

Government of Canada on the basis of the activities of an “affiliate” than was the case in previous iterations of the Integrity Provisions.

As noted above, the Integrity Regime now provides that, if an affiliate of a supplier has been convicted of a listed offence or a similar foreign offence, an assessment will be made to determine if the supplier was involved in, or acquiesced to, the actions that led to the affiliate’s conviction. This determination is to be made by the Minister of PWGSC.

B) Third Party Report

As part of this process, the supplier will be required to secure the services of an independent third party monitor (such as independent legal counsel) to undertake an assessment of the supplier’s involvement in the actions that led to the affiliate’s conviction. The third party’s assessment will be provided to PWGSC and will be considered by the Minister.

If the Minister determines that the supplier was involved in or otherwise acquiesced to the actions that led to the affiliate’s conviction, the supplier will be deemed ineligible to do business with the Government of Canada.

V - Application to Reduce Period of Ineligibility

With the exception of offences that result in indeterminate ineligibility (i.e. offences governed by

subsection 750(3) and (4) of the *Criminal Code*), a supplier may apply to have the period of ten years ineligibility reduced to five years.

As part of its application, the supplier would have to demonstrate that it cooperated with law enforcement authorities and/or have undertaken remedial action to address the wrong doing. Also, it is very likely that the supplier would be required to follow an administrative agreement (discussed below) that would allow PWGSC to monitor the supplier’s progress with respect to its efforts to address the circumstances that led to the conviction.

While not required by the Integrity Regime, it is recommended that the supplier engage outside assistance (such as legal counsel) to assist in the development of a remedial program as part of the application to PWGSC for a reduced period of ineligibility.

VI - Suspension

The new Integrity Regime also gives PWGSC the ability to suspend a supplier from doing business with the Government of Canada for up to 18 months in circumstances where the supplier has been charged with, or admits guilt to, one of the listed or similar foreign offences. PWGSC has the discretion to extend the period of suspension if a judicial process is underway or, put other way, PWGSC may extend the period of suspension while the supplier defends itself against the criminal charges.



VII - Administrative Agreements and Third Party Monitors

The new Integrity Regime also provides for “administrative agreements”. An administrative agreement is an agreement between PWGSC and the supplier in circumstances where PWGSC has determined that additional caution must be exercised with respect to a supplier so as to mitigate the risks of contracting with the supplier. An administrative agreement would place conditions on the supplier in order to be eligible to contract with the Government of Canada. Such conditions would include remedial measures to address actual or perceived lapses in the supplier’s ethical conduct.

Administrative agreements may be used in circumstances where:

- An ineligible supplier has had their ineligibility period reduced;
- In lieu of suspending the supplier (such as in a case where the supplier has been charged with a listed offence);
- As a condition of PWGSC invoking a public interest exemption so as to allow the otherwise ineligible supplier to contract with the Government of Canada; or
- As a condition of PWGSC continuing with a contract that is already in place with a supplier that has become non-compliant during the term of the contract.

The Integrity Regime provides that suppliers that are subject to an administrative agreement will be required to obtain an independent, qualified third party (such as independent legal counsel) to monitor and verify supplier’s implementation of terms and conditions set out in the administrative agreement. As noted above, a third party monitor is also required to assess foreign convictions and the extent to which the supplier participated in the affiliate’s wrong doing.

Should a supplier breach the conditions of an administrative agreement, PWGSC may determine that the supplier is ineligible to contract with the Government of Canada for an additional period of time.

VIII - Breach of Integrity Provisions during Term of Contract

Pursuant to the Integrity Provisions, the Government of Canada has the discretion to terminate a contract for cause in the event that the supplier no longer complies with the requirements of the Integrity Provisions (e.g. the supplier, or one of its affiliates, have been convicted of a stipulated offence). The standard termination for cause provisions included in Government of Canada contracting documents may burden the supplier with extensive costs, including costs associated with the Government of Canada re-procuring the requirement.

IX - Considerations

Should a supplier believe that its conduct, or that of an affiliate, may be inconsistent with the requirements of the Integrity Regime and, hence, result in it being ineligible to contract with the Government of Canada, the supplier should seek out legal advice. Failure to comply with the integrity provisions can result in a supplier being ineligible to participate in Government of Canada contracts both as a supplier and subcontractor and, as a result, put the business at risk.

In the event that a supplier believes that it may be in violation of the Integrity Regime, the supplier may consider, with the advice of legal counsel and after a thorough investigation, whether it would be appropriate to make a proactive disclosure of the issue to PWGSC. By disclosing the issue to PWGSC, the supplier may be in a position to obtain an advance ruling from PWGSC regarding the apparent violation and may be in a better position to enter into an administrative agreement so as to reduce any period of ineligibility. It is also important to note that, with respect to most of the specified offences, the period of ineligibility runs from the date that PWGSC made a determination of ineligibility as opposed to the date the ethical violation occurred or from the date of conviction.

Also, a supplier should take proactive steps to avoid any potential breach of the Integrity Regime. Such

steps include the implementation of, and adherence to, a corporate code of conduct. The implementation of corporate codes of conduct provide suppliers an important and ongoing opportunity to communicate to their employees the importance of ethical conduct and the consequences of adopting unethical practices.

In addition, a supplier must take special care to ensure that the subcontractors included in bids for Government of Canada contracts or, otherwise working on those contracts comply with requirements of the Integrity Regime. This can be accomplished through due diligence and through the adoption of appropriate terms and conditions in teaming agreements and subcontracts. Such terms and conditions would: a) require the subcontractors to certify that they are, and will continue to be, in compliance with the Integrity Provisions; b) flow through the requirements of the Integrity Provisions to subcontractors; and c) allow the supplier to terminate contracts with subcontractors in the event that the subcontract is not in compliance with the Integrity Provisions.

X - Conclusion

The promulgation of the new Integrity Regime is PWGSC's most significant and comprehensive effort to ensure that its suppliers and subcontractors meet PWGSC's ethical requirements.

