



Government of Canada amends key contracting terms to include further grounds for debarment

Effective March 1, 2014, the Department of Public Works and Government Services Canada ("PWGSC") has amended the Integrity Provisions of its standard contracting terms. These amendments significantly broaden the scope of certifications that bidders must provide under the Integrity Provisions of Government of Canada contracts. These amendments will affect the eligibility of bidders to bid on Government of Canada contracts and will give additional rights to the Government of Canada to terminate contracts that include the new provisions.

Essential Provisions

The Integrity Provisions of the Government of Canada's standard contracting terms now require that a bidder certify that it and its affiliates have not been convicted of, or have been absolutely or conditionally discharged from, any of the following offences in the 10 years prior to bid submittal:

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



Furthermore, a bidder must also certify that no one will receive a benefit under the contract resulting from the solicitation process (including, for example, subcontractors and employees) who has been convicted of an offence listed in paragraphs (a) or (b), above, unless the person so convicted has obtained a pardon (or, as it is now called, a “record suspension”) or has its capacities to contract with the Government of Canada restored. This essentially means that a conviction under an offence listed in paragraph (a) or (b), above, will remain a bar on contracting with the Government of Canada until a record suspension or restoration of capabilities has been granted regardless of the fact that 10 years has passed since the conviction.

If a bidder be unable to provide the above noted certifications, the bidder would be prohibited from being awarded the contract resulting from the solicitation process. Furthermore, should a bidder be awarded a resulting contract that includes the Integrity Provisions, that bidder (now contractor) and its affiliates must remain free and clear from convictions of, or discharges from, the specified offences. If the contractor or any its affiliates is convicted of, or discharged from, a specified offence during the term of the resulting contract, the Government of Canada will have the right to terminate the contract for default on terms that are very unfavourable to the contractor.

Also, the bidder must certify that, in the 10 years prior to bid submittal, neither it nor any of its affiliates have been convicted of, or have received discharge from, any “foreign offence that Canada deems to be of similar constitutive elements to the offences listed in

these Integrity Provisions.” This means that convictions or discharges from offences in jurisdictions other than Canada (including, for example, the United States and European Union countries) will result in debarment from bidding on Government of Canada contracts. Unlike a conviction of an offence specified above in paragraphs (a) to (h), above, a conviction or discharge of a similar foreign offence during the course of the resulting contract does not give the Government of Canada the right to terminate the resulting contract for default.

What’s new?

The 10 year limitation period from the date of bid submittal is new. The previous version imposed a ban that was not time limited but could only be lifted as a result of obtaining a record suspension or a restoration of capabilities.

The previous version of the Integrity Provisions only applied to convictions and did not apply to “conditional or absolute discharges” from the specified offences. A conditional discharge allows the court to impose conditions on an individual as a result of having been found guilty of a criminal offence while not going so far as to enter in a conviction. An absolute discharge is to discharge an individual who has been found guilty of a criminal offence without entering a conviction and without imposing conditions. The revised Integrity Provisions have therefore been expanded to capture those individuals who have been discharged from, as opposed to having been convicted of, a specified offence.



Convictions under 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) or section 426 (Secret commissions) of the *Criminal Code* were not included in previous versions of the Integrity Provisions. As such, the offences that will result in a debarment, and may result in a termination of a resulting contract, have been significantly expanded.

The inclusion of convictions of, or discharges from, “any foreign offence that Canada deems to be of similar constitutive elements to the offences listed in these Integrity Provisions” is also new. This provision greatly expands the offences that could result in debarment to offences committed under foreign law. This will be of particular concern to companies that are operating in the United States where prosecutions of anti-trust, stock market offences and bribery of foreign officials are more vigorously pursued when compared to other jurisdictions. In short, should a company enter into a plea in the United States regarding the United States’ equivalent to the offences listed in paragraphs (a) to (h), above, that results in a conviction or a discharge (as opposed to an acquittal), the company or its affiliates risk being debarred from bidding on Government of Canada contracts.

In addition, bidders are now required to ensure that

their subcontracts “include Integrity Provisions no less favourable to Canada than those imposed in the resulting contract.” We take this to mean that the bidder awarded the resulting contract must flow down to its subcontractors the terms of the Integrity Provisions. When selecting subcontractors, bidders must now ensure that the subcontractors are willing and able to sign onto terms similar to those set out in the Integrity Provisions.

Finally, where a bidder or any of its affiliates have been convicted of, or discharged from, a specified offence and 10 years has passed, the bidder is also required to “certify for itself and for its Affiliates that measures have been diligently put in place in order to avoid the reoccurrence of such convictions or reprehensible actions.” We take this provision to mean that the bidder must have implemented compliance policies or other measures to avoid a reoccurrence of the activity that resulted in the conviction or discharge.

Why this is important?

The changes to the Integrity Provisions may affect your eligibility to bid on contracts to provide goods and services to the Government of Canada.

Also, should you execute a contract with the Government of Canada that includes the new and expanded Integrity Provisions, you may risk having your contract terminated by the Government of Canada should you be convicted of, or discharged from, any of the above noted offences. The termination provisions included in standard



Government of Canada contracting documents are very favourable to the Government of Canada and quite onerous on the contractor.

Finally, the changes to the Integrity Provisions require that bidders give early and thorough consideration to the integrity terms that are to be included in their subcontracts and to ensure that subcontractors can meet those requirements.

Should you have any questions regarding the amended Integrity Provisions, please contact either Paul Conlin or Ben Mills.

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