

## Canadian Government Suppliers: Getting in Trouble Abroad May Cause Problems At Home

Recent newspaper headlines are highlighting hurdles that some multinationals may face in contracting with the federal government.<sup>1</sup> The press reports focus on the consequences of the most recent changes to the federal government's bidding requirements. As a result of these changes, a company's ability to bid for government contracts depends not only on whether the company and its domestic and foreign affiliates have criminal convictions in Canada, but also on whether they have criminal convictions for foreign offences in foreign jurisdictions. Fully understanding the nature of these changes has, therefore, become critical to bidders, particularly those with foreign parents or subsidiaries.

### Changes to the Federal Integrity Provisions

As McMillan reported in March 2014,<sup>2</sup> major changes to the government procurement provisions came about as a result of amendments to the Federal Integrity Provisions. The Federal Integrity Provisions are contractual provisions incorporated into all solicitations administered by Public Works ("PWGSC") in relation to federal government procurement and real property transactions.<sup>3</sup>

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<sup>1</sup> McKenna, Barrie, "*Companies worried about strict Ottawa rules on corruption*" *The Globe and Mail*, 12 October 2014..

<sup>2</sup> Masse, Martin G, Neil A. Campbell, Monica Podgorny, "*Federal Government Tightens Procurement Integrity Provisions*", McMillan Government Procurement Bulletin March 2014.

<sup>3</sup> The Integrity Provisions have also been adopted by Aboriginal Affairs and Northern Development Canada; Agriculture and Agri-Food Canada; The Canada Revenue Agency; Defence Construction Canada; Economic and Social Development Canada; The Jacques Cartier and Champlain Bridges Crown Corporation and; Shared Services Canada.

Prior to the March 2014 changes, companies and individuals were ineligible to do business with PWGSC if, at the time of bidding, they could not provide mandatory certification to the effect that they, or their affiliates, had not been convicted of a list of Canadian offences. The March amendments expanded the list of prohibited Canadian offences and stipulated that bidders must now certify that in the last 10 years, they, or their affiliates, have not been convicted of or received a conditional or absolute discharge in relation to the expanded list of Canadian offences.

### The Foreign Offences Provision

In addition to expanding the list of prohibited Canadian offences, the Integrity Provisions were amended to include a requirement that bidders warrant that they, or their domestic or foreign affiliates, have not been convicted of or received a conditional or absolute discharge in relation to similar foreign offences.

The Integrity Provisions do not provide a list of the similar foreign offences. Instead, multinational suppliers wishing to bid on federal contracts in Canada are now required to self-evaluate to determine whether, in the preceding 10-year period, they, or their affiliates, have been convicted of or received an absolute or conditional discharge in relation to offences in other jurisdictions that have "similar constitutive elements" to the list of prohibited Canadian offences (the "Listed Canadian Offences"):<sup>4</sup>

- Frauds against the government under the *Criminal Code of Canada*
- Offences under the *Financial Administration Act*
- Payments of a contingency fee to a person to whom the *Lobbying Act* applies
- Money laundering
- Criminal Offences under the *Competition Act*, including price-fixing and other conspiracies, bid-rigging, and false or misleading representations
- Extortion
- Bribery of public officials
- Criminal breach of contract
- Falsification of books and documents

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<sup>4</sup> See *section 9 of the Integrity Provisions* for the specific offences by statute.

- Participating in activities of criminal organizations
- Income and excise tax evasion
- Bribing a foreign public official
- Selling or purchasing office
- Selling defective products to the government
- Offences in relation to drug trafficking
- Bribery of judicial officers
- Secret Commissions
- Prohibited insider trading
- Forgery and other offences resembling forgery
- Fraudulent manipulation of stock exchange transactions

The introduction of the foreign offences requirement has left bidders uncertain as to whether they can provide the mandatory certification. AS a result, self-assessment by bidders is proving difficult. It would be helpful if PWGSC provided guidance as to what offences Canada deems to be of similar constitutive elements to the Listed Canadian Offences, or provided guidelines to allow bidders to determine how "similar" the elements of a foreign offence need to be. This would be consistent with the practice of other government agencies such as the Competition Bureau and the Canada Border Services Agency, which regularly release detailed guidance in respect the application of their respective governing laws and regulations.<sup>5</sup>

Another cause of uncertainty arises because the scope of the certification required under the Integrity Provisions is unclear. The certification requirement applies not only to the bidder, but also any of the bidder's "affiliates". The Integrity Provisions define "affiliate" broadly and includes a wide range of indicia of "control":

For the purpose of [the] Integrity Provisions, everyone, including but not limited to organizations, bodies corporate, societies, companies, firms, partnerships, associations of persons, parent companies, and subsidiaries, whether partly or wholly-owned, as well as individuals, and directors, are Bidder's Affiliates if:

- a) directly or indirectly either one controls or has the power to control the other, or

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<sup>5</sup> See, for example, the Competition Bureau's *Competitor Collaboration Guidelines* or CBSA's *series of D-Memoranda*.

b) a third party has the power to control both.

Indicia of control, include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity created following the acts or convictions and any conditional or absolute discharges specified in [the] Integrity Provisions which has the same or similar management, ownership, or principal employees, as the case may be.

As a result of the broad definition of "affiliate", a bidder is potentially forced to self-evaluate a whole host of very uncertain requirements against the history of a series of companies which, while under the same corporate umbrella, may have nothing to do with the bidder's Canadian operations.

### What Should Suppliers Do?

Companies with foreign subsidiaries and parents of affiliates that submit a bid to PWGSC should take into account the following considerations when deciding whether or not they can submit a bid with the requisite integrity certification:

1. The Integrity Provisions are effectively contractual provisions imposed by PWGSC. To the extent they are uncertain, they should be given an interpretation that favours bidders.
2. If, during the course of a bidder's due diligence, a potentially relevant foreign conviction of a related company is found, carefully review whether there is sufficient indicia of control to deem the related company to be an affiliate of the bidder. Also, review the elements of the law constituting the foreign conviction against the Listed Canadian Offences in order to see if there is a compelling explanation as to why the conviction(s) are not sufficiently similar to a Listed Canadian Offence.

3. If there is no way to distance the bidder from the foreign conviction, explore whether the Public Interest Exception could apply to a procurement, or encourage the government to issue a request for proposals under the exemption where it is justifiable. The Integrity Provisions permit Canada to enter into a contract with a bidder where the bidder, or the bidder's affiliates, have been convicted of or have received a conditional or an absolute discharge for an offence specified in the provisions for reasons such as:
  - o no one else is capable of performing the contract;
  - o emergency;
  - o national security;
  - o health and safety; or
  - o economic harm.

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#### a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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