



Government of Canada Amends Integrity Regime: Less Debarment, but More Suspension

Compliance and Ethics





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The federal government's procurement department, Public Works and Government Services Canada (PWGSC), recently amended its integrity regime for bidders and contractors seeking to enter into contracts with the federal government. The revised "Integrity Regime," which will be applied by all government departments, consists of a new "Ineligibility and Suspension Policy" (the Policy) and revised "Integrity Provisions" that were incorporated into all new PWGSC solicitation documents and contracts as of July 3, 2015.

The Integrity Regime amendments have some improvements, such as (1) only taking into account convictions in the past three instead of the past 10 years, (2) no longer making convictions of affiliates abroad automatic grounds for debarment; and (3) the possibility of a reduced period of ineligibility from 10 years to five years.

However, the revised Policy does not contain the much-hoped-for improvement of explicitly granting a discretion to reduce debarment below five years in appropriate cases in a manner similar to other jurisdictions such as the United States, or to impose conditional non-debarments as does the World Bank. The Policy also takes a retrograde step of creating a potential 18 month ineligibility period where a supplier is charged with — but not yet convicted of — an offence in Canada or abroad.

Eight significant amendments

Period of ineligibility:

The period of ineligibility is reduced from 10 to five years if the supplier either cooperated with law enforcement or undertook remedial actions. An administrative agreement will be imposed to monitor the progress of a supplier's remedial actions. A supplier is permanently ineligible if convicted of frauds against the government, unless a record suspension is obtained. The period of ineligibility commences when a supplier receives a Notice of Ineligibility/Suspension from the minister.

Suspension:

A supplier may be ineligible for up to 18 months if it is charged with or admits guilt to a listed offence or similar foreign offence. A supplier could thus be punished in Canada for unproven charges. The suspension can be extended for another 18 months or "for so long as is necessary pending completion of a criminal proceeding." An administrative agreement can be imposed in lieu of a suspension.

Treatment of affiliates:

Previously, if an affiliate was convicted of a listed or similar offence, then a supplier was automatically ineligible to contract with the Canadian government. Now if an affiliate is convicted in Canada or abroad the supplier can retain an independent third party to determine whether the supplier participated, was involved in, or influenced the affiliate's actions. Based on this independent report, the minister will determine whether the Canadian supplier is ineligible to contract based on the affiliate's conviction.

Treatment of existing contracts after conviction:

If a conviction or ineligibility event occurs during a contract, the federal government can terminate the contract for default. Suppliers will be given an opportunity to show why the contract should not be terminated. An administrative agreement and third-party monitoring will be required if PWGSC does not terminate the contract.

Administrative agreements and monitoring:

PWGSC can use an administrative agreement, with conditions the supplier must fulfill, where it determines that caution is necessary to mitigate risks from contracting with a supplier. The terms of an administrative agreement would be monitored by an independent, qualified third party paid for by the supplier. Breach of an administrative agreement will lead to a period of ineligibility longer than the originally assessed ineligibility period.

Administrative agreements will be available where:

- an ineligible supplier has had its ineligibility period reduced;
- PWGSC decides not to suspend a supplier;
- a public interest exception is invoked; or
- a decision is made to continue an existing contract with an ineligible supplier.

Retroactivity:

Previously, a supplier would be ineligible if it or an affiliate had been convicted any time in the past 10 years (reflecting the length and automatic nature of the debarment). Under the amendments, a supplier is ineligible based only on convictions in the last three years.

Public list:

PWGSC will publish its list of ineligible and/or suspended suppliers.

Impact of changes

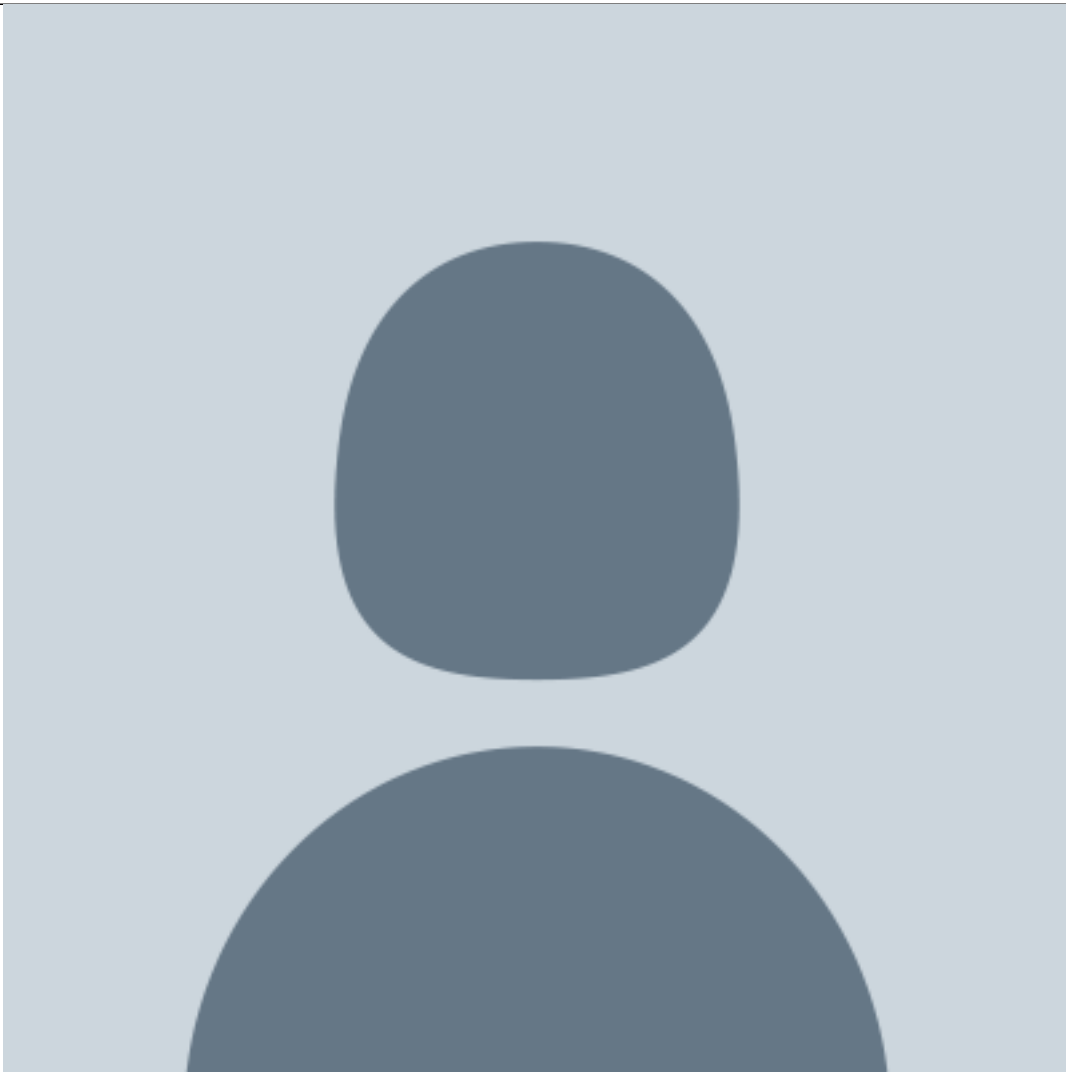
The changes provide some improvements (particularly for foreign companies with foreign head offices), but significant issues remain and the new provision concerning the possible suspension of a “charged” supplier for 18 months or longer is of particular concern. This new provision raises a host of issues, including what constitutes a “charge” and a lack of fairness and due process because a supplier is presumed guilty. Indeed, a strong case based on fairness and the presumption of innocence can be made that the mere laying of charges should not lead to a suspension. A case in point is the recent loss by the commissioner of competition in a federal contract bid-rigging case that the commissioner brought based on a tip it received from PWGSC. A jury trial found nine defendants not guilty of 60 charges of bid-rigging and conspiracy to rig bids, which charges were laid in 2009. Had the new policy been in place, the suppliers could have been ineligible to contract for over six years on charges that proved to be unfounded.

While the possibility of a reduced five-year ineligibility period is a positive change, it does not adequately recognize or reward companies that have “cleaned house.” Other jurisdictions give discretion to contracting entities to not debar suppliers in such circumstances. This may indeed be built into the new policy that states the minister “may” make a determination of ineligibility or suspension, rather than saying the minister “shall” or “must” make such a determination. However, there is no explicit indication that the policy is intended to include a discretion not to debar.

The revised Integrity Regime maintains a very limited number of public interest exceptions, meaning there is little room to obtain a waiver from the requirements. However, the changes mean decisions regarding ineligibility can be judicially reviewed because they are discretionary decisions. The inclusion of administrative agreements and monitoring is a positive change, where appropriately used by PWGSC.

In summary, while the revised Integrity Regime is a step forward from the previous regime, it did not step forward far enough.

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