

INTEGRITY FRAMEWORK RECOMMENDATIONS



**For Public Services and Procurement Canada
(PSPC)**

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ITAC

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As Canada's national ICT business association, the Information Technology Association of Canada (ITAC) champions the development of a robust and sustainable digital economy in Canada. A vital connection between business and government, we provide our members with the advocacy, networking and professional development services that help them to thrive nationally and compete globally. A prominent advocate for the expansion of Canada's innovative capacity, ITAC encourages technology adoption to capitalize on productivity and performance opportunities across all sectors. A member-driven not-for-profit, ITAC has served as the authoritative national voice of the \$170 billion ICT industry. More than 33,500 Canadian ICT firms create and supply goods and services that contribute to a more productive, competitive, and innovative society. The ICT sector generates one million jobs directly and indirectly and invests \$4.8 billion annually in R&D, more than any other private sector performer.

The Honorable Judy Foote
Minister of Public Services and Procurement

Dear Minister Foote,

I would like to thank you for all of the time and patience for which your department and staff have offered to my organization since the creation of the Integrity Framework Regime.

In keeping with this collaborative approach, my organization has generated the attached report, which contains additional recommendations regarding this Regime. ITAC is confident that we can create a Regime that both empowers government and respects industry.

We look forward to discussing your response to these recommendations, please do not hesitate to contact me.



Robert C. Watson
President and CEO
Information Technology Association of Canada (ITAC)

INTRODUCTION

ITAC and its members agree that Canada should have an integrity framework that fosters corporate responsibility and ethical behaviour. We are concerned, however, that the current framework is overly broad, lacks flexibility and is too heavily oriented toward punishment (rather than ensuring that suppliers are dealing fairly with government).

Attempts to clarify the language to the Integrity Regime announced on April 4, 2016 further exacerbated these shortcomings and moved Canada's integrity regime further out of alignment with its principal trading partners.

To remedy these concerns, ITAC recommends that the Department of Public Services and Procurement ("PSPC") undertake, in consultation with industry representatives and other stakeholders, a review of the Integrity Regime with a view to:

1. Replacing "automatic debarment" rules with a more flexible approach that ensures penalties are appropriate to each given circumstance;
2. Eliminating grounds for debarment stemming from "charges" (rather than convictions);
3. Narrowing the scope of offences covered by the Integrity Regime to crimes that involve bribery, fraud and similar corruption-related wrongdoing;
4. Making the obligation to provide notice of changes more practical; and
5. Narrowing the meaning of "affiliate".

Until such time that this review of the Integrity Regime can be performed, ITAC recommends that PSPC suspend the mandatory minimum penalty provisions in the current regime.

BACKGROUND

ITAC's concerns about the Integrity Regime reflect the following key points.

1) Mandatory Minimums

The Ineligibility and Suspension Policy (the "Policy") creates what amounts to "mandatory minimum" penalties of long-term debarment, regardless of the seriousness of the offence, the culpability of the supplier or whether the supplier has taken responsibility for any wrong-doing and taken remedial action to prevent a reoccurrence.

This approach contrasts with the integrity regimes of Canada's principal trading partners. By way of example:

- i. The European Union's recently adopted integrity directive allows companies to undergo a "self-cleaning process" which generally consists of an active contribution to an investigation, the implementation of prevention measures, and compensation for damages. This allows EU decision makers to "tailor the punishment to fit the crime" and to reflect the moral blameworthiness of the offending company.
- ii. With some exceptions, the United States undertakes a mitigation analysis before debarring a company. Deferred-prosecution agreements, in which a corporation accused of corruption commits to cooperate fully with an investigation into its transgressions and implement internal compliance systems, in exchange for having the charges withdrawn, are also common.

Canada's Integrity Regime does not provide the Government with similar flexibility. Although administrative agreements may be used to shorten the period of debarment in some circumstances, doing so only has the effect of reducing the debarment to 5 years (rather than eliminating or suspending the debarment altogether). In other circumstances (including where the supplier has provided a false or misleading certification or declaration to PSPC in relation to the Policy), the Policy provides no ability to reduce the period of debarment.

ITAC is concerned that the failure to build flexibility into the Integrity Regime will have serious economic consequences for Canadian taxpayers. Mandatory minimum debarments will result in less competition on future government procurements and potentially cripple the viability of the debarred entity. This, in turn, will lead to less employment and economic activity. Additionally, mandatory minimums will increase the risk of retaliatory trade barriers being erected in foreign markets, which could undermine Canada's export based economy.

To avoid these outcomes, and to put Canada on a level playing field with its principal trading partners, a more flexible approach to penalties is needed. ITAC recommends that PSPC look to the EU and the United States for viable alternatives.

2) Charges

The updated version of the Integrity Provisions published on April 4th includes an obligation on a bidder to certify (among other things):

- i. that it has provided with 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; and
- ii. that none of the domestic criminal offences, and other circumstances, described in the Policy will or may result in a determination of ineligibility or suspension, apply to the bidder, its affiliates and its proposed first tier subcontractors.

The obligation is to report charges laid in countries that do not respect the rule of law. As well, it is unclear whether the obligation is tied to any particular timeframe (e.g., “the prior 3 years”) or if it applies even to charges that have been withdrawn.

A bidder that provides a false or misleading list of charges (domestic and foreign) pertaining to itself, its affiliates and its proposed first tier subcontractors faces automatic debarment for 10 years, with no opportunity for the punishment to be reduced.

On its face, the Policy does not provide PSPC with flexibility to consider factors such as inadvertence, honest mistake, or impracticality. As well, there is no obvious process for a bidder to present evidence that it had no knowledge of the inaccuracy of the information that it certified.

Additionally, a supplier will face suspension at the discretion of PSPC if it has been charged with (or admits guilt of) any of the offences listed in the Policy or a similar foreign offence.

ITAC is concerned that, by tying debarment to “charges” (rather than convictions), the Policy violates the presumption of innocence and the fair procurement principles reflected in Canada’s trade agreements. Further, in doing so, the Policy is susceptible to legal challenges before the courts and the Canadian International Trade Tribunal and increases the prospect of Canada experiencing the economic harm discussed above in respect of mandatory minimum penalties.

For these reasons, ITAC recommends that the Policy be revised to eliminate “charges” (including a failure to report – or accurately report – charges) as a grounds for debarment.

3) Offences Unrelated to Corruption

The offences listed in the Policy include crimes that go beyond bribery, fraud, and similar corruption-related wrongdoing. By way of example, listed offences include: (i) misleading marketing practices, (ii) sending a deceptive notice of winning a prize, and (iii) lobbying infractions – including such administrative oversights as the failure to file a return on time. The Policy also would purport to suspend a supplier where a subcontractor has received a prior suspension, which is unknown to the supplier.

The breadth of the listed offences creates two key challenges:

- i. it increases the likelihood of a supplier being automatically debarred in circumstances where a conviction has nothing to do with corruption or, on an objective standard, does not make the supplier unfit to supply goods or services to the Government; and
- ii. it increases the likelihood of a supplier being automatically debarred for inadvertently providing a false or misleading list of charges or convictions pertaining to itself, its affiliates and its proposed first tier subcontractors.

The significance of these challenges cannot be understated. Particularly for suppliers who are multinationals, ensuring that lists of charges and convictions are accurate and remain up to date will be very difficult given that they operate globally. They often have hundreds of foreign affiliates, and their internal corporate compliance and reporting processes likely were not designed to collect information about non-corruption offence.

ITAC is concerned that the inclusion of non-corruption offences in the Integrity Regime, together with automatic debarment for making a false or misleading certification, will inevitably result in the debarment of suppliers who, on an objective standard, have not engaged in the type of conduct that makes them unfit to supply goods or services to the Government.

For this reason, ITAC recommends that PSPC narrow the scope of offences covered by the Integrity Regime to crimes that involve bribery, fraud and similar corruption-related wrongdoing.

4) Notice of Changes

The Policy now requires a supplier to inform the Registrar of Ineligibility and Suspension in writing within 10 working days of any charge, conviction or other circumstance relevant to the Policy with respect to itself, its affiliates and its first-tier subcontractors.

It is unrealistic to expect that a supplier (and, in particular, a multinational company with worldwide affiliates) can meet this 10 day timeframe. In addition to the challenges of collecting and reporting information quickly (including information about affiliates and subcontractors), in the case of foreign charges and convictions, it will be necessary to undertake a legal

assessment as to whether a foreign offence is equivalent to an offence enumerated within the Policy.

The reporting obligation is complicated further by the vague wording of the Policy, which requires a supplier to provide notice within the 10 days of “any ... other circumstance relevant to the Policy”.

ITAC is concerned that the “notice of change” provisions in the Policy are unworkable.

For this reason, ITAC recommends that they be made more practical, both in terms of their scope and the related timeframe for providing notice.

5) Definition of “affiliate”

The definition of “affiliate” in the Policy is broad in four significant respects:

- i. it applies to two persons who are under “common control” and where “each person is controlled by a third person and the third person by whom one person is controlled is affiliated with the third person by whom the other person is controlled”;
- ii. it incorporates broad indicia of control;
- iii. it applies to foreign affiliates; and
- iv. it includes a “senior officer”.

The impacts of this definition are far-reaching. By way of example, it introduces significant uncertainty about the scope of a supplier’s reporting obligation, particularly in respect of charges and convictions against (a) foreign affiliates, (b) senior officers and (c) entities acquired through mergers and acquisitions.

ITAC is concerned that the general breadth and lack of precision of the definition of “affiliate” places suppliers at risk of debarment, particularly since they are responsible for certifying that none of their affiliates has been charged, convicted, or pleaded guilty to any offence listed in the Policy or a similar foreign offence.

For this reason, ITAC recommends that the definition of affiliate be narrowed to, at a minimum, exclude (i) affiliates over whom a supplier does not have direct corporate control or indirect control through a clear “directing mind”, and (ii) senior officers.

Other Comments

There remains confusion and inconsistency among Government departments and agencies as to which version of the Integrity Regime they have adopted. Some departments and agencies are continuing to use the 2014 Integrity Regime, notwithstanding the changes implemented in July 2015 and April 2016. This inconsistent application of the Integrity Regime makes it more difficult and costly for industry to participate in procurements. These challenges are particularly acute for smaller companies who do not have the resources to navigate complex legal rules.

Going forward, ITAC recommends that the Government obligate all Government departments and agencies to adopt the most current Integrity Regime simultaneously.

ITAC is dedicated to helping the Government create an Integrity Framework, which is workable for industry and for Government. We look forward to continued engagement on this subject.