20. Incentivizing Integrity: Adoption of a Canadian False Claims Act

Issue

Fraud committed against the government within the context of public sector procurement is a serious crime that undermines competitive markets, unduly excludes honest businesses, has significant economic consequences for businesses and the public, and costs taxpayers millions of dollars annually. Despite these consequences, the protections afforded to the Government of Canada under Canadian law are deficient. As the scale and scope of federal spending is set to increase, the federal government should institute a series of reforms, including a more powerful incentive to support whistleblowers, in order to more effectively ferret out fraudulent conduct.

Background

Governments across Canada spend billions each year providing a variety of public goods and services including health care, defense, transportation, education, infrastructure and other services for businesses, workers, veterans, the elderly and the young. Most of this public sector procurement is conducted through competitive processes. While the overall value of public procurement as a proportion of the Canadian economy is difficult to approximate, we can come to appreciate its scale by studying the activity of the federal department of Public Works and Government Services Canada ("PWGSC"), which provides federal government departments and agencies with procurement services. It is the federal government's central purchasing agent and Canada's largest public purchaser of goods and services. PWGSC's purchases account for more than 85 per cent of the total value of federal government procurement, buying, on average, $15 billion (CAD) worth of goods and services each year, through approximately 60,000 transactions.[1]

Hidden among honest providers of these goods and services, however, are individuals and organizations that defraud the government for private gain. Fraud can take many forms, from bid-rigging and kickbacks, to illegal subcontracting, prevailing wage violations, and other schemes that not only defraud the government of taxpayer dollars, but can allow a perpetrator to obtain an unfair competitive advantage over honest competitors when vying for government contracts. Regardless of their design, fraud schemes share two important characteristics; they can be very difficult to identify without critical and salient inside information, and they can be resource-intensive to investigate and prosecute.

The potential for fraud and malfeasance within the context of public procurement is heightened when one considers the ambitious infrastructure spending plan tabled by the Government in the 2016 Federal Budget. Each year over the next decade, the Government has committed to steadily increasing federal infrastructure investment. At full implementation, this will represent an annual additional investment of $9.5 billion per year. These outlays will almost double federal infrastructure investment to nearly $125 billion – from $65 billion – over ten years, which will be the largest new investment in infrastructure in Canadian history.[2]

Much of this spending will be directed to the construction industry, an industry we know to be particularly susceptible to bid-rigging and other fraudulent practices.[3] In fact, the Competition Bureau of Canada recently conducted a review of bid-rigging matters investigated since 1990. The review indicated that, while hardly the only industry to be active in fraudulent conduct, the highest number of allegations of big-rigging between 1996 and 2009 related specifically to the construction services sector. Approximately 40 per cent of the total number of cases investigated by the Bureau in that period involved the construction industry, a finding that is consistent with the experience of other OECD member states.[4]

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[1] Public Works and Government Services Canada's (PWGSC) Report on Plans and Priorities 2016-17. Available online at http://www.tpsgc-pwgsc.gc.ca/rapports-reports/documents/rpp/2016-2017/tpsgc-pwgsc-rpp-2016-2017-eng.pdf.
[2] Finance Canada. *Growing the Middle Class*. [Ottawa], 2016. Available online at http://www.budget.gc.ca/2016/docs/plan/budget2016-en.pdf
[3] OECD Policy Roundtables: Construction Industry 2008. Available online at http://www.oecd.org/daf/competition/cartels/41765075.pdf
[4] OECD Policy Roundtables: Collusion and Corruption in Public Procurement 2010. Available online at http://www.oecd.org/competition/cartels/46235884.pdf.

Fiscal stimulus through increased and accelerated infrastructure spending has raised the specter of possible fraud in the past. In 2009, in its Second Report to Canadians on its Economic Action Plan, the federal government indicated that it was accelerating and increasing expenditures on infrastructure, including $12 billion (CAD) in new stimulus funding announced in the January 2009 budget.[5] At the time, the Commissioner of Competition indicated that "bid-rigging and other fraudulent practices are areas where we reasonably fear we may see an up-tick in activity in view of the likely significant increase in public infrastructure spending."[6] More recently, current Commissioner of Competition John Pecman commented on the billions proposed to be spent on infrastructure beginning in 2016, saying "I think it is fair to say that when procurement is done in haste and perhaps the competitive bidding process is done quickly and there is not a lot of care taken, it increases the likelihood of bid-rigging…[K]nowing what we do, that the construction sector and the whole infrastructure sector is susceptible to bid-rigging, it is incumbent on us to prioritize our awareness and work to help deter this type of conduct from happening."[7]

The False Claims Act (FCA)

While Canadian law does provides some baseline protections for whistleblowers in both the public and private sectors[8], and public procurement agencies do have established steps that they can take to promote more effective competition in public procurement to reduce incidents of fraud or malfeasance, the overall basket of protections under existing statutes afforded to the Canadian government, and ultimately the taxpayer, is woefully inadequate.

One of the most effective tools against such fraud currently missing from Canada`s enforcement basket is what is known as the *False Claims Act*, a statutory scheme prevalent in the United States that provides a meaningful incentive structure for whistleblowers to bring credible information forward to government in order to facilitate the investigation of such crimes and the recovery of lost proceeds. Individuals and organizations committing fraud can be assessed with treble damages and whistleblowers can be awarded out of the proceeds. Taxpayers are made whole, crime is deterred, and integrity is incentivized.

The principle of the law is straightforward: any citizen who finds the existence of fraud against the government may initiate and sustain a recovery proceeding against the perpetrator of the fraud in the government's name. The citizen-informer (known as a *relator*) can then expect to receive in return a portion of the sum recovered by the state if successful (between 15% and 30%). The private right of action that the *relator* is entitled to, known as a *qui tam*, or whistleblower, provision, is what makes this approach so effective, providing an innovative and powerful legal avenue that allows the government to leverage the power of the public to detect and punish fraud against the state and recover money embezzled by dishonest companies and individuals.

By any measure, the U.S. False Claims Act[9] has been the most effective legal tool in combating fraud against the public purse. Prior to 1986 (when amendments were made to the U.S. law to strengthen its qui tam provisions), the U.S. Department of Justice recovered less than $50 million (USD) a year under the False Claims Act. In the 10 years following 1986, the Justice Department recovered $1 billion. In 2015 alone, they recovered more than $3.5 billion, $2.8 billion of which came from qui tam suits brought forth by private individuals and companies. The total recoveries in the past six years to the U.S. Treasury are $26.4 billion. At a time when people question government efficiency and effectiveness, the False Claims Act has a twenty-to-one return in fighting public sector fraud (for every dollar that the federal government spends on FCA enforcement, it recovers $20 in return). In fact, the legal tool has been so effective that 30 separate U.S. states have followed suit and implemented their own versions of the legislation.

As has been noted, fraud schemes are complex, and the government concludes thousands of contracts each year to purchase goods and services. It does not always have the information it needs to detect collusion and corruption in the allocation and management of these contracts. Moreover, the state does not always have the resources to act on

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[5] Canada's Economic Action Plan: Budget 2009. Available online at http://www.budget.gc.ca/2009/pdf/budget-planbugetaire-eng.pdf.
[6] Speaking notes for Melanie L. Aitken, Commissioner of Competition to the Northwinds Professional Institute 2009 Competitive Law and Policy Forum. Available online at http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/02994.html at pg. 5.
[7] Bill Curry, "Competition Bureau warns of bid-rigging as Ottawa set to spend on infrastructure," *The Globe and Mail*, May 29, 2016. Available online at http://www.theglobeandmail.com/news/politics/competition-bureau-warns-of-fraud-as-ottawa-set-to-spend-on-infrastructure/article30200239/.
[8] E.g. Sec. 425.1 of the Federal Criminal Code, Sec. 52 of the Competition Act, and the Public Servants Disclosure Protection Act of 2006.
[9] 31 USC 3729-3733

the information it receives, given the volume of cases and the complexity of the schemes. By providing an incentive for whistleblowers to come forward, as well as a pathway for relators to pursue cases unilaterally, the False Claims Act helps to solve both of these problems in an effective and efficient way, and can bolster the enforcement capacity of the federal government without necessarily expanding the federal workforce or devoting additional financial resources for that purpose.

It is for these reasons that the final report of the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry (the `Charbonneau Commission) – a Quebec-based commission charged with the task of inquiring into the existence of schemes that entailed activities of collusion and corruption over a 15 year period (1995-2011) in the management of public construction projects, and to examine potential remedial measures to identify, eliminate and prevent collusion and corruption in the awarding and management of public contracts – resoundingly endorsed the adoption of a Canadian False Claims Act. Reflecting on the success and efficacy of both the U.S. federal law, as well as a version of the law effective in New York State, the Commission stated that the FCA ``has proven to be formidably efficient at recovering significant sums on behalf of the public treasury without the necessity of added state resources. We recommend that Government adopt such a law.``[10]

As a legal measure to protect taxpayers and businesses alike, the False Claims Act has proven to be effective. The *qui tam* provisions particular to the U.S. legislation have allowed relators to pursue cases that have resulted in billions of dollars of recoveries that would have otherwise been lost and, even more importantly, has served as an action-forcing mechanism encouraging Government to actively pursue the fraud, waste and abuse of taxpayer dollars. The rate at which federal spending is set to increase, and the haste by which such spending will occur, will invariably increase the likelihood of bid-rigging, collusion and other nefarious behaviour. Therefore, it is incumbent that the Government of Canada instills reasonable taxpayer protections to ensure that public dollars are spent wisely and that the penalty for honesty that companies suffer when competing against businesses willing to break the rules is eliminated.

Recommendations

That the federal government:

1. Adopt a federal *False Claims Act* statute that includes whistleblower incentive (*qui tam*) provisions which provide the authority and financial incentive to private individuals to enforce the statute on the government`s behalf.
2. Encourage Provincial and Territorial Attorneys General to explore the adoption of false claims statutes at the Provincial and Territorial level.
3. Include specific penalties within the statute that deter frivolous and vexatious litigation.

[10] See "Rapport final de la Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction" pp. 166-172 (November 2015). Available online at https://www.ceic.gouv.qc.ca/fileadmin/Fichiers_client/fichiers/Rapport_final/Rapport_final_CEIC_Integral_c.pdf