

Office of the President and
Chief Executive Officer

Cabinet du président
et chef de la direction

November 11, 2014

Hon. Diane Finley
Minister of Public Works and Government Services Canada and
Receiver General for Canada
11 Laurier Street
Gatineau, QC K1A 0S5

Dear Minister Finley:

I am writing to inquire into recent changes that were made to the Public Works and Government Services Canada (PWGSC) Integrity Framework in relation to federal government procurement and real property transactions.

Since the Canadian Integrity Framework is significantly different from programs that are implemented in Great Britain, France, Germany and the United States, we feel it is important for the government to explain how these provisions support accountability and integrity in its procurement and real property transactions.

At the outset, let me stress that the Canadian Chamber of Commerce fully supports the need for companies to respect the laws of the countries in which they operate. We believe that businesses have an obligation to behave in a legal and ethical manner at all times. However, these provisions, which were announced without consultation with the business community and which will have a very significant impact on companies operating in Canada, raise some very serious questions. We believe it is essential that the Department clarify the measures' intent and their application.

We have four primary inquiries:

A. Treating Multinationals as a Global Entity - PWGSC's Integrity Framework states, "The Integrity Framework applies to convictions of the supplier or anyone, be it an individual or other entity, who directly or indirectly, legally or de facto, controls the company. This includes any affiliates and members of the board of directors."

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1. Does this mean a crime committed by any individual member of the Board of Directors could potentially have the effect of barring the company from federal procurement contracts?
2. This definition suggests that multinationals are treated as a single global entity. It is unclear how PWGSC intends to legislatively apply the term “affiliate” under the new provisions. At present, the term “affiliate” is very broad, and seems to assume parent companies, subsidiaries, sister companies and members of the board of directors operate within the same management structure or are controlled by a common third party. We seek a comprehensible definition of “affiliate” as the Department intends to apply it.
3. In many jurisdictions, Canadian firms are not permitted to do business without a local partner, which is often the majority owner. Would the conviction under a scheduled offence of such a company constitute a reason for barring the Canadian firm from Canadian government procurement?

B. Expiry of Debarment and Certifying Preventative Measures - The certification requirement is limited to convictions that occurred in the last 10 years. Bidders must certify that preventative measures have been taken to avoid reoccurrence of offences for convictions occurring more than 10 years ago.

1. How do bidders “certify” preventative measures?
2. What mechanisms do bidders apply to demonstrate they have complied with the current Framework over the last decade?
3. Does the Department have guidance for suppliers who may have purchased or merged with firms whose history will make the combined enterprise non-compliant with this framework, which is introduced retroactively?
4. Is there a recourse mechanism for organizations to demonstrate sound behaviour, and to prove that preventative measures have been taken to get “back on side?”

C. 10-year Debarment for PWGSC Contracts – Companies that are found non-compliant will be barred for 10 years from bidding on federal government contracts. The Integrity Framework establishes rules for debarring organizations that have committed an offence under 18 broad categories.

1. Canada already has well established penal statutes that punish companies that are convicted of criminal offences. What is the relationship between those penalties and the ten-year ban?
2. Will the Integrity Framework impose a single, fixed penalty regardless of which of the offences listed has been committed, the severity of the offence and the sentence imposed by a court?
3. Not all the offences listed are germane to federal government procurement. Why are offences like insider trading listed?

D. Jurisdiction and Application to “Similar” Foreign Offences – PWGSC’s integrity framework applies to convictions for “similar foreign offences.” There is currently no appeals process or hearing in Canada. A bidder must certify that neither it nor the bidder’s affiliates have been convicted of any foreign offence that has “similar constitutive elements” within the past 10 years. This clause implies that Canada will grant full credit to a foreign state’s judicial process, without any Canadian process to validate it.

1. Canada has traditionally objected to the extra-territorial application of law, even by our closest partners. In 1985, Canada passed the Foreign Extra Territorial Measures Act to grant authority to the Attorney General to prevent foreign orders and rulings from having effect in Canada. Is the Integrity Framework compatible with this legislative record?
2. What does “similar constitutive elements” mean? PWGSC has not legally defined this clause and has provided no regulatory process on how it will identify whether a foreign offence is similar to the scheduled Canadian offences.
3. Except for the application of international conventions, are there examples of other democratic nations accepting the ruling of a foreign court without a domestic hearing?

The Canadian Chamber supports efforts to ensure high standards of ethics in government procurement, but we believe clarity is urgently required to ensure these new regulations are not regarded as arbitrary, retroactive or unenforceable.

Given the important implications the regulations will have for businesses operating in Canada, we would appreciate receiving the government's response to these issues at the earliest possible opportunity.

Sincerely,

A handwritten signature in black ink that reads "Perrin Beatty". The signature is written in a cursive style with a large initial 'P' and a long, sweeping underline.

Perrin Beatty
President and Chief Executive Officer