



April 9, 2015

Via email: minister@tpsgc-pwgsc.gc.ca

The Honourable Diane Finley, PC, MP
Minister of Public Works and Government Services
Place du Portage, Phase III, Room 18A1
11 Laurier Street
Gatineau, QC K1A 0S5

Dear Minister Finley:

Re: PWGSC Integrity Framework

We write on behalf of the Canadian Bar Association's Anti-Corruption Team (CBA-ACT) to comment on the department of Public Works and Government Services Canada's (PWGSC) Integrity Framework. We understand the Integrity Framework is currently under review and we ask that you take into consideration our concerns with the current policy.

The CBA is a national association of 36,000 lawyers, Québec notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. Building on over a decade of CBA's work in the area of anti-corruption, CBA-ACT is a joint committee comprised of members from the International, Business, Charities & Not-for-Profit, Competition, Criminal Justice and Construction and Infrastructure law sections as well as the Canadian Corporate Counsel Association of the CBA.

We support the government's objectives in seeking and promoting the integrity of its suppliers as well as providing a strong deterrent to corrupt practices. We encourage public consultation on any proposed changes to the Integrity Framework and offer some recommendations to ensure that its operation and scope meet those important goals while respecting the rule of law and due process.

A debarment regime should balance the public interest of preventing corruption with fairness to those who are subject to debarment as well as maintaining a competitive supplier base for the provision of goods and services to the government. In addition, a government policy intended to influence the behaviour of private entities should take into account the leniency programs of other government departments to ensure objectives are effectively met government wide.

We have examined the Integrity Framework with a focus on these particular areas.

Rule of Law, Due Process and Transparency

The Integrity Framework must align with the rule of law and due process. These values are the cornerstones of Canada's legal system. The rule of law establishes the principle that laws should govern society and those subject to the law should not face arbitrary decisions by government entities. Currently, the Integrity Framework applies only to suppliers of PWGSC and departments that have signed an MOU. Debarment should apply to either all or no suppliers contracting with the federal government.

The consequences of a violation of any debarment offence identified in the Integrity Framework is the same for a person convicted with a lower sentence as for someone convicted with a much higher sentence. Both receive an automatic 10-year debarment. The Integrity Framework applies similar treatment to potentially very differing circumstances. The factors that determined sentencing should also apply when determining the length or terms of debarment. We question, for example, whether the same debarment period is appropriate for a misleading advertising offence under the *Competition Act* as a cartel offence under that Act, or a government bribery offence.

The Integrity Framework does not contain a mechanism allowing suppliers to appeal its outcomes, which may violate due process. Although debarment is only imposed after a conviction or guilty plea, the Integrity Framework does not offer an opportunity to be reinstated. A penalty as serious as automatic 10-year debarment should consider whether a supplier has implemented appropriate mitigation or compliance measures to avoid future violations.

There is also a need for greater transparency with adoption and implementation of the Integrity Framework. The process for creating a fair debarment regime that responds to the goal of eradicating corruption in government procurement should include public consultation to help avoid the arbitrary nature of the length of debarment. To promote education and deterrence, the public should be made aware of any investigation.

While debarment is a useful tool to combat corruption, it should be used in an equitable manner taking into account the severity of the conviction or guilty plea and any mitigating circumstances.

Policy vs. Statutory Instrument

The Integrity Framework is currently a PWGSC policy. The process for adopting or modifying a departmental policy lacks the transparency and safeguards of the regulatory and statutory process and does not necessarily take into account the public interest. We recommend that supplier debarment be enshrined either as an act of parliament or a statutory instrument with public consultation. As an act of parliament or a statutory instrument the regime would help to respond to our concerns about the rule of law, transparency, an appeals and review process and respecting general sentencing principles.

An act of parliament or a statutory instrument would ensure that amendments to the Integrity Framework are made through open parliamentary debates and public consultation. A legislative foundation would ensure that such an important regime is subject to parliamentary scrutiny and the views of all stakeholders, including those of the general public, could be heard and recorded.

An act of parliament or statutory instrument also has the advantage of bringing all federal contracts under a single set of integrity measures rather than various departmental policies. All suppliers would be subject to the same rules, not just suppliers of PWGSC, as with the current Integrity Framework.

Debarment

PWGSC's stated purpose for the Integrity Framework is "protecting the integrity of its procurement". To ensure that the government's procurement process is protected from disreputable business, some of our members believe that the following factors should be considered when determining the length of the debarment term:

- a) whether it is a first offence or a repeat offence;
- b) the seniority of the individuals responsible for the offence or who authorized or acquiesced in the offence;
- c) the nature, severity and magnitude of the offence;
- d) the level of procedures and controls the company already had in place to address anti-corruption or the relevant offence;
- e) whether the company self-reported;
- f) the extent to which the company cooperated with authorities after the offence had been discovered; and
- g) remedial measures taken by the company.

The inflexibility of the 10-year ban differs from the approach taken by most other countries and organizations, including the World Bank, which uses discretionary and criteria-guided policies when determining debarment lengths. Since the Integrity Framework does not consider mitigating factors it does not provide much incentive for companies to self-report. This is contrary to the approach taken by many regulators (including the Ontario Securities Commission and the U.S. Department of Justice) in formalizing credit for cooperation policies.

Some of our members, in addition to the consideration of the criteria listed above, suggest that a debarment regime should provide:

- a process and discretion to determine whether debarment is justified in the circumstances;
- flexibility regarding the nature and length of the debarment;
- a procedure to challenge the debarment terms; and
- under certain circumstances, the ability to have the debarment lifted following a period where the entity has demonstrated rehabilitation and a strong record of compliance.

To protect the integrity of PWGSC's procurement process, a debarment regime must provide strong disincentive to corrupt behaviour while ensuring the public interest is properly served. A proportionate debarment regime would advance the objectives of encouraging companies to implement effective anti-corruption policies and deal promptly and openly with instances of corruption, including cooperating with authorities.

Retrospectivity

The Integrity Framework retrospectively attaches additional penalties to convictions and guilty pleas that predate the coming into force of, or amendments to, the Integrity Framework.

The principle that penal laws should generally operate only prospectively is a fundamental aspect of the rule of law. People should not be punished for acts which were lawful at the time they were committed, and punishment for unlawful acts should not exceed that provided for at the time they were committed. Debarring a supplier for conduct that occurred before the Integrity Framework

(or amendments) came into force should only be justified following a determination, pursuant to the criteria listed above, that it is necessary to protect PWGSC procurement.

Applying an automatic, non-discretionary debarment to past convictions denies due process to those companies who may have responded differently had they known a guilty plea would result in a mandatory 10-year debarment.

The concept of “similar foreign offences” under the Integrity Framework requires clarification. There are important differences between judicial systems, and though laws may be similar, convictions may be politically influenced. There should be criteria to determine whether a foreign offence is sufficiently “similar” and whether a conviction or guilty plea was validly obtained.

Impact on government leniency programs

If cooperation is not a mitigating factor, other government programs aimed at achieving cooperation may be undermined. For example, the Competition Bureau encourages firms to self-report *Competition Act* offences through its immunity and leniency programs. Only the first to self-report will obtain immunity. Because that entity will not be charged with an offence, it will escape debarment under the Integrity Framework (even though it admits to committing a debarment offence). The Integrity Framework preserves an additional incentive for firms to seek immunity, provided they are the first to do so.

However, the Integrity Framework may have a negative effect on the Competition Bureau’s leniency program. Leniency, not immunity, is available to firms that self-report after the immunity position is taken by the first entity to self-report. The first-in leniency applicant (that is, the second entity to self-report) is expected to cooperate with the Competition Bureau’s investigation and plead guilty to a criminal offence under the *Competition Act*. In return, it obtains a 50% reduction in the fine the government would otherwise seek, and its officers, directors and employees are completely spared, provided they cooperate and otherwise qualify for immunity.

Until November 2012, the Integrity Framework was not applied to debar leniency recipients. This exemption created a strong incentive to self-report and cooperate with the Competition Bureau for firms that depend on government procurement. The policy change in 2012 has created a strong disincentive for many companies to self-report or cooperate with the Competition Bureau.

Lawyers must advise clients about the risks and benefits of applying for leniency, including the fact that if they participate in the leniency program they face a 10-year debarment from supplying PWGSC. As a result, some companies may decide not to self-report or cooperate and take the risk involved in resisting the Competition Bureau’s inquiry and defending criminal charges to potentially avoid debarment.

The immunity and leniency programs are some of the Competition Bureau’s most important tools for discovering, investigating and prosecuting criminal conspiracies. The Integrity Framework may reduce the effectiveness of the leniency program. The government should be mindful of the impact of the Integrity Framework on other government programs, particularly those similarly designed to combat crime.

Unintended Consequences in Combatting Corruption

While no formal leniency programs are available for fraud and bribery offences under the *Criminal Code* or the *Corruption of Foreign Public Officials Act*, self-reporting an offence and pleading guilty can be a mitigating factor in sentencing. An additional automatic penalty in the Integrity Framework that does not consider self-reporting provides a disincentive for firms dependent on PWGSC contracts to self-report.

This disincentive could impede the investigation of bribery offences. A firm that discovers its involvement in bribery may not see the advantage to self-report. Cooperation with investigations should be encouraged. The Integrity Framework currently creates a disincentive to cooperate which may not promote the public interest of eradicating corruption, and may have the opposite effect.

Conclusion

We support the government's effort in countering the negative effects of bribery and rooting out corruption. A debarment program should take into account the facts of each case as outlined above, how it may interact with other government programs, and whether the program will provide the positive outcomes it seeks while respecting the rule of law and due process.

We urge PWGSC to consider whether it may be more appropriate to formalize the Integrity Framework into statute or regulation to promote transparency. A government policy should be carefully crafted to promote the public interest while pursuing its stated objective. The CBA is well-positioned to assist in the development of policy or legislation.

We hope our comments will help in your review of the Integrity Framework and we encourage you to involve our organization in the process given our available expertise in the area of anti-corruption.

Sincerely,

(original letter signed by Noah Arshinoff for W. Michael G. Osborne)

W. Michael G. Osborne
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