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International Procurement

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This article reviews international law developments in 2014 in the field of international procurement.

I. Canada's "Integrity Framework" Drastically Expands Geographic Consequences for Violating Anti-Corruption Laws

On March 1, 2014, Public Works and Government Services Canada ("PWGSC"), the department of the government of Canada with responsibility for the government's internal servicing and administration, updated its "Integrity Framework" regulation.¹ The Integrity Framework establishes eligibility criteria for contractors that relate to compliance with anti-corruption and procurement ethics laws around the world. The following discussion summarizes the Integrity Framework, compares and contrasts the Integrity Framework with comparable U.S. laws, and highlights some practical concerns the Integrity Framework creates for companies selling goods and services to the Canadian Government.

Overview of Integrity Framework Changes. The March 1, 2014 revisions made a number of significant changes to the Integrity Framework. First, the Framework now specifies that suppliers who have received a conditional or absolute discharge related to certain fraud or corruption charges (i.e., a mechanism similar to a "plea bargain" that resolves criminal charges with an acknowledgment of guilt in the United States) are ineligible to do business with PWGSC. The scope of legal issues that can make contractors ineligible has expanded to include offenses of the contractor and any affiliates in foreign countries regardless of whether such offenses have any connection to Canada. Contractors that are ineligible under the Integrity Framework will be disqualified for ten years. Even after the ten years expires, contractors must certify that preventive measures are in place to avoid re-occurrence of the convictions or reprehensible actions that led to the disqualification.

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1. The Integrity Framework revisions were issued under Policy Notification No. PN-107U1. See *ARCHIVED Integrity Provisions -PN-107U1*, BUYANDSELL.GC.CA (March 1, 2014), <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107U1>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

216 THE YEAR IN REVIEW

Comparison of PWGSC Integrity Framework and comparable U.S. laws. Similar to the PWGSC Integrity Framework is the legal regime applied to United States government contractors. The United States' standards cover a greater range of conduct, but impose less harsh penalties, whereas the Canadian Integrity Framework covers a narrower range of conduct (though it is greater in geographic scope), but imposes harsher penalties. The following discussion summarizes the United States' analogous laws and lists the main distinctions between United States law and Canada's Integrity Framework.

Under United States procurement statutes and regulations, a contractor must be found "responsible" to be eligible to win federal contracts. Among other things, a contractor must have "a satisfactory record of integrity and business ethics" to be considered "responsible."² Generally, contractors must provide responses to specific questions and agencies use those responses to determine whether the contractor is responsible.³ Contractors are required to provide that information via a United States government contractor information clearinghouse (www.sam.gov) and update it at least twice per year. Contractors are also often required to provide the same information—or certify that the information in the clearinghouse is current—in connection with specific proposals.

The information contractors provide relates to criminal convictions and charges, as well as civil judgments and proceedings, involving: (i) fraud committed in connection with government procurement contracts in the United States, whether those contracts are at the federal, state, or local level; (ii) violations of federal or state antitrust laws in connection with the submission of offers; and (iii) commission of embezzlement, theft, forgery, bribery, and similar offenses, regardless of whether they were committed in connection with a public contract. Contractors must also report delinquent U.S. federal taxes and whether any federal contracts have been terminated for default. The information contractors must provide typically covers the preceding three or five years and covers the actual entity, affiliates, and high-level employees. While these requirements focus on U.S. law, United States contractors must also report convictions or charges relating to violations of the Foreign Corrupt Practices Act—which prohibits U.S. persons from bribing foreign officials—and such violations could, and often do, involve corruption related to procurements conducted by other countries.

In the United States, agencies have discretion to determine whether or not a contractor is responsible. Generally speaking, there is no "black and white" response, or set of responses, to responsibility questions that will make a contractor either responsible or non-responsible. However, if a contractor is suspended (temporarily disqualified from Government contracting during the pendency of an investigation and ensuing legal proceedings) or debarred (excluded from Government contracting for some specified period of time) that will generally prevent the contractor from winning any contracts regardless of whether different agencies have different views regarding the contractor's responsibility. When contractors have been suspended or debarred, often they will make changes to personnel and internal policies and procedures to resolve the issues that led to the suspension or debarment and become eligible to win and perform contracts again. Contractors are not required to be suspended or debarred for any minimum amount of time, and

2. Federal Acquisition Regulation ("FAR"), 48 C.F.R. § 9.104-1(d) (2015).

3. See *id.* at §§ 52.209-5, 52.209-7.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

PROCUREMENT 217

contractors often become eligible for contracts quickly by showing that they are “presently responsible” despite recent problems.⁴

The main differences between United States responsibility principles and the Integrity Framework are:

- The United States Government’s version of these eligibility criteria covers only violations of United States law (though contractors can violate United States law in connection with actions they take in winning or performing contracts in other countries), whereas the PWGSC rules cover both violations of Canadian law *and* similar violations of other countries’ laws;
- United States standards provide that violations of law that create both *criminal and civil* liability may make contractors ineligible, whereas the Framework focuses solely on violations of criminal laws; and
- The United States standards are flexible regarding the duration of penalties and allow contractors to rehabilitate themselves rather quickly, whereas the Framework imposes a strict 10-year ban on any contractors that lose eligibility (there is a limited “public interest” exception for situations where not imposing the 10-year ban is in the government’s best interest, but commentary from ITAC suggests this exception will be used sparingly, if at all).

Practical Concerns for Government Contractors. An obvious concern is that, in the event that a company that sells, or wishes to sell, to the PWGSC becomes involved in a criminal matter relating to a government contract somewhere in the world, it could lead to a 10-year ban from government contracts in Canada and immediate termination of any Canadian government contracts the company has already won. This ban and termination will result regardless of the merits of charges brought against the company and does not take into account whether foreign government officials have incentives to harm the company (e.g., because they are partial to a competitor). In addition, enforcing the Framework could sharply reduce competition, particularly in sectors with only a handful of vendors, and thereby raise the costs of goods and services for Canadian taxpayers. The Integrity Framework is especially harsh in this regard because it does not allow a contractor to remedy its integrity profile by, for example, terminating all employees responsible for a violation of anticorruption law, enhancing internal controls, and/or paying for and submitting to the oversight of an independent monitor.

Canada’s Integrity Framework imposes severe penalties for violations of anti-corruption laws regardless of where those violations occur. While there are always obvious incentives for contractors to avoid violation of criminal anti-corruption laws, Canada’s PWGSC has raised the stakes for failing to comply with such laws anywhere in the world.

4. In recent years, Congress has considered a proposed statute called the “SUSPEND Act” meant to impose longer and harsher punishments for contractors that engage in certain types of behavior, but that legislation has not been enacted. See Scott H. Amey, *Chairman Issa’s SUSPEND Act: Pros and Cons*, POGO (July 25, 2013), <http://www.pogo.org/blog/2013/07/20130725-chairman-issas-suspend-act-pros-and-cons.html>. Generally speaking, however, prime contractors must determine that their subcontractors are responsible, and prime contractors may not subcontract with suspended or debarred companies.

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