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Integrity Provisions and Leases with Federal Governmental Bodies

Overview of the new Integrity Regime

On July 3, 2015, the Government of Canada introduced a revamped “Integrity Regime” that applies to all real property transactions (including leases)¹ between private contractors and the federal departments and agencies identified in Schedules I, I.1, and II of the *Financial Administration Act* (<http://laws-lois.justice.gc.ca/eng/acts/F-11/FullText.html>).² This regime applies regardless of the transaction dollar amount.

The Integrity Regime is composed of two pillars: Public Works and Government Services Canada’s (“**PWGSC**”) “Ineligibility and Suspension Policy” (<http://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>) and the associated “Integrity Provisions” that are to be incorporated into offers to lease and leases with the federal government (<http://www.tpsgc-pwgsc.gc.ca/biens-property/ci-ic-eng.html>) (collectively, the “**Regime**”).

Under the Regime, an individual or a corporation (a “**Supplier**”) seeking to do business with the federal government is ineligible to do such business if they – or members of their board of directors – have been convicted or discharged (unless the conditions of their discharge have been satisfied) of one of the enumerated “integrity” offences (or a similar foreign offence) within the past three years. An ineligible Supplier will be prohibited from bidding on government procurement contracts or entering into real property transactions with the federal government for 10 years, though the term of ineligibility may be reduced to five years if the Supplier cooperates with law enforcement and undertakes remedial actions.³ Under extreme circumstances, a Supplier convicted of frauds against the government can be permanently banned from such business. PWGSC will also publish a list of ineligible and suspended Suppliers.

Although the Ineligibility and Suspension Policy applies to all real property transactions, there are specialized Integrity Provisions (the “**Provisions**”) which must be incorporated into different leasing documents.

1 Except leases that contain an option to purchase.

2 Note: the regime also applies to construction contracts and goods and services contracts.

3 There is also a Public Interest Exemption which can apply where it is necessary for the public interest for the government to do business with an otherwise ineligible Supplier. This exemption will be applied on a case-by-case basis and requires an additional administrative agreement between the Supplier and PWGSC.

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Leases

New leases

PWGSC has stated that the Regime is to be incorporated by reference into all future contracts and real property transactions between the government and Suppliers.

The Provisions for leases between the federal government, as tenant, and a Supplier, as landlord, contain 17 clauses. These include an obligation on the landlord to certify that neither it, nor any of its “Affiliates”⁴, have directly or indirectly violated specified provisions under various federal legislation including the *Lobbying Act*, the *Criminal Code*, the *Financial Administration Act*, the *Income Tax Act*, the *Excise Tax Act*, the *Corruption of Foreign Public Officials Act* or the *Controlled Drugs and Substances Act* or under similar foreign legislation. The landlord is also obligated to provide the government with a list of the names of its directors and owners.

Both of these reporting obligations are continuing obligations, meaning that the landlord is obligated to provide written notice to the government (i) if there is a change to the list of directors or owners, or (ii) if either it or any of its Affiliates is convicted of one of the offences listed in the Provisions.

Another important requirement of the Provisions that may be of particular importance to institutional landlords is the obligation not to rely on a subcontractor to perform any of the terms of the lease who has (or whose Affiliate has) been convicted or pled guilty to any of the enumerated offences without prior written approval from the Minister of Public Works and Government Services (the “**Minister**”). Failure to abide by this provision will lead to a five-year period of ineligibility from entering into real property agreements or contracts with the government. Although it is unclear, it does not appear as if this would be sufficient grounds for terminating the lease.

The “teeth” of the Regime comes in the form of termination rights for the government, which are incorporated into the lease by way of the Provisions. These rights provide that if the landlord is convicted of certain offences, makes a false declaration under the lease, or fails to provide up-to-date information to the government, then the government may, at its option, terminate the lease. If the government chooses to terminate the lease, the Provisions provide for a notice and cure period. The Provisions also give the government the right to “exercise any other remedies that may be available”. However, it is unclear if this would include a claim for damages.

Where an Affiliate of the landlord is the party convicted of one of the offences, then the government *may* terminate the lease *if* it is of the opinion that evidence exists that the landlord “directed, influenced, authorized, assented to, acquiesced in or participated in the commission or omission of certain acts or offences” that made the Affiliate itself ineligible under the Regime.

Existing leases

The Regime is not retroactive; that is, its provisions do not apply to any leases entered into before it came into force, but only to contracts entered into (and procurements in process) as of July 3, 2015.

However, where an existing lease that does not contain the most current version of the Provisions is to be amended, the government’s contracting officer will propose to add or update the Provisions in the lease. PWGSC has provided a template letter for the addition of the Provisions (<https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/annex/8/13>), though the format does not appear to be mandatory. It is unclear what will happen if a Supplier refuses

⁴ Including but not limited to parents and subsidiaries, as well as individuals, directors, officers and key employees, if (i) one controls or has the power to control the other; or (ii) a third party has the power to control both (see the Provisions for the full definition). Note that “control” is also defined in the Provisions.

to accept the inclusion of the (revised) Provisions. A recent bulletin on the Government of Canada website clearly anticipates that this could happen. Nevertheless, its only guideline for how a government agent should respond in such a situation is to “request direction from the Acquisitions Program Integrity Secretariat.”

While there is no case law or precedent on this issue yet, one would expect that the government could not unilaterally terminate the existing lease on the basis of the landlord’s reticence, although refusal to incorporate and abide by the Provisions would likely disqualify the landlord from engaging in future business with the federal government.

Invitations to offer

Where a federal department or agency issues an Invitation to Offer, all potential landlords responding to the Invitation must be eligible for a lease award under the Ineligibility and Suspension Policy. In the event that a lease is awarded to a landlord but the Minister then determines that the Offeror made a false declaration, once a notice period has followed, the government will have the right to terminate the Lease for default.

As in the case of landlords negotiating leases with federal governmental bodies, Offerors (including those bidding as joint ventures) must provide a complete list of names of all individuals who are currently directors of the Offeror.⁵ This is a mandatory requirement and failure to fulfil it will render an Offer non-responsive. Offerors also have the same continuing responsibility to inform the government of any change affecting the list of names of directors, and to ensure that any contracts with first-tier subcontractors include integrity provisions “similar” to the Provisions imposed in the lease.

Otherwise, the Offeror is burdened by the same obligation to certify that neither it nor its Affiliates have been convicted or pled guilty to any of the enumerated offences within the relevant time periods. Where an Offeror makes a false declaration or has provided false or misleading information under the Provisions, they will be deemed ineligible to be awarded real property agreements and contracts for a period of 10 years, though this period may be abridged to five years at the Minister’s discretion if the Offeror enters into an Administrative Agreement.⁶

Moreover, if an Offeror is charged with certain of the listed offences and is involved in pending criminal proceedings related thereto, then the Minister may suspend the Offeror from being awarded real property agreements and contracts for up to 18 months (subject to renewal).

⁵ Offerors bidding as sole proprietorships or as joint ventures must provide the names of the owners. Offerors bidding as societies, firms or partnerships do not need to provide a list of names.

⁶ There is also a Public Interest Exception in this version of the Provisions, with slightly different requirements.

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