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THOMSON WEST

INTERNATIONAL GOVERNMENT CONTRACTOR

Information and Analysis on Legal Aspects of International Public Procurement

Vol. 3, No. 5 **May 2006**

Analysis

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Government Accountability In Canadian Procurement: A Matter Of Trust

Democracies recognize the need to maintain public confidence in the integrity of government institutions. How does a responsible government regain citizens' trust after it has been abused? The U.S. reawakened to this concern during the Darleen Druyun scandal. This question also became a major issue in the recent Canadian federal election, resulting from a massive public-contracting fraud that became known as the "sponsorship scandal." The sponsorship scandal eventually led to the demise of the Liberal minority government in January 2006 and the election of the Conservative Party, which campaigned on a platform of strengthening government accountability and ending a "culture of entitlement."

One of the Conservative Party's main campaign promises was to introduce legislation to strengthen oversight of government operations. It is, therefore, not surprising that, as its first legislative initiative, the Party proposed the Federal Accountability Act (An Act Providing for Conflict of Interest Rules, Restrictions on Election Financing and Measures Respecting Administrative Transparency, Oversight and Accountability, Bill C-2, 55 Elizabeth II, 2006 (First Reading, April 11, 2006)). The Act, over 200 pages long, will create a wide range of checks on government operations, including the award, administration and termination of contracts.

This analysis discusses the Federal Accountability Act as it affects Canadian federal government contracting and considers how it compares to rules and oversight in the U.S.

The Sponsorship Scandal—After the 1995 Quebec referendum on separation from Canada, the federal government established a program under which large amounts of public funds would be spent increasing its profile in Quebec. The funds were designated for cultural and social events in the province, but rumors circulated that the money was being used mainly to reward Liberal supporters.

When the media reported in early 2002 that the government paid $550,000 to a Quebec communications agency for a report that the government could not produce, Prime Minister Jean Chrétien called in the auditor general of Canada—an independent official who reports to Parliament, akin to the comptroller general of the U.S.—to conduct an investigation. The auditor general released her report Feb. 10, 2004, with explosive findings, describing the sponsorship program as "scandalous" and "appalling" in its abuse. She found that the government had paid more than $100 million to a variety of communications agencies in Quebec, and that the program was used basically to generate commissions for these companies rather than to produce any benefit for Canadians. The report stated that officials in Canada's Department of Public Works and Government Services—the federal government's central purchasing agency—"broke just about every rule in the book." CBC News Online, "Federal Sponsorship Scandal," Feb. 1, 2006.

The Royal Canadian Mounted Police also investigated alleged fraud in the sponsorship program, beginning in May 2002. Three years later, Paul Coffin—the head of Coffin Communications and the first person to face charges in the scandal—pleaded guilty to 15 counts of fraud. On Sept. 21, 2005, Chuck Guité, the former government bureaucrat who ran the program, and Jean Brault, the former owner of Groupaction Marketing, pleaded not guilty to six charges of fraud. CBC News Online, "Federal Sponsorship Scandal," Feb. 1, 2006. Mr. Guité's trial is underway.

Given the enormity of the scandal, Prime Minister Paul Martin appointed a Quebec Superior Court judge, Mr. Justice John Gomery, to lead an independent commission of inquiry into the sponsorship program. After conducting extensive hearings, Mr. Justice Gomery released the first part of his report on Nov. 1, 2005. His major findings included:

- clear evidence of political involvement in the administration of the sponsorship program;

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- insufficient oversight at senior levels of public service, which allowed program managers to circumvent proper contracting procedures and reporting guidelines;
- a veil of secrecy surrounding the administration of the sponsorship program and an absence of transparency in the contracting process;
- reluctance, for fear of reprisal, by public servants to oppose a manager who circumvented established policies and who had access to senior political officials;
- deliberate actions to avoid compliance with federal legislation and policies, including federal contracting policy;
- five companies that received large sponsorship contracts channelled money to political fundraising activities in Quebec, with the expectation of receiving lucrative government contracts; and
- refusal of ministers, senior officials in the Prime Minister's Office and other public servants to acknowledge responsibility for the mismanagement that occurred.

CBC News Online, "Gomery Report: Major Findings," Nov. 1, 2005.

The Gomery findings sealed the fate of the minority Liberal government. Less than four weeks later, all opposition parties united to bring down the government on a vote of no confidence, stating that the government had lost the moral authority to govern. The resulting general election was held January 23, and, for the first time in 12 years, the Liberal Party failed to elect enough members to form a government. The Conservative Party formed a minority government, and its leader, Stephen Harper, became Canada's 22nd prime minister.

One of the most regrettable outcomes of the sponsorship scandal was the widespread disgust it generated among Quebecers. It is perversely ironic that a program designed to increase Quebecers' sense of attachment to federalism had precisely the opposite result.

The Federal Accountability Act—Mr. Justice Gomery's report revealed massive human, ethical, political and institutional failings that facilitated the sponsorship scandal. Having hammered home this message during the election campaign, the new government had to act quickly on its mandate to take tough measures and clean house. The proposed Federal Accountability Act is the new government's house-cleaning broom.

The Act is comprehensive, and a complete review is far beyond the scope of this analysis, which looks at four elements especially relevant to government contracting: (1) the creation of an independent procurement auditor; (2) codifying the government's commitment to measures that promote fairness, openness and transparency in the bidding process; (3) enacting conflict of interest and post-employment rules for public office holders; and (4) strengthening oversight of lobbying.

The Procurement Auditor—The Federal Accountability Act proposes to create the office of a procurement auditor to provide ongoing and independent oversight of government contracting procedures. The procurement auditor will review government practices for acquiring material and services, and assess their fairness, openness and transparency. While government departments will still be responsible for their contracting practices, these practices will now be subject to independent outside review. Id., §§ 309–310.

Legal oversight of federal government contracting existed before the Federal Accountability Act. At the federal level, an independent, quasi-judicial tribunal, the Canadian International Trade Tribunal (Tribunal), hears complaints about federal contracting irregularities. Canadian International Trade Tribunal Act*,* R.S.C. 1985, c. 47 (4th Supp.), as amended. Most Canadian government contracting is subject to rules established by federal legislation—i.e., Financial Administration Act, RSC 1985, c. F-11; Government Contracts Regulations, SOR/87-402—as well as obligations imposed under international and domestic trade agreements.

Under the North American Free Trade Agreement (NAFTA), negotiated at Ottawa, Canada, on Dec. 11 and 17, 1992; Mexico City on Dec. 14 and 17, 1992; and at Washington, D.C. on Dec. 8 and 17, 1992 (in force in Canada on Jan. 1, 1994), Canadian, U.S. and Mexican suppliers can file a protest with the Tribunal if the procedures set out in Ch. 10 of NAFTA are not followed. Similarly, under the World Trade Organization Government Procurement Agreement, negotiated at Marrakesh, Morocco, on April 15, 1994 (in force in Canada on Jan. 1, 1996), suppliers of member nations may also protest to the Tribunal. Domestically, the Agreement on Internal Trade, signed at Ottawa on July 18, 1994, allows Canadian suppliers to protest with the Tribunal (the coverage of the Agreement on Internal Trade is broader than the international treaties, but the Agreement applies only to Canadian suppliers). The Tribunal's authority to receive bid challenges mirrors the authority over bid protests of the Government Accountability Office and Court of Federal Claims

in the U.S., and was, in fact, a NAFTA requirement. Indeed, many early Tribunal cases cited GAO decisions for precedent. The procurement auditor thus complements the existing mechanisms for supplier challenges to contract awards.

The procurement auditor also will have the authority to investigate complaints by Canadian suppliers regarding the purchase of materiel or services by a federal government department. Federal Accountability Act § 309 (adding § 22.1 to the Department of Public Works and Government Services Act). However, the powers of the procurement auditor are more circumscribed than those of the Tribunal because the procurement auditor may receive a complaint only after a contract award. The Tribunal can receive a complaint at any stage of the procurement process and, indeed, may suspend the contract award while a complaint is investigated.

The procurement auditor is not empowered to recommend that a contract be terminated. Id., § 309 (adding § 22.2 to the Department of Public Works and Government Services Act). The Tribunal, on the other hand, may recommend any remedy it considers appropriate, including termination. Moreover, there is no statutory ministerial duty to implement the procurement auditor's recommendations, whereas the Tribunal's recommendations must be implemented to the greatest extent possible. Canadian International Trade Tribunal Act, RSC 1985, c. 47 (4th Supp.), as amended, § 30.18(1).

So what does the procurement auditor add to the process? Certainly, many complaints that one might make to the procurement auditor can be made to the Tribunal, and the Tribunal has wider latitude in crafting a remedy. However, that an independent official will have the ongoing responsibility to review government practices is a significant development. The Canadian International Trade Tribunal is a complaint-driven process, whereas much of the ongoing work of the procurement auditor will not be. This proactive approach should strengthen practices and procedures. Another significant development is the procurement auditor's authority to receive complaints on the government's administration of contracts. This is notable because the complaint could relate to the administration of a contract between the government and someone other than the complainant.

Third parties sometimes believe they are being damaged by government failure to enforce the terms of a contract with an incumbent supplier, for example, terms requiring the incumbent to respect other suppliers' existing market share. The Tribunal, like GAO, has held that contract administration is beyond its jurisdiction because such issues do not involve the procurement process. Moreover, under the doctrine of privity of contract, third-party suppliers who believe that the government is not administering a contract with an incumbent according to its terms have no standing to sue. The proposed Act contains, for the first time, a formal process allowing suppliers to challenge contract administration, an innovative concept with no true equivalent in U.S. procurement processes.

GAO often investigates agency procurement practices, and third parties may protest contract changes that should have been awarded by competition, but no process allows a contractor, third party or other interested agency to file a complaint about the actual administration of a contract. U.S. contractors may be interested to see if the proposed Canadian solution could work in the U.S.

Commitment to Fairness, Openness and Transparency in the Bidding Process—Section 313 of the Federal Accountability Act provides:

> The Government of Canada is committed to taking appropriate measures to promote fairness, openness and transparency in the bidding process for contracts with Her Majesty for the performance of work, the supply of goods or the rendering of services.

(Adding § 40.1 to the Financial Administration Act.) The obligations of fairness, openness and transparency existed as matters of public and administrative law before the new Act was proposed and were embodied in the international and domestic trade agreements noted above. Again, NAFTA required parity with the Competition in Contracting Act (CICA) in the U.S. for fair and open competition. These principles also were enshrined in published government policies. For example, the Supply Policy Manual of the Department of Public Works, similar to the Federal Acquisition Regulation in the U.S., commits to "open, fair and honest" supply activities. A copy of the PWGSC Supply Policy Manual may be found at *www.pwgsc.gc.ca/acquisitions/text/sm/chapter01-e.html*. See also Treasury Board, "Values and Ethics Code for the Public Service."

Nonetheless, the above provision is legally significant for several reasons. First, and most obviously, by codifying this commitment, the government makes a strong statement of principle. Second, because the section is in a statute, it has legal significance. Future cases will undoubtedly give content to the duty of "fairness,

openness and transparency in the bidding process." Courts will have to decide important issues such as whether this commitment is substantive in nature or only procedural. Courts also will have to decide to whom the duty is owed. Does the duty of openness and transparency extend, for example, to members of the public who are not involved in the bidding process? The commitment set forth in § 313 is similar to the CICA requirement for full-and-open competition through the use of competitive procedures. 41 USCA § 253. But the legislative history and intent of the Federal Accountability Act call for procedures exceeding the CICA requirements. Thus, whereas third parties such as the general public do not have rights under CICA, the Canadian courts may well determine that the Act creates a public cause of action.

Conflict of Interest and Post-Employment Rules—Existing conflict of interest and post-employment rules for public office holders are contained in generally unenforceable government policy directions. The new Conflict of Interest Act will strengthen the rules by giving them the force of law. Federal Accountability Act, pt. 1.

Again, a complete review of the proposed Conflict of Interest Act exceeds the scope of this analysis, which focuses on the post-employment rules for public office holders. These rules will apply to ministers, ministerial staff and advisers—essentially, all persons who work on behalf of a minister.

The Act seeks to regulate the post-employment activities of these individuals by limiting their ability to parlay their government positions into lucrative jobs in the private sector. Inter alia, public office holders will be subject to the following restrictions:

- They shall not act in any manner to take improper advantage of their previous public office.
- They shall not act for any person or organization in connection with any specific proceeding, transaction, negotiation or case for which they previously provided advice to the Crown. This obligation does not expire.
- They shall not provide advice to a client, business associate or employer using information obtained in their capacity as a public office holder.
- For a period of one year, they may not enter into a service contract with, accept an appointment to the board of directors of, or accept an offer of employment with any entity with which they had direct and significant dealings while in public office.
- For a period of one year, they shall not make representations, whether for remuneration or not, on behalf of any person or entity to the government department or organization with which they had direct and significant official dealings while in public office.

The last three points apply to ministerial staff who work more than 15 hours per week. Federal Accountability Act, pt. 1 (enacting the Conflict of Interest Act, §§ 33–36).

As for post-employment restrictions, the Act would codify in Canada what is the law in the U.S. See 18 USCA §§ 205, 207, 208; 5 CFR § 2637 et seq. (implementing regulations); 41 USCA § 51 et seq. (Anti-Kickback Act). U.S. law has long imposed criminal sanctions on certain former officers, employees and elected officials of both the executive and legislative branches who were involved personally and substantially in procurement decision-making and used that position or knowledge to advise contractors or influence government officials. The most recent and high-profile violation of conflict of interest restrictions involves Darleen Druyun. Druyun pleaded guilty, identifying four instances in which she favored the Boeing Co. in procurement decisions while she was negotiating employment with Boeing's then-CFO, Michael Sears. Druyun served nine months in prison and paid a $5,000 fine. See 47 GC ¶ 87; 47 GC ¶ 269; 47 GC ¶ 347; 48 GC ¶ 84. Sears was also convicted and served four months in prison. The scandal led to other fallout at the Air Force and Boeing.

Like the sponsorship scandal in Canada, the Druyun/Boeing scandal raised questions about transparency and intimidation. The Air Force sought to determine how the scheme could go unnoticed by other responsible officials. Thus, although the codification of post-employment and conflict of interest restrictions in Canada is an appropriate step, the Druyun/Boeing scandal demonstrates that legislation alone is insufficient protection.

Commissioner of Lobbying—Finally, a brief word should be said about lobbying. Presently, lobbyists at the federal level must register in the Lobbyists Registration System. Publicly available registration information generally identifies the lobbyist, the client, the lobbyist's firm, the subject matter of the communication and the government institution. Lawyers are not exempt from these registration and disclosure requirements if they lobby for their clients.

The existing lobbying provisions will be expanded significantly by the creation of a new commissioner of

lobbying who is appointed for a seven-year term and may be removed from office only for misconduct. Federal Accountability Act, § 68 (amending the Lobbying Act by adding new § 4.1 ff). This provides the office with considerable security and freedom from political interference.

The Act also will provide for monthly filing of detailed returns with the commissioner. This is more onerous than the existing Lobbyists Registration Act, which requires returns to be filed every six months. Federal Accountability Act, § 69(4) (replacing the existing § 5(3) of the Lobbying Act). Furthermore, the information in the monthly return must include more specific information on the public office holder being lobbied. Unlike existing rules, which only require a lobbyist to identify the name of a department or government institution of the public office holder with whom the lobbyist is communicating or expects to communicate, the following information must be provided for every communication and meeting that involves a senior public office holder and meets the definition of "lobbying" under the Act:

- the name of the senior public office holder who was the object of the communication or meeting;
- the date of the communication or meeting;
- particulars, including any prescribed particulars, to identify the subject matter of the communication or meeting; and
- any other information that is prescribed.

Senior public office holders include ministers of the Crown, ministers of state and any appointed employees that are required to work in their offices. Senior public office holders also include senior executives, such as deputy ministers or chief executive officers, associate deputy ministers and assistant deputy ministers. The commissioner may request the senior public office holder involved to verify the information provided by a lobbyist.

Lobbyists will be prohibited from receiving any payment wholly or partly contingent on the outcome of their activity, and their clients are likewise prohibited from making such a payment. Id., § 75 (adding new § 10.1 to the Lobbying Act).

Senior public office holders will be barred from lobbying for five years after they leave office. However, the commissioner of lobbying will have the discretion to exempt an individual from the required five-year "cooling–off" period if the commissioner believes the exemption would not conflict with the purposes of the Act.

The commissioner may investigate and prosecute offenses under the Act for up to 10 years. The Act imposes increased penalties of up to $200,000 in fines and two years in prison. The commissioner may also prohibit someone who has committed an offense from lobbying for up to two years.

U.S. law has long prohibited the use of federal appropriations to pay for a device to influence a member of Congress in favoring or opposing legislation or appropriations. 18 USCA § 1913. The Byrd Amendment, 31 USCA § 1352, prohibits a government contractor from using appropriated funds to influence a member of Congress, or an officer or employee of an agency in the award of a federal contract. See also FAR subpt. 3.8. The Byrd Amendment also imposes disclosure and certification requirements on government contractors. Furthermore, lobbying costs are unallowable under FAR 31.205-22. Several proposals in the 2005–2006 legislative period would further tighten contractor lobbying activities.

Conclusion—The proposed Federal Accountability Act in the Canadian Parliament would, in most instances, elevate restrictions involving federal procurement to U.S. levels. The proposed Act, however, offers some innovative approaches that the U.S. procurement community will want to monitor. Moreover, U.S. companies performing work under Canadian government contracts will need to track the legislation to ensure compliance with new restrictions and take advantage of opportunities to ensure fair and open competition in the administration of Canadian government contracts.

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