Transparency International Canada Inc.

February 17, 2015

The Honourable Diane Finley, PC, MP
Minister of Public Works and Government Services
11 Laurier Street
Gatineau, Quebec K1A 0S5

Dear Minister Finley;

Re: PWGSC Integrity Framework

The purpose of this letter is to outline the observations of Transparency International Canada (TI-Canada) with respect to the Public Works and Government Services (PWGSC) Integrity Framework. As a leading anti-corruption non-governmental organization, we welcome efforts by the Government of Canada to combat corruption in all its forms, including through appropriate bidder debarment mechanisms. We understand that your Department is currently working on amendments to the Integrity Framework and we ask that, in that process, you take into consideration some concerns we have about the current terms of the Integrity Framework and the manner in which it is administered by PWGSC. We ask that you involve TI-Canada in any consultations, committees or working groups you may be establishing to consider amendments to the Integrity Framework.

1. **TI – Canada**

TI – Canada is the Canadian chapter of Transparency International (TI), which is widely regarded as the World's leading anti-corruption NGO. TI's vision is a world in which government, politics, business, civil society and the daily lives of people are free from corruption. The mission of TI-Canada is to be an informed voice that promotes anti-corruption practices and transparency in Canada's public sector, businesses and society at large. We carry out our mission by promoting

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compliance with Canadian laws and international conventions against bribery and corruption by educating businesses, professional organizations, governments and the public at large, by developing ethical standards of conduct for businesses, by commissioning and conducting research on corruption-elimination and prevention measures, and by assisting the Government of Canada in fulfilling its obligations under international conventions against corruption.

For more information on TI – Canada, please see: http://www.transparency.ca/1-Overview/index.htm.

For more information on TI, please see: http://www.transparency.org/.

1. Integrity Framework – General Concerns

a. Basic Principles

Supplier debarment is widely accepted as an effective and legitimate governmental tool to combat bribery and corruption. In that regard, we note that many OECD countries and international organizations (e.g. the World Bank) have adopted these kinds of measures. In our view, a well-designed bidder debarment mechanism can deter corruption, promote compliance and encourage other levels of government to implement similar mechanisms.

TI has previously provided commentary on important elements of an effective bidder debarment system in past submissions. Notably, in 2006, TI published Recommendations for the Development and Implementation of an effective Debarment System in the EU. The main thrust of this document was in the summary of its recommendations:

> Summary of Recommendations
>
> In synthesis, we recommended that the EU debarment system:
> - Be implemented with the aim of curbing corruption by promoting trustworthiness among EU funds users, managers and providers, and promoting behaviour change.
> - Be consistent in its application; this requires among others:
> a. The development of implementation guidelines,
> b. The centralization of the debarment/sanctioning function.
> - Be guarded by concrete elements that provide the assurance of due process.
> - Be transparent and, in particular, that the relevant mechanisms to actively make the relevant information available to the authorizing officers and the public be put in place.
> - Be proportionate, fair, timely and accountable; this requires among other elements that:
> a. Due process must guide entry (listing) and exit (de-listing) procedures,
> b. Clear criteria must guide the implementation of discretionary debarment,

c. Debarment must be automatic in cases of res judicata,
d. Authorizing officers should be obliged to check entries into a consolidated debarment "register" before contracting,
e. Mechanisms to facilitate full and timely exchange of information on debarment should be set in place with Member States and international institutions,
f. Debarment should be applied with proportionality and fairness, and take account of mitigating circumstances.

We believe the above fundamental principles are also relevant in the Canadian context and should be considered in any process leading to the amendment of the current Integrity Framework.

We understand that other organizations have made submissions with respect to the Integrity Framework. While we do not express support or opposition for any particular view expressed in these submissions, we believe they underscore the need to engage in meaningful consultations with stakeholders and the public on the Integrity Framework.

The focus of our concerns about the Framework is on issues of clarity and transparency (both in terms of its application and the process of its development and adoption). In this letter, we outline general concerns we have with the policy of the Framework, the lack of public input into its adoption and the lack of due process and transparency in its application. In an Annex, we provide more detailed comments on various specific elements of PWGSC's Integrity Provisions.

Our overall aim in making these submissions is to assist the Government of Canada in developing an effective deterrent to corruption that will a) withstand legal challenges by suppliers, b) be transparently applied and enforced vigorously and consistently and c) be widely supported and politically sustainable. Unfortunately, we have concerns on all these fronts in relation to the current terms of the Integrity Framework.

b. Adoption as a Policy v. Statutory Instrument

We note that the Integrity Framework has been adopted as a matter of PWGSC policy, by way of amendments to the Supply Manual. This means that the process for adopting or modifying the Integrity Framework lacks the transparency and full safeguards of the regulatory and statutory process. In our view, this is a flaw. We believe that adopting supplier debarment as a statutory or regulatory measure – rather than as a mere policy instrument - would help ensure that the Integrity Framework is demonstrably effective, legally enforceable and transparent.

In several other countries, including the United States, supplier debarment is incorporated into regulatory or statutory measures, subject to the general supervisory powers of the Courts. We

believe a careful review of these laws should be carried out so that Canada may adopt the best and most effective elements of such statutes and regulations.

In the Canadian context, the Integrity Framework could, for example, be incorporated into the *Financial Administration Act*, (R.S.C., 1985, c. F-11) or the *Government Contracts Regulations* (SOR/87-402, as amended) or be adopted as a stand-alone legislative measure. Among other things, such statutory or regulatory instruments should apply to all federal contracting and not just to contracting by PWGSC and those with whom PWGSC has entered into a Memorandum of Understanding, as the current policy measures do.

We are not aware of a public consultation process in the adoption of the Integrity Framework. Adopting the supplier debarment through the regulatory or statutory process would also provide a process for public engagement and consultation. Given the importance of these measures and the far reaching consequences they may have, we believe that debarment rules should only be adopted after providing an opportunity for meaningful consultations with interested parties and the public at large. Providing for an open, consultative adoption process will also ensure a wider public consensus behind the measures.

c. Procedural Fairness and Transparency

Debarment mechanisms are an important and legitimate tool that can be deployed by governments to help combat and deter corruption. However, we note that debarment is a form of additional punishment, typically (but not always) imposed after sanctions have already been imposed through the criminal justice process. For a debarment system to be credible, durable and effective, we believe – as TI underscored in its 2006 submission to the EU – that it must be consistent with the Rule of Law and basic standards of procedural fairness.

Under our criminal justice system, punishment is expected to be proportional to the offence and achieve the objectives of denunciations, punishment, deterrence, rehabilitation and (to some degree) reparation. The conditions under which such additional penalties are to be applied should be clear and the process fair, public and transparent. This is not only a matter of protecting the legitimate procedural rights of the target of debarment, but assures the public that procurement integrity measures are indeed being vigorously applied in a consistent and accountable manner.

We note that the Integrity Framework imposes a ten-year debarment period with no opportunity to be reinstated. There is no mechanism in the current system by which a debarred supplier can demonstrate that it has reformed its practices and, therefore, deserves to have the debarment lifted. This seems out of step with most debarment systems.

The World Bank debarment system, for example, provides for regular third-party reviews of a company's compliance measures which provide an opportunity to the World Bank to determine if the company's debarment should be lifted. In our view, this approach may be more in line with principles of fairness and may have the added advantage of providing a powerful incentive for companies to improve their controls and to implement world-class compliance programs. We, therefore, suggest that the Government of Canada should carefully study the existing empirical evidence and experience with the World Bank debarment system (and other similar systems in existence) and consider the advisability of measures in Canada that would provide for lifting debarments in appropriate circumstances.

We also urge the Government of Canada to consider whether investigations and determinations on debarment should be made by an independent administrative body. We understand that there have been informal discussions within the expert government procurement law community that debarment decisions could be issued by the Canadian International Trade Tribunal (CITT), following an appropriate inquiry process. The CITT is an independent tribunal that has extensive procurement-related jurisdiction and expertise. Adding supplier debarment decisions to its already existing jurisdiction would be coherent and could provide adequate procedural and transparency safeguards. While we have not reached any conclusions on the merits of this idea, we believe it deserves consideration and, again, underscores the value of meaningful consultations.

The current debarment process lacks transparency. Investigations and determinations are carried out by PWGSC out of public view. The public has no visibility of the process. It, therefore, lacks a very important role in education and deterrence, and in providing the accountability that a public process would allow. The initiation of investigations, their outcomes, PWGSC's reasons for its decisions and even the number of investigations carried out by PWGSC are all unknown to the public. By contrast, the debarment process of the World Bank, for example, is far more transparent. There is both educational and deterrent value in such transparency.

2. Integrity Framework – Specific Concerns

As explained above, our view is that the Government of Canada should carry out an open and thoughtful consultation process that would result in a well-designed supplier debarment system incorporated into a regulatory or statutory instrument. That said, TI – Canada has specific concerns with respect to the terms of the Integrity Framework debarment provisions. These concerns echo the themes developed in Part 1 of our letter, above: transparency, clarity and fairness. Our specific observations are detailed in the attached Annex, which we offer in the event the Government is only prepared to amend the current policy. We request that you

give these observations due regard as you consider improvements to the Framework, that you provide TI – Canada with a meaningful opportunity to meet with your officials to discuss our concerns and that you include TI – Canada in any consultative process on amendments to the Integrity Framework.

Conclusion

The current Integrity Framework is based on a laudable goal but the process of its implementation, its current terms and its administration by PWGSC raise concerns. In our view, the procurement integrity provisions of the Government of Canada should:

a) be adopted as legislative or regulatory provisions;

b) apply to all federal contracting;

c) be consistent with fundamental Canadian principles of transparency and procedural fairness.

Striking the right balance and arriving at a durable Canadian solution that is effective in fighting corruption, induces positive change in business practices and enjoys broad support will take time and careful consideration. In that process, we believe TI – Canada can play a useful role and we urge you to involve our organization and to benefit from its considerable anti-corruption and transparency expertise.

Sincerely yours,

Peter Dent
Chair and President

cc. The Honourable James Moore, Minister of Industry, Industry Canada
The Honourable Tony Clement, President of the Treasury Board, Treasury Board of Canada
The Honourable Ed Fast, Minister for International Trade, Department of Foreign Affairs, Trade and Development
Mr. Marcus Davies, Legal Officer, Criminal, Security & Diplomatic Law Division, Department of Foreign Affairs, Trade and Development

ANNEX

SPECIFIC TI – CANADA CONCERNS AND OBSERVATIONS

ON PWGSC'S INTEGRITY FRAMEWORK

The specific concerns outlined below refer to the Integrity Provisions as currently found in PWGSC's Standard Instructions – Goods or Services – Competitive Requirements (ID 2003, 2014-09-25, https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/1/2003/19).

a) Paragraph 3: Affiliates

If debarment provisions are to be meaningful, they must contain provisions that do not allow companies to evade them through creative corporate restructuring or through the use of affiliates. However, we are concerned that the broad definition of affiliates in the Integrity Framework may result in punishment being applied to certain companies that may have some corporate relationship to a company found guilty of a relevant offence but who are otherwise entirely blameless. There is a legitimate concern that the current definition of affiliates could result in unfair results that could even penalize a victim of improper corporate conduct.

Rules relating to the application of debarment to affiliates need to be very carefully considered and crafted to ensure they do not permit evasion of debarment through corporate shells, but also that there are no perverse or unfair outcomes.

b) Paragraph 8: Time Period

The current policy provides for a ten-year debarment period. We have a few concerns in this regard. Effective sentencing in criminal matters is a sophisticated exercise involving a careful consideration of all relevant factors to arrive at a punishment that achieves the objectives of the law and imposes punishment that is generally proportionate to the severity of the offence. At the same time, it is a fundamental principle of our systems of laws that offences are not retroactive. In other words, one cannot be punished today for an act that was not an offence when it was committed. Unfortunately, the current policy may be inconsistent with these fundamental principles.

Ten years is a long period of time for debarment. Determining the right length of debarment is difficult and requires a thorough and careful deliberation. This further supports the need for a meaningful consultation process.

We note that, under previous PWGSC policy, there was an exemption from debarment for companies or individuals who were convicted of offences under the *Competition Act* but who were cooperating participants under the Competition Bureau's Leniency Program. When companies who participated in this program decided to collaborate with Bureau investigations and agreed to guilty pleas, they did so on the understanding (essentially a *quid pro quo*) that they would not face debarment by PWGSC. Retroactively changing the terms of the Integrity Framework raises legitimate issues of fairness to participants in the Bureau's Leniency Program and may undermine the effectiveness of that program.

Finally, we note that the Integrity Framework provides no mechanism by which a supplier can demonstrate that it has reformed its practices and, therefore, deserves to have the debarment lifted. The World Bank debarment system, for example, provides for regular third-party reviews of a company's compliance measures which provide an opportunity to the World Bank to determine if the company's debarment should be lifted. In our view, this experience should be carefully considered by the Government of Canada to determine if a similar approach could be adopted here. Such a system is widely perceived as providing a powerful incentive for a company to improve its controls and to implement world-class compliance programs.

c) Paragraph 9: Conditional and Absolute Discharges:

Under the Integrity Framework, bidders must certify not only that they have not been convicted of certain listed offences but also that they have not "received a conditional or absolute discharge" for such offences. We question why PWGSC insists on imposing a ten-year debarment on a company when under the penal provisions of the relevant statute, no penalty was considered to be warranted. This raises legitimate questions about the proportionality of the debarment with the seriousness of the offence.

d) Subparagraph 9h): Controlled Drugs and Substances Act

The inclusion of this offence as leading to debarment may be well founded but, without an explanation for its inclusion, is puzzling. It is entirely a legitimate policy decision for the Government of Canada to determine the types of offences that will give rise to debarment, but it should be prepared to explain its decision. We note that all the other listed offences are generally related to economic crimes, frauds against the government or improper conduct with public officials. The addition of this drug-related offence begs the question as to why this offence is included and not countless other criminal offences. For example, why list this drug trafficking offence but not list anti-terrorism offences or human trafficking offences?

e) Paragraphs 9 (Concluding Sentence) and 11 – Application to subcontractors

The extent to which the Integrity Framework applies to subcontractors remains unclear. The concluding sentence of paragraph 9 provides that bidders must also certify that no one convicted of an offence under the *Financial Administration Act* (subparagraph 9a) or of certain frauds against the government under the Criminal Code (subparagraph 9b) will receive any benefit from the contract. This presumably means that the bidder may not subcontract any part of the awarded contract to anyone convicted of the offences in subparagraphs a or b. Why this subcontractor debarment extends only to offences in subparagraphs 9a or b is unclear and may create a significant loophole allowing suppliers convicted of serious corruption offences to participate in federal contracts, but as subcontractors instead of prime contractors.

The application of debarment rules to subcontractors is a complex issue that requires the consideration of sophisticated anti-avoidance rules. It is unclear that the current policy adequately ensures that undesirable subcontractors are not allowed. At the same time, important concepts, such as the definition of "subcontractor" remain unclear.

f) Paragraph 10 - Foreign Offences

Paragraph 10 of the Integrity Provisions provides that bidders must also certify that within the same ten-year period neither the bidder nor an affiliate have been convicted "…under any foreign offence that Canada deems to be of similar constitutive elements to the offences listed in these Integrity Provisions." As an internationally focused organization largely dedicated to the global and domestic fight against corruption, we support the aim of the Integrity Framework in seeking to sanction and deter corruption in Canada and abroad. However, we have concerns with the manner in which the Integrity Provisions seek to achieve this aim.

First, it is unclear what is meant by a foreign offence that "Canada deems to be of similar constitutive elements". Is there a process by which this deeming is meant to occur or by which such a deeming could be challenged? Is there any formality of deeming that must occur before a bidder provides the certification At a bare minimum, these types of questions should be clarified.

Second, we have concerns about the recognition and application in the Integrity Provisions of foreign offences. In some countries with weak legal systems, corruption allegations and convictions can themselves be obtained through corrupt means and be prosecuted as political manoeuvres or a form of state-sanctioned blackmail. Where this might occur, the victim of such a corrupt prosecution might also be further victimized by debarment under the Integrity Provisions. There should, therefore, be an explicit opportunity for a bidder to show that a conviction abroad was not obtained in a manner consistent with the Rule of Law.

g) Paragraph 12 – Preventative Measures

Paragraph 12 provides that where the ten-year time period has elapsed since a relevant conviction occurred, the bidder must certify "…that measures have been diligently put in place in order to avoid the reoccurrence of such convictions or reprehensible actions." This requirement is vague and provides insufficient guidance as to what measures might be sufficient to meet this requirement. This sort of vagueness strikes us as unnecessary; guidance on the essential elements of a diligent anti-corruption program is available under Canadian law, for example, in the probation order issued by the Court in *R. v. Niko Resources Ltd.*, ABQB, June 2011 (available online at: http://www.cba.org/CBA/advocacy/PDF/ProbationOrder.pdf).

We also note that this requirement extends back indefinitely in relation to offences that may have happened decades ago in predecessor companies, where none of the relevant personnel is still active. This imposes on bidders of older, larger companies a duty to carry historical research on their companies (and the various predecessor companies that came to compose them) that may be quite difficult, costly and burdensome. We question how imposing this burden advances the underlying anti-corruption policy of the Integrity Framework or promotes greater compliance today.

More fundamentally, however, we question whether the Integrity Provisions should simply require all bidders, not just those with convictions in the distant past, to demonstrate that they have diligently implemented measures to prevent "reprehensible actions". We have not reached any final conclusions on the utility, effectiveness or practicality of such certifications, but we suggest that this is the kind of question that should be tabled in the context of broad public consultations.

h) Paragraph 13 – Public Interest Exception

Paragraph 13 lists a number of public interest exceptions under which PWGSC can enter into a contract with a bidder who is unable to provide the required Integrity Provisions certification. These exceptions are:

- no one else is capable of performing the contract;
- emergency;
- national security;
- health and safety; and
- economic harm

We understand the need for the above listed public interest exceptions, except “economic harm”, which is vague. It is unclear whether this is meant to cover economic harm to the bidder, the government, the economy in general or something else. Obviously, any bidder who is debarred will be able to argue some measure of economic harm, so it is important that PWGSC clarify what this means, and what criteria and what metrics will be relevant to its decisions under this paragraph.