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Doing Business with the Canadian Public Sector

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Canada's public sector entities include federal, provincial, municipal and territorial governments, Crown corporations, government agencies, boards and commissions, public utilities, and a wide variety of public institutions, including hospitals and educational institutions. When engaging with the public sector, additional legal requirements and practical matters need to be considered, above and beyond the usual legal and commercial issues encountered in private transactions. This summary sets out, at a high level, certain key issues to consider when dealing with the public sector.

PROCUREMENT ISSUES

Many, but not all Canadian public sector contracts proceed by way of competitive procurement process, a common example of which is a request for proposals. In order to be able to bid on a project, an entity may have to "pre-qualify." The mechanism by which this is accomplished is determined by the specific procuring entity a potential bidder is looking to transact with. Some entities will establish a pre-qualification process for potential bidders while others will simply request that a pre-qualification questionnaire be completed by a potential bidder.

Public sector procuring entities will typically establish monetary or other technical thresholds whereby a competitive procurement process will be triggered. Many will establish internal procurement policies setting out such elements.

For federal contracts, a security clearance may be required in certain circumstances where bidders will require access to protected or classified information, assets or sensitive federal work sites. The security clearance requirements will be unique to each bid solicitation and the clearance process to obtain the requisite security clearance may be lengthy.

COMMUNICATING WITH GOVERNMENTS: REGISTRATION REQUIREMENTS

A wide variety of communications with governments constitute "lobbying." Typically, "lobbying" refers to a far broader range of communications than most private sector actors would expect. In most Canadian jurisdictions, "lobbying" includes communications with any public office holder (elected or otherwise) with respect to (i) government expenditures, grants and contributions, and (ii) the development or introduction of new or amended legislation, regulations, programs, or policies. Discussions regarding a contract with government will often constitute lobbying, depending on the jurisdiction and the person communicating.

Regulatory regimes for lobbying are becoming increasingly common across Canada and are growing in their complexity. The federal government, most provinces and a growing number of cities have lobbying regimes in place, with new regimes and enhancements of existing regimes being put in place each year. These regulatory regimes typically apply both to "consultant" lobbyists (such as a government relations firm or lawyer who is paid to communicate with public office holders), and to "in house" lobbyists (such as senior executives who, together with their colleagues, spend a significant portion of one person's time communicating with public office holders).

Regulatory regimes for lobbying, for the most part, do not prohibit communications with public office holders, but they do require public disclosure of the fact that communications took place, and that those engaged in such communications be registered with the applicable regulator. In some cases these regulatory regimes set out additional rules that require disclosure of specific meetings, place limits on former public office holders' communications with government officials, and/or restrict the use of tax dollars to lobby government. Some lobbying regimes implement blanket prohibitions on lobbying, for example, during procurement.

Importantly, "public office holders" are not limited to elected officials and their staff, but also typically include any director, officer or employee of the government or of a government agency, board or commission, as well as most government appointees (except, for example, judges).

Certain exceptions are available to relieve communicators from the legislative compliance requirements, such as where the communications in question were made as part of a public process (i.e. to a legislative committee), or where the communications by or on behalf of a person related solely to either (i) the enforcement, interpretation or application of existing legislation or regulation to that person, or (ii) the implementation or administration of any program, policy, directive or guideline that affects that person. However, regulators in this area generally take a broad view of whether a communication is lobbying, and these exceptions are applied quite narrowly.

Unless an exception is available, communications to public office holders about a matter that is lobbying (as described above) must always be registered and disclosed when the communication comes from a "consultant" lobbyist, i.e. any individual who has been retained by you to lobby. When employees of a private enterprise engage in lobbying directly, registration and disclosure are only required when certain thresholds are met.

ACCESS TO INFORMATION LAWS

The federal government and each province also have rules requiring the disclosure of certain records kept by those governments. Accordingly, parties communicating with governments, even in respect of non-registrable matters that are not "lobbying", must keep in mind that their correspondence and materials could end up in the public domain as a result of these rules.

Federally, rules relating to the disclosure of information on government contracts (in excess of C$10,000) are set by the Treasury Board. By way of example, the Treasury Board Contracting Policy allows for certain disclosure of information in relation to the procurement process, to unsuccessful bidders, commonly termed as "supplier debriefings."

There is a broad right to request access, under the *Access to Information Act* (AIA), to any record that is under the control of a government institution. This broad right of access is limited by the fact that the AIA provides that certain information cannot be disclosed to third parties. By way of example, the AIA identifies commercially confidential information as information that cannot be disclosed to a third party.

Provincial regimes also provide access to information for provincial governments. Under the *Freedom of Information and Protection of Privacy Act* (Ontario), individuals have a right to access records or portions thereof, in the custody or under the control of a government institution. This broad right of access is tempered by (i) the requirement that requests not be frivolous and vexatious, and (ii) the enumerated exceptions to the right to access information.

GOVERNMENTAL AUTHORITY AND APPROVAL PROCESSES

Canadian public sector financial approvals are complex, requiring in many cases several steps, including:

- A legislative appropriation (a broad category of budgeted funding approved by the applicable legislature)
- A Treasury Board approval (an actual approval of expenditure by the executive branch of government)
- Sign offs at the relevant department or agency level

These restrictions are not just limited to entities owned by the government, but often extend to entities funded by government. For example, in Ontario, pursuant to the *Broader Public Sector Accountability Act* (Ontario), the Management Board of Cabinet has the authority to issue directives that govern goods and services procurement by certain public sector organizations. One such directive, the Broader Public Sector Procurement Directive (Directive), is in place to ensure a fair, competitive and transparent process for obtaining goods and services that are publicly funded. The Directive applies to various organizations, including hospitals, school boards, universities and colleges, children's aid societies, community care access corporations, and publicly funded organizations that receive public funds of C$10-million or more in a fiscal year.

RESTRICTION ON ASSIGNMENT OF CROWN DEBTS

Many jurisdictions in Canada restrict the ability of a third party to assign debts owing to the Crown (even by way of security). The rules vary across jurisdictions, but in some cases (including the case of the federal government), no assignment whatsoever is permitted except with certain

consents from the Crown. Consents can take time to obtain and should be planned for. These restrictions can have a significant impact on financing of arrangements where a public sector entity is a counterparty.

GIFTS

Increasingly, Canadian lobbying and conflict of interest laws are heavily restricting the ability of private sector parties to provide gifts to public officials. "Gifts" can include even minor shows of hospitality typical in private sector interactions, such as hosting a meal, or providing a ticket to a lunch, dinner or event.

Where lobbying laws are not engaged, small gifts will often be permitted where the gift does not create an actual or perceived conflict of interest, or compromise the integrity of the recipient or the recipient's organization. Federally, the acceptance of gifts is typically permissible in situations where:

- It is an infrequent occurrence
- The gift is of minimal value
- The gift is within the "normal standard of courtesy or protocol"
- The gift does not, or does not appear to, compromise the integrity of the recipient or his/her organization

Any gift giving must, of course, also be careful to remain free of any conduct that might be prohibited under the *Criminal Code* or other anti-corruption legislation.

DISPUTES

Disputes with public sector counterparties will often require special notification or adherence to procedural requirements and often proceed in a manner quite different from a private dispute or complaint. Public sector entities are generally reluctant to agree to arbitration or foreign choice of law clauses and are more likely to contest a case that might otherwise be settled for fear of setting a precedent.

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