

**The Federal Accountability Act and
doing business in Canada: new pitfalls?
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Many international companies, particularly those in the US, are important suppliers to the Canadian federal government. As a result of such international free trade agreements such as the North American Free Trade Agreement (NAFTA) and the World Trade Organisation (WTO) Agreement on Government Procurement (AoGP), foreign suppliers generally have equal access with Canadian suppliers to many large value Canadian federal government contracts.

The Federal Accountability Act ('Fed AA') is a mammoth legislative attempt to 'change the way business is done in Ottawa [Canada] forever'¹ and is one step in a series of reforms by Prime Minister Harper's government to address issues of federal government mismanagement in Canada. The Fed AA was passed by Canada's House of Commons on 21 June 2006 and granted Royal Assent on 12 December 2006. Although the Fed AA received Royal Assent, not all of its provisions have come into force yet. It is an omnibus bill that modifies over 50 federal statutes and creates a new Conflict of Interests Act¹. The primary focus of the Fed AA is the regulation of internal government functions and the actions of federal government officials and employees. Increased transparency and accountability form the primary objectives sought by this legislation. Other countries, such as the US, are taking the same approach to tighten accountability and transparency in business dealings with government.

The scope of the Fed AA is so wide that it would be impossible to outline all of the changes in one short article. Hopefully, we will raise some potential issues that all companies who do business with the Canadian government should consider.

Potential pitfalls

Many changes effected by the Fed AA have important implications for companies doing business with the Canadian federal government or with Crown corporations. Most of the changes will impact on companies in their business development activities and should prompt the development of internal policies to conform to the Fed AA.

Conflicts of interest and gift-giving

New conflict of interest and post-employment rules for public office holders have been created under the Conflict of Interest Act. Though a 'public office holder' is defined differently in the Conflict of Interest Act, the Lobbyist Act² and the proposed Code of Conduct for Procurement (CoCP), restrictions in this legislation include prohibiting a public office holder from holding shares in a publicly traded corporation from being an active partner in a partnership; or from holding a position as a director in a corporation, for example. Post employment rules include a 'cooling-off' period, prohibiting the public office holder from being employed for either one, two or five years, depending on their former position.

Other changes include stricter rules on giftgiving, hospitality and political donations. Corporations are prohibited from making political contributions, both in cash and in kind. Any

¹ [S.C. 2006, c. 9, s. 2](#)

² not yet in force as of the date of this article

gifts that 'might reasonably be seen to have been given to influence the public office holder'³ are prohibited, which means that businesses may no longer be able to host high-level officials at networking or social functions, such as dinners or sporting events. Internal policies may safeguard companies to ensure that there is a consistent approach to business development and interaction with government officials.

Federal contracting and procurement²

One of the most significant changes to the procurement process under the Fed AA is the creation of integrity provisions and the office of a Procurement Ombudsman. The government has produced a draft Code of Conduct for Procurement, which consolidates the existing conflict of interest and anti-corruption policies. The code will apply to both public servants and government suppliers and is intended to provide a clear statement of mutual expectations. It is not yet clear when the code will be published officially or what its final contents will be. In the draft code, bidders will be required to provide certification that they have complied with the requirements of the code. These 'integrity provisions' will be contractually binding, and false certification will include sanctions such as bid exclusion, termination of a contract, or exclusion from future work.

The Procurement Ombudsman will be responsible for providing guidance and oversight to the federal procurement process by reviewing the fairness, openness and transparency in departmental procurement practices. It will fall to courts and tribunals to interpret this provision of the Fed AA and determine what meaning will be given to the duty of 'fairness, openness and transparency'³, and to whom this duty would be owed. Though the Ombudsman's role is advisory, not adjudicative, and the remedies may be more limited (eg no power to cancel a contract) the office will allow suppliers to contest the administration of a contract after it is awarded; whereas the Canadian International Trade Tribunal (CITT) does not have jurisdiction over such matters.

Lobbying

Businesses that use lobbyists (both in-house and consultants) should be aware that the Fed AA makes amendments to the Lobbyists Registration Act (renamed 'Lobbying Act'), requiring lobbyists to publicly disclose not only their clients, but also to report the subject matter of *all* meetings held with designated public office holders. These reports will become publicly accessible on a monthly basis.

Business activity by a company may not necessarily be 'lobbying' under this legislation if it is done by the company through its employees and officers. It would become registerable activity if it is done through a paid lobbyist. The impact, among others, is that competitors will now have access to a company's lobbying efforts and to summaries of these pitches if such activity falls under this Act. The penalties and sanctions under this new legislation are quite high and have been increased from its predecessor legislation. Thus, companies will have to review internal procedures to assess whether their activities can be defined as lobbying (which would be subject to registration), and to ensure that internal guidelines exist to properly track and record dealings with government officials⁴.

Conclusion

The Fed AA touches upon a wide array of problems that were identified in the wake of the sponsorship scandal. This legislation raises the question of whether internal bureaucratic culture

³ [s. 11 Conflict of Interest Act](#)

can be changed by law alone. What does this mean to companies doing business with the Canadian federal government?

At a minimum, companies should revisit internal policies to ensure safeguards are in place to comply with the rigorous demands of the Fed AA. For example, human resource departments may wish to review the requirements of the Fed AA and ensure that former or retired civil servants who are prospective employees disclose appropriate information in the application process. Policies on business development with government officials should be reviewed to ensure compliance with the Conflict of Interest Act and the CoCP.

Critics of the Fed AA have accused it of being a transfer of responsibilities from the federal government to private business. Others have said that the problem is trying to regulate human behaviour that falls outside the formal or informal behavioural rules and norms. In the end, the foreseeable impact from the Canadian Fed AA is that, indeed, the way business is done in Canada will change forever.

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² Quote from Stephen Harper, published in Government of Canada, *Federal Accountability Act and Action Place: Turning a New Leaf* (pamphlet) (Ottawa: 11 April 2006).

³ The Federal Accountability Act: Changes to Procurement and Contracting in Canada, Ronald D Lunau, Phuong T V Ngo and Catherine Beaudoin, published by American Bar Association; see www.governmentcontracting.ca

⁴ Ronald D Lunau and Paul E Pompeo, 'Government Accountability in Canadian Procurement: A Matter of Trust' (May 2006) Vol 3, No 5 International Government Contractor 1 at 3.