SUBMISSION TO THE SENATE
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
IN RELATION TO ITS STUDY OF BILL C-2
(Revised based on testimony)

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The *Federal Accountability Act* has gaping loopholes in relation to government contracting. These loopholes could have the following major impacts:

- Further abuse of public money such as we saw through the Adscam and through the $70 million plus contracting scandal at National Defence.
- A corrosive effect on funding to non-profit organizations and agencies, which will be subject to extensive accountability rules, while for-profit contracts are excluded from many provisions.
- Reduced overall accountability for government spending as managers divert funds towards private contracts that avoid these accountability provisions.

The legislation has adopted a largely bureaucratic approach to dealing with the issue by increasing the powers of and the number of oversight bodies rather than by increasing the transparency of government.

Public accounts, budgets, estimates, departmental reports, *Access to Information* provisions and oversight by the Auditor General provide significant accountability and details on how funds are spent within governments and by government agencies. Stronger rules in Bill C-2 will extend and increase accountability over almost all areas of government spending – except over private contracts.

A core element of the *Federal Accountability Act* should be to increase disclosure, access to information, and power by the Auditor General to review contracts, since this was the essence of recent scandals and was ostensibly the impetus for this sweeping piece of legislation.

In particular, the Federal Accountability Act has the following major loopholes:

- Does not require enough public disclosure about government contracts;
- Does not address the recommendations of the Information Commissioner regarding disclosure of details of government contracts with third parties or even meet the principles established in courts over this information.
- Excludes contracts for goods and services from review by the Auditor General; and
- Does not allow individual citizens to lodge complaints with the proposed Procurement Auditor;

To correct these major loopholes, the *Federal Accountability Act* needs to be further amended to include the following provisions.

Public disclosure of all government contracts

We were happy to see that the House of Commons acted on one of our recommendations and included an amendment to the *Financial Administration Act* to require "pro-active disclosure" by government departments of the basic details on all contracts over $10,000[1]. This has been government policy since March 2004, but it was not enshrined in any legislation or regulations and could have been reversed at any time.

Interestingly enough, the policy was put in place partly to *reduce* the government's costs of complying with Access to Information Requests.

To further increase transparency and reduce costs of complying with Access to Information requests and legal cases the government should simply post all contracts publicly on the Internet. The public has a right to know this information.

Implement the proposals made by the Information Commissioner to ensure that details of contracts are not excluded from coverage under the Access to Information Act.

Section 20 of the existing *Access to Information Act* provides a mandatory exemption for third party information with conditions that can be applied broadly.

The Information Commissioner has recommended that this exemption should not be used to exempt details of contracts from coverage of the *Act*[2]. Current practice and case law has established the principle that there should be no reasonable expectation of confidentiality in relation to a successful bid once a contract has been awarded[3].

Amendments approved by the House of Commons to Bill C-2 significantly expanded the scope of the *Access to Information Act* over government institutions. The public also has a right to know about the terms of contracts using public funds signed between the government and private companies. This legislation should at least meet the standard of current practice and case law.

- Add a clause to section 20 of the *Access to Information Act* that states that the head of a government or agent of the government shall not refuse to disclose a record or a part thereof if that record or part thereof contains details of a contract or a successful bid for a contract with a government institution.

  As proposed by the Information Commissioner, this amendment should involve the following:

  Paragraph 20(1)(b) of the Access to Information Act is repealed.

  Subsection 20(2) of the Act is replaced by the following:

  (2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a record or a part thereof if that record or part contains

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[1] In Clause 312 (1) (e) of Bill C-2. All references in this submission refer to the Bill as passed by the House of Commons June 21, 2006.
http://www.parl.gc.ca/legisinfo/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=14&Type=0&Scope=I&query=4649&List=toc-1

[2] See *Proposals of the Information Commissioner to amend the Access to Information Act*. p. 8
http://www.justice.gc.ca/en/dept/pub/atia/prop/prop.html

[3] See Government of Canada. April 2006. *Strengthening the Access to Information Act*. p. 17
http://canada.justice.gc.ca/en/dept/pub/atia/

> *(a) the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee; or*
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> *(b) details of a contract or a bid for a contract with a government institution.*

Give the Auditor General the power to investigate all companies that receive government funds whether through a funding arrangement or through a contract.

The proposed changes in the *Federal Accountability Act* would extend the powers of the Auditor General to analyse the records of recipients of funds from the federal government – but it excludes funding provided through contracts for goods and services.[4]

This is a major loophole that would not allow the Auditor General to examine the record and accounts of companies that have a contract for a good or service for the government. The Auditor General would only be able to examine material from the government's side of the fence, while extending that fence to include many more non-profit organizations and agencies.

This could have a highly corrosive effect on public funding to non-profit organizations and agencies. Managers could easily avoid the higher standard of auditing and accountability by simply contracting to a private company instead. Private companies with contracts will also be able to avoid many of the increased paperwork costs of reporting. This could lead to a highly uneven playing field and lower effective levels of accountability rather than more.

This loophole should be closed by the following changes to the Bill C-2, involving amendments to the *Financial Administration Act.*

- Add the words "or contract" (or "contracts" where plural) after all instances of the term "funding agreement" in the proposed in clause 301 and 312 of Bill C-2;
- Replace the words "but excludes contracts" with the words "and includes contracts" in the definition of "funding agreement" in clause 312;
- Add the words "or exclusive commercial rights" after the words "recipient receives funding" in clause 312;
- Delete section 42. (4) (d) under the definition of "recipient" in clause 312; and
- Add the words "or contract" after every instance of the word "funding agreement" in clause 304.

Concurrent with this, the budget of the Auditor General should be increased.

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[4] See clauses 304 and 312 of Bill C-2. While the definition of "recipient" would be broadened to include organizations that have received more than $1 million over five years rather than $100 million as is currently the case (and to include co-operatives which had previously been excluded), the powers of the Auditor General under clause 304 are limited to a review in relation to "funding agreements". Clause 312 of Bill C-2 includes the following proposed definition for funding agreement that would apply to both the *Financial Administration Act* and the *Auditor General Act*: "funding agreement", in respect of a recipient, means an agreement in writing under which the recipient receives funding from Her Majesty in right of Canada or a Crown corporation, either directly or through an agent or mandatory of Her Majesty, including by way of loan, but excludes contracts for the performance of work, the supply of goods or the rendering of services."

Allow all citizens to lodge complaints with the Procurement Auditor

Bill C-2 includes proposals in clause 306 that would allow complaints to be lodged with a Procurement Auditor, but it would only allow "Canadian suppliers", as defined in the Agreement on Internal Trade Implementation Act to lodge complaints.

This section is convoluted, obscure undemocratic and has no rationale in terms of the Bill for this restriction.

If the government is really interested in increasing accountability, it should allow all Canadians, and not just companies, to be able to lodge complaints.

- Delete the proposed section in clause of 306 of Bill C-2 that restricts who can lodge complaints (proposed section 22.2 (1) for the *Public Works and Government Services Act*), and replace it with the following:
    - *"Any Canadian citizen, resident or legal person may lodge a complaint referred to in section 22.2 (1)."*