

## Legal update

### Non-compliance in public calls for tenders: a step towards faster dispute resolution?

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#### Construction, engineering and infrastructure

In public calls for tenders, eligibility and compliance requirements often end up at the centre of disputes between the awarding body and tenderers who feel, rightly or wrongly, that another tenderer has fallen short of those requirements. Resolving such disputes can often be costly and time-consuming. A decision handed down in August by the Honourable Louis Gouin in *Groupe TNT inc. v Ville de Montréal*<sup>1</sup> suggests an alternative approach that tends to be preventative rather than remedial by making it easier to resolve disputes at their source.

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#### The decision in *Group TNT inc. v Ville de Montréal*

When tenderers are rejected under a public tendering process, there are two traditional remedies available to them: (1) seek an injunction order enjoining the public body from awarding the contract to an ineligible tenderer or non-compliant tender or (2) bring an action for damages seeking compensation for the profits they would have earned had they won the contract.

Courts are often averse to issuing an injunction insofar as tenderers have access to another remedy—i.e. an action for damages—and are therefore not then exposed to “serious and irreparable harm.” However, tenderers usually prefer to avoid actions for damages if at all possible because proceedings can be long and costly. They are more concerned about getting the contract and maintaining day-to-day operations.

As mentioned earlier, the decision by the Honourable Louis Gouin, j.s.c., in *Groupe TNT inc. v Ville de Montréal* suggests an alternative approach that encourages the resolution of disputes early on.

#### The relevant facts

In April 2017, the Ville de Montréal (City) published a call for tenders for the construction of a sanitary collection system (Call for Tenders). As one of the key components of the project was the construction of a sanitary collection system by means of micro-tunneling, the qualification of the company that would perform the micro-tunneling work, be it the general contractor or one of its subcontractors, was a major consideration in awarding the contract.

Under the Call for Tenders, the tenderers had to be in possession of an authorization to enter into a public contract/subcontract from the Autorité des marchés financiers (AMF) as of the tender submission date. While their subcontractors were also required to hold such an authorization, the time they were supposed to be in possession of it was not indicated in the tender documents.

The companies Groupe TNT inc. (TNT) and Construction Bau-Val inc. (Bau-Val) submitted the lowest bids. The City ultimately settled on Bau-Val, even though Bau-Val's micro-tunneling subcontractor, by contrast with TNT's subcontractor, did not have its AMF authorization on the tender submission date. As soon as TNT was informed of the City's decision, it sought a provisional injunction enjoining the City from awarding the contract to Bau-Val, which it was scheduled to do three weeks later.

## The court's analysis

The debate revolved around the following question: as of what time was the subcontractor required to be in possession of the AMF authorization? Was it the tender submission date, as argued by TNT, or the date the subcontract was to be entered into, as argued by Bau-Val? The court determined that TNT had successfully met the applicable tests—i.e. urgency, colour of right, serious and irreparable harm and balance of convenience—allowed the application and granted a 10-day provisional injunction.

The importance of this decision lies in how the court evaluated the “serious and irreparable harm” test that TNT was required to meet. As mentioned earlier, courts tend to disallow applications for provisional injunctions if they find that the “serious and irreparable harm” test is not satisfied.

However, after finding that there was colour of right, the Court made the following comments when talking about “the serious and irreparable harm” test:

[Translation]

“At a time when the courts are doing their utmost to avoid pointless debates that tie up the courtrooms and monopolize judicial resources, the Court does not think this practice ought to be encouraged, especially given the particular circumstances of this case [...].”

## Discussion

The Court's comments will certainly resonate with contractors and service providers. This approach has the advantage of giving hope to aggrieved tenderers that they will get what they want—namely the contract resulting from the call for tenders—and avoid an action for damages: an option often dismissed out of hand because of the time and costs involved.

This decision shares the same philosophy as Bill 108, *An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics* (Bill), which was passed by the Quebec National Assembly on December 1, 2017. With this Bill, the government is establishing a body called the Autorité des marchés publics (AMP) that will have significant powers to intervene in the tendering or awarding process. The AMP will be able, following a complaint by a tenderer in certain specified circumstances and after an investigation, to order a public body to amend its tender documents or cancel the public call for tenders.

Again, an alternative to an action for damages will be made available to aggrieved tenderers that will allow them to quickly determine where they stand and enforce any rights they may have, provided they act quickly and follow the specified procedure.

There is no question that, as in the case of the Bill, Justice Gouin's decision reflects a political and public desire to cut down on disputes under public tendering and awarding processes that end up in court and to thereby allow such disputes to be resolved using a faster and more efficient approach. It remains to be seen whether the courts will adopt an approach comparable to Justice Gouin's when analyzing the “serious and irreparable harm” test in similar cases and when circumstances lend themselves to it: an approach that is consistent with the current political desire to do things differently and at a lower cost.

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## Footnote

1. 2017 QCCS 3731.

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