

## Legal update

### Public contracts: the Autorité des marchés publics will ensure the honest and fair treatment of tenderers for public contracts in Quebec

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#### Construction, engineering and infrastructure

On June 9, 2016, the Quebec government tabled Bill 108, the *Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics* (Bill). This Bill builds on the legislative and regulatory changes that were introduced further to the passage of the *Integrity in Public Contracts Act* in December 2012.

The Bill proposes the establishment of a body called the Autorité des marchés publics (AMP) that would be empowered, among other things, to monitor and intervene in tendering and awarding processes for public contracts.

#### Establishment of the Autorité des marchés publics (AMP)

The AMP will be a mandatory of the State and have the following mission and functions:

- to oversee all public contracts, including tendering and awarding processes for those contracts;
- to apply the provisions of the *Act respecting contracting by public bodies* concerning the authorizations required to obtain a public contract or subcontract, ineligibility for public contracts, and performance evaluations;
- to examine and process complaints that are filed;
- to examine the contract management of Quebec's ministry of transportation and any other public body the government designates; and
- to monitor public contracts in order to, in particular, analyze procurement trends and public bodies' contracting practices and identify problematic situations affecting competition.

#### The AMP's complaint examination process and powers

Under the proposed complaint examination process, any interested person (complainant) may file a complaint with the AMP when the tender documents:

- contain conditions that do not ensure the honest and fair treatment of tenderers;
- do not allow tenderers to compete although they are qualified to meet the stated procurement requirements; or

- are not compliant with the normative framework.

## Conditions for filing a complaint

To avail itself of the complaint examination process, the complainant must first have complained to the public body involved. If the complainant is not satisfied with the public body's decision or the public body does not respond to the complaint within the prescribed time periods, the complainant may file a complaint with the AMP before the expiry of the time periods specified for that purpose, in accordance with the prescribed procedure. A complaint may also be filed directly with the AMP, without it having to first be filed with the public body, if the complainant is informed of an amendment made to the tender documents during the period starting two days before the complaint filing deadline indicated on the electronic filing system; in this case, certain deadlines will have to be met.

## Complaint processing

The AMP may, on summary examination, dismiss any complaint that it considers abusive, frivolous or clearly unfounded.

If it considers the complaint admissible, the AMP informs the public body, which must then, without delay, submit its observations to the AMP and, as applicable, send the AMP a copy of the reasons for its decision.

The AMP has 10 days from the time it receives the public body's observations to make a decision with reasons in writing. If the complaint cannot be processed within that time, the AMP must agree with the public body on an additional time period. If the AMP and the public body cannot agree on an additional time period, the AMP will have only an additional five-day time period to make its decision. If the AMP fails to make a decision within that time, it will be deemed to have decided that the tendering process complies with the normative framework.

During the examination of a complaint, the AMP must, if need be, defer the submission of bids until a new tendering closing date is set by the public body in accordance with the decision that the AMP will make regarding the complaint. If the process is an awarding process, not a tendering process, the AMP must, if need be, defer the projected contract date.

## The AMP's powers after the examination of a complaint is concluded

After it completes its investigation, the AMP may order the public body to **amend** its tender documents or **cancel** the public call for tenders. Clearly, this is an important power devolved to the AMP.

Moreover, any public contract entered into after a tendering or awarding process and before the AMP has made a decision on a complaint sent to it will be cancelled by operation of law, as will any public contract entered into in contravention of an order made by the AMP.

## Conclusion

Businesses will now have a new, inexpensive avenue by which to rebalance the scales between them and their competitors before it's too late. However, they will have to act expeditiously and comply with the specified terms and conditions. They will also have to refrain from taking legal action before the AMP has made a decision, or else their complaint will be dismissed.

In view of the powers given to the AMP and the substantial benefits promised by the new system, it is both likely and desirable that businesses will not hesitate to use the new oversight mechanism. It will be up to the AMP to put the necessary protections in place to minimize the risk of the rules being used by some tenderers for dilatory or other strategic purposes.

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