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BILL 1: NEW REQUIREMENTS FOR PUBLIC CALLS FOR TENDERS
Nearly everybody talks about it. The *Integrity in Public Contracts Act*, also referred to as Bill 1, has been assented to on December 7, 2012 after an expedited review process of barely three months. Everybody is talking about it because the Act imposes on tenderers new requirements aiming at curbing fraud and corruption which, according to investigations of public authorities, undermine the construction industry.

AMENDMENTS TO THE ACT RESPECTING CONTRACTING BY PUBLIC BODIES
The *Act Respecting Contracting by Public Bodies* ("**ARCPB**") determines the conditions applicable to contracts between a public body and private contractors involving an expense of public funds. It applies, among others, to government departments and bodies, educational and health establishments and public transit companies. The ARCPB applies to supply contracts, to services contracts and construction contracts entered into with these public bodies, as well as to public-private partnership agreements entered into as part of an infrastructure project carried out under a public-private partnership within the meaning of the *Act respecting Infrastructure Québec*.

The ARCPB imposes on public bodies the general rule whereby contracts are to be awarded by way of calls for tenders, which is supposed to enable owners to get the lowest contract price through competition between tenderers while affording to tenderers an equal opportunity to get State contracts. This being said, the conclusions of the Duchesneau Report, made following the police investigation of the Marteau Squad on fraud and corruption in the construction industry, and the revelations from the Charbonneau Commission, demonstrate that the call for tenders system for the awarding of public contracts obviously fails to achieve its expected results.

Bill 1 accordingly amends the ARCPB in order to reinforce integrity in public contracts and control access to these contracts. It further increases the number of public bodies covered by this Act by adding entities such as Hydro-Québec, Loto-Québec and the SAQ.

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The amendments implement a system to verify whether enterprises wishing to enter into contracts with public bodies or municipalities meet the required conditions as regards integrity. Therefore, an enterprise wishing to enter into a contract or a related subcontract for an amount equal to or greater than a threshold determined by the government is required to obtain an authorization from the Autorité des marchés financiers (the "**AMF**"). This rule is also applicable to sub-subcontracts, the amount of which is equal to or greater than such threshold.

Subject to transitional provisions, the enterprise must be authorized as of the date it files its bid, except where the call for tenders specifies a different date which precedes the date the contract is entered into. An authorization must be maintained throughout the contract or subcontract. An authorization is valid for a period of three years and must be renewed upon expiry. The AMF keeps a public register of enterprises holding an authorization to enter into a contract or a subcontract. These rules also apply to contracts awarded by towns and municipalities.

CONDITION FOR OBTAINING AN AUTHORIZATION

An application for an authorization must be made to the AMF using a prescribed form with several schedules, which can be obtained from the website of the AMF. A guide for enterprises wishing to obtain an authorization is also available from the same website. The contractor must also provide with his application an attestation from Revenu Québec, issued not more than 30 days before the date on which the application is files, stating that the enterprise has filed the returns and the reports that it was required to file under fiscal laws and that it has no overdue account payable to the Minister of Revenue. Lastly, the enterprise must not have been refused an authorization or have had its authorization revoked in the preceding 12 months.

Upon receipt of an application for authorization from an enterprise, the AMF sends to the permanent anti-collusion squad (unité permanente anticollusion or "**UPAC**") the information obtained in order for the UPAC to make the verifications it deems necessary, in collaboration with the Sûreté du Québec, Revenu Québec, the Régie du bâtiment du Québec and the Commission de la construction du Québec. The UPAC sends to the AMF a report on the compliance of the enterprise with the integrity requirements. The AMF renders a decision of the application for an authorization.

DECISION OF THE AMF

The Act provides for mandatory and discretionary grounds for refusal. The fact, for an enterprise or related person, to be found guilty of any offence under various provincial or federal laws as listed in Schedule I to the Act results in the enterprise being automatically denied its application for an authorization. The offences listed in Schedule 1 mainly relate to criminal law and tax laws.

Therefore, if the enterprise which applies for an authorization, any of its shareholders holding 50% or more of the voting rights attached to the shares of the enterprise, or any of its directors or officers has, in the preceding five years, been found guilty of an offence listed in Schedule I of the Act, the AMF refuses to grant or to renew an authorization. The AMF may even revoke an authorization if an enterprise or any of its related persons is subsequently found guilty of such an offence.

Furthermore, if an enterprise has, in the preceding five years, been found guilty by a foreign court of an offence which, if committed in Canada, could have resulted in criminal or penal proceedings for an offence listed in Schedule I, the AMF will automatically deny the issuance or renewal of an authorization. Lastly, an enterprise found guilty of certain offences described in electoral laws, who, in the preceding two years, has been ordered to suspend work by a decision of the CCQ or been ordered to pay an amount claimed under subparagraph c.2 of the first paragraph of section 81 of the *Act respecting labour relations, vocational training and workforce management in the construction industry* will also be denied its application for an authorization.

The AMF may also at its sole discretion refuse to grant or to renew an authorization or even revoke

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an authorization to an enterprise if the enterprise concerned fails to meet the high standards of integrity that the public is entitled to expect from a party to a public contract or subcontract. In this respect, the AMF, following an investigation by the UPAC, will review the integrity of the enterprise, its directors, partners, officers or shareholders as well as that of other persons or entities that have direct or indirect legal or de facto control over the enterprise (a "**Related Person**").

To that end, the AMF may consider the following factors listed in the ARCPB:

1. whether the enterprise or a Related Person maintains connections with a criminal organization;

2. whether the enterprise or a Related Person has been prosecuted, in the preceding five years, for any of the offences listed in Schedule I;

3. whether an enterprise or a Related Person has been a Related Person of another enterprise which was found guilty, in the preceding five years, of an offence listed in Schedule I, at the time such offence was committed;

4. whether an enterprise or a Related Person is under the direct or indirect legal or *de facto* control of another enterprise that has, in the preceding five years, been found guilty of an offence listed in Schedule I;

5. whether the enterprise or a Related Person has, in the preceding five years, been found guilty of or prosecuted for any other criminal or penal offence;

6. whether the enterprise or a Related Person has repeatedly evaded or attempted to evade compliance with the law in the course of the enterprise's business;

7. whether a reasonable person would conclude that the enterprise is the extension of another enterprise that would be unable to obtain an authorization;

8. whether a reasonable person would conclude that the enterprise is lending its name to another enterprise that would be unable to obtain an authorization;

9. whether the enterprise's activities are incommensurate with its legal sources of financing; and

10. whether the enterprise's structure enables it to evade the application of the ARCPB.

CONSEQUENCES OF FAILURE TO BE AUTHORIZED

A contractor or subcontractor whose authorization expires, is revoked or denied upon application for renewal is deemed to have defaulted on the public contract or subcontract on the expiry of a period of 60 days after the date the authorization expired or the AMF notified its decision. In such a case, the enterprise must cease its work under any public contract, except for contracts where only the obligation to honour the contractual guarantees remains. However, the enterprise may continue to perform the public contract if the public body, for reasons of public interest, applies to the Conseil du trésor for permission for continued performance of the public contract or subcontract in question. The Conseil du trésor may subject the permission to certain conditions, including that the contractor or subcontractor agrees to the implementation, at the contractor's or subcontractor's expense, of oversight and monitoring measures. In the case of bonded contracts, regulations favour the exercise of oversight and monitoring measures by the surety of the enterprise.

TRANSITIONAL PROVISIONS

The proclaimed target of the government is to submit any contract worth $25,000 and more to the authorization mechanism. However, as more than 24,000 different enterprises on average enter

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each year into contracts worth in the aggregate between $20,000,000,000 and $30,000,000,000 per year with public bodies, the UPAC and the AMF will obviously not be able to review the files of all the enterprises wishing to enter into contracts with public bodies.

The Act therefore provides that, from the day it comes into force, the new provisions apply to contracts and subcontracts that involve an expenditure equal to or greater than $40,000,000 and for which the award process is underway on that date or begins after that date.

Furthermore, the Act also provides that regardless of the amount of the contract, the government may, before March 31, 2016, determine that the rules requiring an authorization apply to public contracts or subcontracts even if they involve a public expenditure amount of less than $40,000,000 or that such rules apply to a category of contracts other than those determined in application of the sections in question. In such a case, the Government may determine special terms for the applications for authorization that enterprises must file with the AMF in respect of such contracts. We have seen some examples of the application of this provision since December 19, 2012, since the government, by five different orders in council, has identified 125 contracts of the City of Montreal, the estimated value of which would likely be less than $40,000,000, which would require an authorization. These orders in council have been issued at the request of the City of Montreal, which wanted to subject these contracts to the new authorization regime. Specific application conditions have been made applicable to these orders in council, particularly the following:

> a preliminary application for authorization must be filed by each tenderer to the AMF no later than on the deadline for submitting bids;
> only the applications of the two best ranked tenderers after the bids have been analyzed would be considered by the AMF as being completed;
> if the contract cannot be awarded to either of those tenderers, the other preliminary applications would be considered completed for the subsequent tenderers until the contract can be awarded.

Lastly, the Act provides that the Government may, before 31 March 2016, require enterprises that are party to public contracts that are in process to file an application for authorization within the time it specifies. This provision is not limited to the contracts that are in process at the time the Act comes into force and may therefore affect any contract in process before March 31, 2016, possibly for a contract whose awarding process would have commenced after January 15, 2013. The consequences of this provision are serious since an enterprise which would not obtain its authorization following a request from the government would see its name registered in the register of enterprises ineligible for public contracts (designated under tis French acronym the “RENA”) for a period of five years. Such registration results in a presumption of default under all of its public contracts in process and forces the enterprise to cease its work unless the co-contracting public body obtains from the Conseil du trésor the permission for the enterprise to continue its work, with or without conditions.

A first order in council has just been issued under this provision on May 8, 2013, under which the Centre hospitalier de l’Université de Montréal (CHUM) and the Centre Universitaire de Santé de McGill (CUSM) requested the government to require a party to a contract with them to apply with the AMF for the authorization to enter into a contract. This order in council grants to the enterprise 21 days from the date it comes into force to file its application for the authorization to enter into a contract. The order in council adds that if the enterprise fails to provide within the allotted time the information and documents prescribed by the AMF, it will be deemed to have defaulted under the contract within 60 days following the expiry of the 21 days period or the expiry of the time granted by the AMF for providing the information it requested, according to the case. It must be understood from that order in council that should the enterprise fail to provide its application for authorization to the AMF, it will be deemed to have defaulted under the contract.

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CONCLUSION

The new conditions for obtaining a public contract imposed by the Act are demanding but they are no stranger to the legislative framework applicable to the construction industry. In fact, the *Building Act* was already imposing similar high integrity conditions to enterprises who wish to obtain a licence from the Régie du bâtiment. It does not seem to this day that the Régie du bâtiment has pushed the systematic application of these control rules. However, it must be understood that with Bill 1, unanimously passed by the National Assembly, government authorities intend to exercise strict control over the integrity of enterprises wishing to enter into contracts with the State. These enterprises must therefore ensure that they, as well as their directors, officers and shareholders, have a clean record, failing which they will suffer a purgatory of up to five years with no access to public contracts. Enterprises with a director, officer or shareholder charged with, or found guilty of an offence listed in Schedule I to the Act must distance themselves from such persons if they wish to maintain their right to enter into contracts with the State.

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