Bill 1 : New Requirements for Public Calls for Tenders

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LAVERY: A LEADER IN MONTREAL IN THE PRIVATE EQUITY, VENTURE CAPITAL AND INVESTMENT MANAGEMENT INDUSTRY

Creating and setting up private equity and venture capital funds are complex initiatives requiring specialized legal resources. There are very few law firms offering such services in Quebec. Lavery has developed enviable expertise in this industry by working closely with promoters to set up such structures in Canada and, in some cases, the United States and Europe, in conjunction with local firms. Through Lavery's strong record of achievements, the firm sets itself apart in the legal services market by actively supporting promoters, managers, investors, businesses and other partners involved in the various stages of the implementation and deployment of private equity and venture capital initiatives.

The *Integrity in Public Contracts Act*, also referred to as Bill 1, has been assented to on December 7, 2012. This Act imposes new requirements on public contracts tenderers. Managers of infrastructure funds have to be familiar with the rules under this Act as they most likely will have to deal with them in the context of an investment or a project involving a public body.

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. 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.

Bill 1 amended 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 the ARCPB by adding entities such as Hydro-Québec, Loto-Québec and the SAQ.

The amendments provides for the implementation of a system to verify that enterprises wishing to

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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) with a public body 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**").

The enterprise must generally have obtained this authorization by the date it files its bid. In the case of a consortium, each member enterprise must be individually authorized by that date. An authorization must be maintained throughout the performance of the public 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 with public bodies. These rules also apply to contracts awarded by towns and municipalities.

CONDITIONS FOR OBTAINING AN AUTHORIZATION

An application for an authorization must be made to the AMF. The contractor must provide with his application an attestation from Revenu Québec, stating that the enterprise has filed the returns and the reports required under tax 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 anticorruption 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 ("CCQ"). The UPAC sends to the AMF a report analysing the enterprise compliance with the integrity requirements. The AMF renders a decision on the application for an authorization.

DECISION OF THE AMF

Bill 1 provides for mandatory and discretionary grounds for refusal. Thus, the fact, for an enterprise or related person, of having been found guilty, within the five preceding years, of any offence under various provincial or federal laws listed in Schedule I to this Act will result 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.

If the enterprise applying for an authorization, or if 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 such Schedule I, the AMF will refuse 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 or who, in the preceding two years, has been ordered to suspend work pursuant to a decision of the CCQ will also be denied its application for an authorization.

Furthermore, the AMF may also, at its sole discretion, refuse to grant or to renew an authorization or even revoke an authorization already granted to an enterprise if the enterprise 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*

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person"). To that end, the AMF may consider certain elements which are described in the ARCPB, particularly the fact that the enterprise or a related person maintains connections with a criminal organization, has been prosecuted, in the preceding five years, in respect of certain offences or has repeatedly evaded or attempted to evade compliance with the law in the course of the enterprise's business. The AMF will also consider the fact that a reasonable person would conclude that the enterprise is the extension of another enterprise that would be unable to obtain an authorization or that the enterprise is lending its name to another enterprise that would be unable to obtain an authorization.

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 to which it is a party. In such a case, the enterprise must cease its work, except for contracts where only the obligation to honour the contractual guarantees remains. However, the enterprise may continue to perform the contract if the public body applies to the Conseil du trésor for permission for the continued performance of the contract or subcontract for reasons of public interest and the Conseil du trésor grants such permission. The Conseil du trésor may subject the permission to certain conditions.

TRESHOLDS AND APPLICATION

Upon coming into force, the Act provided that the new provisions would apply to public contracts and subcontracts that involve an expenditure equal to or greater than $40,000,000. This threshold has been lowered to $10,000,000 in December 2013.

Furthermore, the Act 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 this threshold or that such rules apply to a category of contracts other than those currently regulated pursuant to the ARCPB. In such a case, the government may stipulate special terms for the applications for authorization that enterprises must file with the AMF in respect of such contracts.

Lastly, the Act provides that the government may still before 31 March 2016, require enterprises that are parties to public contracts currently in process to file an application for authorization within the time it specifies. This provision is not limited to the contracts currently in process at the time Bill 1 comes into force and may therefore affect any contract in process before March 31, 2016.

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