Contracts by public entities: stay tuned on June 1, 2016

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The regulation governing contracts of public bodies leaps into the digital age. The amendments, passed on April 13, 2016, and coming into force June 1, 2016, aim to clarify the rules pertaining to the results evaluation.[1]

Five key changes

Tenders in electronic form are mandatory if so required in the tender documents —> change of computer systems will be needed to ensure the integrity of the signatures and tenders.
Minor modifications to the conditions for compliance —> still not possible for the public body to specify what constitutes a minor irregularity in the tender documents.
Qualitative evaluation of tenders —> it is possible to ask for the details of the evaluation in case of refusal.
For supply contracts, the concept of "total acquisition cost" is introduced —> to determine the lowest price or the adjusted price, the public body may take into consideration the additional costs related to the useful life of the goods which are not included in the tenders.
Adoption of a new regulation respecting information technology contracts[2] —> these contracts are removed from the ordinary framework of supply and services contracts

Electronic transmission of tenders

Public bodies may henceforth require tenderers to transmit their tenders only through the electronic tendering system approved by the government (ETS).[3] Failing to do so will then constitute a ground for automatic rejection, as well as the fact that the electronic tender "is unintelligible, infected or otherwise illegible once its integrity has been established by the electronic tendering system."[4] Moreover, only tenders whose integrity has been ascertained,[5] meaning that it is possible to verify that the information which the document contains has not been altered, that the medium used

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provides stability and perennity to the information and that the security measures necessary to its preservation exist[6]may be accepted. If it is not possible to ascertain the integrity of a document at the opening of tenders, the public body must not disclose the prices, but rather send a default notice to the tenderer in question, who will then have two business days to remedy the situation, failing which the tender will be rejected.[7] If integrity can be ascertained, the public body shall publish the result of the opening in the ETS within four business days.[8].

The public body may of course continue to accept the filing of paper tenders, exclusively or in addition to electronic tenders. In this last case, effective from May 31, 2019, in the event that a same tender is both sent electronically and on paper form, it will be deemed to constitute two separate tenders for the purpose of compliance analysis.[9] Prior to May 31, 2019, it may be considered that the paper form version prevails.

Evaluation of the tenders

Conditions for compliance
If, effective from June 1, 2016, the erasure of or correction to the tendered price which is not initialled will no longer constitute a ground for automatic rejection, grounds such as a conditional or restrictive tender, a security which does not comply with the form and conditions required, lateness in submitting a tender and non-compliance with a condition stipulated to be essential remain.[10] In this respect, the regulation is more timid than the draft regulation published on November 11, 2015, which, for example, would have given the public body the authority to establish which conditions could be the subject of a correction by tenderers in the event of an irregularity. This proposed faculty was finally not retained.

Results of the evaluation
Regarding contracts to be awarded following a quality evaluation, whereas the public body was previously required to inform each tenderer only of the overall results of the evaluation. From June 1st, 2016, they will also be required, upon the written request to the tenderer sent within 30 days of the quality evaluation results, provide the tenderer with the results in respect of each criterion used, as well as briefly set out the reasons justifying the fact that a tender was not accepted, if such was the case. The public body is required to provide its response to the tenderer within 30 days from the date it received the tenderer's request.[11]

Changes specific to supply contracts

Supply contracts are the subject of particular amendments, the most important of which apply to the adjustments to be made to the tender price to determine the lowest price. The concept of "impact cost"[12] disappears, to be replaced with that of "total acquisition cost," which allows the public body to take into account the "additional costs related to the acquisition of the goods". These costs must be identified in the tender documents. They represent quantifiable and measurable elements non included in the tendered price, the cost of which will be borne by the public body during the useful life of the goods acquired. They may include installation, maintenance, support and training costs.[13] Their value must be communicated to tenderers within 15 days of the contract awarding.[14]

The amendments to the regulation also specify the procedure applicable for calls for tenders in two stages[15] as well as the procedure pertaining to compliance tests: the public body must first test the goods proposed by successful tenderer according to the terms provided for in the call for tenders and can only resort to the other tenderers if the goods proposed by the successful tenderer fail to pass the compliance test.[16]

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New regulation applicable to contracting in the field of information technologies

In addition to the above amendments, a new regulatory framework is adopted in respect of information technologies contracts which, effective June 1, 2016, will cease to be covered by the ordinary regime regulating services and supply contracts. We simply note that if the structure of the Regulation respecting contracting by public bodies in the field of information technologies, O.C. 295 2016 generally retains that of the current regulations, it also innovates, the government seeking to reflect certain issues specific to the "acquisition of goods or the provision of services in the field of information technologies […] [which] seek[s] predominantly to ensure or enable functions of information processing and communication by electronic means, including the collection, transmission, display and storage of information". The new regulation provides specific rules pertaining to intellectual property or cloud computing and the possibility to use a new method for awarding contracts, "competitive dialogue".

Conclusion

These regulatory amendments reflect the government's wish to make electronic tenders the norm in the medium term. They also reflect some teachings of the courts, particularly as to the importance of precise tender documentation. Lastly, particularly with respect to supply, they aim to give more flexibility to the public body in order to ensure the best possible value to the taxpayer.

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1. O.C. 292-2016, 293-2016, 294-2016 and 295-2016 dated April 13, 2016, GOQ.II.1803-1826 (April 13, 2016), respectively amending the *Regulation respecting supply contracts of public bodies*, CQLR c. C-65.1, r. 2 (*Rrscpb*), the *Regulation respecting service contracts of public bodies*, CQLR c. C-65.1, r. 4 (*Rscpb*) and the *Regulation respecting construction contracts of public bodies*, CQLR c. C-65.1, r. 5 (*Rccpb*), all three adopted under the *Act Respecting Contracting By Public Bodies*, CQLR c. C-65.1.
2. *Regulation respecting contracting by public bodies in the field of information technologies*, O.C. 295 2016.
3. Sec. 4(5.2.), 9.2 *Rccpb*, *Rscpb*, *Rrscpb*; an exception applies to supply contracts referred to in section 183 of the Act respecting health services and social services, CQLR, c. S 4.2 where the documents related to the tendered price are in the form of a price list whose scope or layout does not make it possible to identify a total price (sec. 46.2 *Rrscpb*).
4. Sec. 7 para 1 (5) *Rccpb*, sec. 7 para 1 (4) *Rscpb*, sec. 7 para 1 (4) *Rrscpb*.
5. Sec. 13.1 *Rccpb*, sec. 10.1 *Rscpb*, sec. 10.1 *Rrscpb*.
6. *An Act to Establish a Legal Framework for Information Technology*, CQLR c. C-1.1, sec. 6.
7. Sec. 7.0.1 para 1 *Rccpb*, *Rscpb*, *Rrscpb*.
8. Sec. 14 para 4 *Rccpb*, sec. 11 para 4 *Rscpb*, sec. 11 para 4 *Rrscpb*.
9. Sec. 7 para 3 *Rccpb*, *Rscpb*, *Rrscpb*.
10. Sec. 7 para 1 *Rccpb*, *Rscpb*, *Rrscpb*.
11. Sec. 32 para 5 *Rccpb*, sec. 28 para 4 *Rscpb*, sec. 26.3 para 3.
12. Sec. 13 al. 2 *Rrscpb* (2008-2016).
13. Sec. 15.1.1 and 15.1.2. *Rrscpb*.
14. Sec. 15.1.2 *Rrscpb*.
15. Sec. 26.1-26.3 *Rrscpb*.
16. Sec. 7 para 1(5), 12 para 2 *Rrscpb*.

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