Bill 108 : highlights of the new rules on public contracting and the powers of the Autorité des marchés publics

July 11, 2016

Last June 8, Carlos J. Leitão, the Minister responsible for Government Administration and Ongoing Program Review and Chair of the Conseil du trésor, tabled Bill 108, *An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics*.

This Bill creates the Autorité des marchés publics, whose mission will be to:

> examine the contract management of the ministère des Transports and any other public body designated by the government;
> monitor public contracts for the purpose of analyzing procurement trends and the contracting practices of public bodies and identifying problematic situations that affect competition;
> examine the tendering or awarding process for a public contract following a complaint, on its own initiative or at the request of the Chair of the Conseil du trésor.

It will henceforth be possible for persons and partnerships interested in a public contract to complain about the process of awarding and tendering of the contract, depending on whether the contract is entered into by mutual agreement or granted by way of a call for tenders.

In order to process the complaints fairly, public bodies must set up a procedure for receiving and reviewing complaints, which must be made accessible by Internet.

Complaints against the process of awarding a contract by mutual agreement

Public bodies can forego the call for tenders procedure applicable to contracts involving an expenditure equal to or greater than the threshold of $25,000 (supply contracts for government departments and bodies) or $100,000 (contracts for professional and technical services or construction work)[1] in order to conclude contracts by mutual agreement.

However, where a public body does so, it must show that it is abiding by the purposes of the *Act respecting contracting by public bodies*[2] and that the call for tenders procedure would not serve the public interest.

In such a case, the public body must henceforth publish a notice of intention in the *SEAO (electronic tendering system)*, at least 15 days before concluding the contract, to allow any company to express

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an interest in carrying out the contract.

If a company expresses an interest and is able to perform the contract in accordance with the requirements and obligations set out in the notice of intention, the public body will be required to proceed by way of a call for tenders or not follow through with its intention to enter into a contract by mutual agreement.

If the public body finds that the company does not meet the requirements of the notice of intention, it may conclude the contract with the company initially identified.

In all events, the public body will be required to send its decision to the company having expressed an interest in the contract within a certain time period before the scheduled date for concluding the contract, by postponing that date, if necessary.

If the company disagrees with the public body's decision, it may submit a complaint to the Autorité des marchés publics which, after verifying the process for awarding the contract, may order the public body not to proceed with the contract by mutual agreement, or to initiate a public call for tenders if it intends to conclude the contract. The public body will be invited to submit its observations and the reasons for its decision to the Autorité.

We note that where there are exceptional circumstances, the Conseil du trésor may nevertheless permit a public body to conclude a contract by mutual agreement that is the subject of an order of the Autorité des marchés publics, if the public body can show that it is in the public interest for the contract to proceed on that basis.

If the public body contravenes an order of the Autorité des marchés publics, or it proceeds with the contract awarding process before the Autorité renders its decision, the Autorité may notify the public body that it is resiliation of the contract by operation of law.

Complaints against the process of awarding a contract by call for tenders

Any interested person may file a complaint with a public body if the conditions provided for in the tender documents do not ensure the honest and fair treatment of the tenderers, or do not allow qualified tenderers to participate in the process. Complaints may also be filed with respect to the process for the certification of goods and the qualification of service providers or contractors.

The public body may then amend its tender documents and its certification or qualification process, or dismiss the complaint. In any event, it must send its decision to the complainant within a certain time period prior to the tender closing date, by postponing that date, if necessary.

If the complainant disagrees with the public body's decision, or the decision is not sent within the specified time limit, the complainant may file a complaint with the Autorité des marchés publics which, after verifying the process for awarding the contract, may order the public body to amend its public tender documents or cancel the call for tenders. The public body will be invited to submit its observations and the reasons for its decision to the Autorité.

Where there are exceptional circumstances, in such case, the Conseil du trésor may also nevertheless permit the public body to proceed with the public call for tenders that is the subject of the order of the Autorité des marchés publics, if the public body can show that it is in the public interest that it should proceed.

If the public body contravenes an order of the Autorité des marchés publics, or it proceeds with the contract awarding process before the Autorité renders its decision, the Autorité may notify the public

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body that it is resiliation of the contract by operation of law.

In addition to the aforementioned powers, the Autorité des marchés publics may appoint an independent person to act as a member of a selection committee for purposes of the awarding of a public contract, order the public body to appoint an independent process auditor, and order the public body to inform the auditor of the composition of the selection committee for his approval.

The Autorité des marchés publics will also have the power to make recommendations to the chief executive officer [3] of the public body, and may require that it be informed, within the time period determined by it, of the measures taken by the public body to give effect to its recommendations.

Audit and investigative powers of the Autorité des marchés publics

In carrying out its functions, the Autorité des marchés publics may:

> enter the establishment of a public body or any other premises in which it may keep documents;
> use any computer, equipment or other thing that is on the premises to access data contained in an electronic device, computer system or other medium or to audit, examine, process, copy or print out such data; and
> require from the persons present any relevant information as well as the production of any book, register, account, contract, record or other relevant document and make copies.

Register of enterprises ineligible for public contracts

Public bodies will always have the obligation to ensure that the bidders, or the successful bidder, are not named in the register of enterprises ineligible for public contracts before entering into any of the contracts described in section 3 of the *Act respecting contracting by public bodies*.[4]

The law will henceforth provide that companies whose application for authorization to contract, or the renewal thereof, is denied, or whose authorization is revoked, are ineligible for public contracts for a period of five years.

In this regard, prior authorization to contract need only be obtained by companies that seek to conclude any contract with a public body involving an expenditure equal to or greater than the amount determined by the government,[5] i.e. $1 million or $5 million depending on the category of contract.

In addition, the government may henceforth determine that an authorization is required, based on specific conditions, notwithstanding that the expenditure involved in the public contract is below the specified threshold.

Furthermore, the Conseil du trésor may nevertheless permit a public body to enter into a contract with a company that is ineligible for public contracts if it is in the public interest that the contract be performed by that company, or where urgent action is required and there is a threat to human safety or property.

As of the date of publication of this newsletter, Bill 108 was at the study stage. Its final content and the date it comes into force will only be known once it is adopted. Lavery's Business and Corporate Integrity Group will keep you informed of further developments.

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1. Article 502 of the Agreement on Internal Trade.
2. CQLR c C-65.1. These purposes are, among others, to promote public confidence in the public procurement process, transparency in contracting processes, the honest and fair treatment of tenderers, and the opportunity for qualified

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tenderers to participate in calls for tenders by public bodies, etc.

3. According to section 30 of the Bill, the concept of chief executive officer refers, as the case may be, to the deputy minister, the president or the director general, to the board of governors of a general and vocational college or university-level educational institution, or to the council of commissioners of a school board.
4. Supra, note 2. The contracts described in section 3 are as follows, where they involve public expenditure:

   1. supply contracts, including contracts for the purchase, lease or rental of movable property, which may include the cost of installing, operating and maintaining the property;
   2. construction contracts to which the Building Act (chapter B-1.1) applies and for which the contractor must hold the licence required under Chapter IV of that Act;
   3. service contracts other than contracts to integrate the arts with the architecture and environment of government buildings and sites.

   The following contracts are also described in section 3 and give rise to the same obligation, whether or not they involve public expenditure:

   1. public-private partnership contracts entered into for the purposes of a public infrastructure project for which a public body brings in a contractor to participate in designing, building and operating the infrastructure;
   2. any other contract determined by government regulation. Contracts of affreightment, contracts of carriage other than those subject to the Education Act (chapter I-13.3), damage insurance contracts and contracts of enterprise other than construction contracts are considered to be service contracts.

5. Order in Council 435-2015: Service contracts and subcontracts involving an expenditure equal to or greater than $1,000,000; Order in Council 793-2014: Public-private partnership contracts involving an expenditure equal to or greater than $5,000,000; Order in Council 796-2014: Service contracts and subcontracts and construction contracts and subcontracts involving an expenditure equal to or greater than $5,000,000.

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