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A bid's nonconformity to the eligibility criteria set out in a call for tenders, such as minimum experience, constitutes a major irregularity

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When it comes to presenting a bid in response to a call for tenders made by a public body, two major questions are of interest to businesses concerned, namely "What is the nature of the contract?" and "Does my business conform to the conditions of the call for tenders, for example, those concerning the experience required of tenderers?"

Absent the necessary skills in the field contemplated by the call for tenders or the years of experience required to comply with the conditions set out in the invitation to tender, businesses will refrain, obviously, from devoting time to a tender process they know they have no chance of winning.

But what happens when a public body fails to comply with the conditions it itself deemed "essential", whether explicitly or implicitly?

Traditionally, courts would analyze such situations by attempting to characterize the default of the bid impugned for not respecting all the tender conditions as a "minor" or a "major" irregularity.

However, in two consecutive decisions handed down within three months of each other, the Québec Court of Appeal repositioned the debate on different elements that are to be considered when analyzing the conformity of a bid. In its most recent decision, it even innovated by adding a new dimension to the manner in which the concept of "fairness among tenderers" is to be considered when analyzing the conformity of tenders.

This text proposes a combined analysis of the decisions in *Ville de Matane c. Jean Dallaire, architectes & EBC inc.* [1] and *Tapitec inc. c. Ville de Blainville* [2] rendered by the Court of Appeal on November 25, 2016 and February 24, 2017, respectively.

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Ville de Matane c. Jean Dallaire, architectes & EBC inc.

The City of Matane invited tenders for the building of a sports complex. One of the fundamental conditions of the call for tenders was that tenderers have experience in connection with at least three projects of comparable scale and complexity. This condition was characterized as “essential” in the invitation to tender.

Despite this requirement, the City awarded the contract to a business that did not possess the required experience and that, to the City’s knowledge, only had experience in small-scale residential and institutional projects. EBC Inc., another bidder, sought to have the resolution awarding the contract annulled on grounds of the successful bidder’s lack of experience vis-à-vis the condition set out in the invitation to tender.

The City of Matane tried to persuade the Court that the default was a minor irregularity inasmuch as the winning bidder undertook, subsequently to the opening of tenders, to have personnel on its team with sufficient experience to meet the requirement relating to the three projects of comparable scale and complexity set out in the invitation to tender.

The Court of Appeal rejected the City’s argument and confirmed that the winning bid’s default did constitute a major irregularity.

Indeed, through its own characterization as essential of the condition relating to experience on three projects of comparable scale and complexity, the City of Matane created a mandatory requirement with which compliance had to be demonstrated at the time of tendering. Allowing the winning bidder to prove its experience differently after filing its bid would amount to circumventing the City’s own requirement and would be contrary to the contract as well as to the principle of fairness between bidders.

The requirement relating to the experience of tenderers set out in an invitation to tender must therefore be complied with and applied straightforwardly. Once a requirement of an invitation to tender is characterized as “essential”, the public body may not consider a default in relation thereto a “minor irregularity”. On the contrary, such a default necessarily constitutes a major irregularity.

Tapitec inc. c. Ville De Blainville

In this case, the City of Blainville was looking to have a sports field built with a synthetic grass surface. As it wished to find a highly specialized contractor familiar with the laying of this type of surface, the City of Blainville decided to proceed by way of a qualitative assessment of tenders received rather than automatically awarding the contract to the lowest bidder.

As one of its conditions, the City required that tenderers have had a place of business in Québec for at least the past five years. Despite this requirement, the City awarded the contract to a business that had opened a place of business in Québec only two years previously.

The Court of Appeal quashed the City’s decision and confirmed that the failure to meet a condition relating to a bidder’s experience, even if such condition is not explicitly characterized as essential, will automatically disqualify a bid, when the circumstances so warrant. This was the case in the City of Blainville’s tender documents which, although they did not contain words such as “essential”, “automatic disqualification” or “fundamental”, set out a condition of having had a place of business in Québec for at least five years, which condition was, according to the Court of Appeal, essential in that it resulted in limiting the number of bidders by imposing mandatory experience or qualification criteria. The Court insists on the effect of such conditions on businesses in their decision of whether or not to tender. As a result, a public body cannot consider such a default as merely a minor

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irregularity.

Hence, the Court of Appeal clearly states that the obligation to accept only a conforming bid is owed as much to parties participating in the tender process as to those who refrained from so doing because they did not conform to the requirements set out in the invitation to tender. By limiting the pool of tenderers through the imposition of an experience requirement, the public body must absolutely reject any bid that does not comply with such requirement. Otherwise, the public body will breach the principle of fairness between bidders, which constitutes a major irregularity and renders its decision challengeable.

The requirement relating to the experience of tenderers set out in an invitation to tender is therefore, where the circumstances so warrant, an essential condition from which the public body may not depart. Obviously, each case turns on its facts and a detailed analysis of the tender specifications will be necessary to determine whether the experience requirement is an essential condition.

What can be gathered from these two decisions?

These two judgments forcefully assert the principle of equality between bidders and the idea that by limiting the number of persons allowed to tender a bid through the imposition of criteria relating to experience or professional qualifications, public bodies make it their duty to abide by such criteria. A requirement characterized as essential in an invitation to tender can never be circumvented and any default in conforming to any such requirement appearing in a bid must automatically result in the disqualification of same. Failing this, bidders who were wrongly passed over will be entitled to claim damages for any injury suffered.

Although the question is one to be determined on a case-by-case basis of whether or not a requirement relating to the experience or professional qualifications of bidders is essential, we note that the Court of Appeal seems to be encouraging certain public bodies to reconsider their manner of analyzing the conformity of the bids they receive, taking into account both other bidders and those contractors who may have forgone participation in a process they believed they had no chance of winning.

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1. *Matane (Ville de) c. Jean Dallaire, Architectes,* 2016 QCCA 1912.
2. *Tapitec inc. c. Ville de Blainville,* 2017 QCCA 317.

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