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The public tendering process: are there alternatives to the lowest bidder rule?

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In Québec, both at the provincial and municipal levels, the awarding of contracts by government bodies for construction work and material supply seems, for the most part, to be governed by the lowest bidder rule. Nevertheless, the Charbonneau Commission highlighted the many drawbacks to this method: risk relating to the quality of infrastructure and services, undue pressure on bidders' margins, incentive to generate "extras", risk of collusion, etc. Despite the debate surrounding the Commission, there does not appear to have been any fundamental change in this practice, with authorities focusing more on the transparency of the identity of the parties, the source of funds and the frequency of requests for "extras" by individual bidders.

But in the final analysis, are public bodies actually required to use this method of selection? Could there be other alternative options? We thought it would be interesting to present a summary of the methods of awarding public contracts in Québec .

In 2015-2016, the total value of public contracts in Québec was approximately $8 .5 billion . The contracts are mainly supply contracts, service contracts and construction contracts awarded by government bodies, including ministries, school boards, Crown corporations, health and social services agencies and municipal bodies . The bodies on the list, other than municipal bodies, are governed by the Act respecting contracting by public bodies and its regulations . Municipal bodies are governed by the *Cities and Towns Act.*

The lowest bidder rule is frequently prescribed in legislative provisions, as described below . Generally, the rule applies in situations where the government or municipal body manages to clearly state its requirements at the time of the call for tenders . The Secretariat of the Conseil du trésor has established that in such a situation, lowest price is the only basis for awarding a contract .

However, the lowest bidder rule is not systematically employed for all public contracts . There are three other methods: "minimum quality and price", "lowest adjusted price" and "quality only" . Municipal bodies may also apply a bid weighting system for evaluating offers .

"Price only" method of awarding contracts

This is the method of awarding contracts that uses the lowest bidder rule solely .

Type of public contract	**Legislative source**
Supply contract	*Regulation respecting certain supply contracts of public bodies,* s. 13
Service contract of a technical nature	*Regulation respecting certain service contracts of public bodies,* s. 13

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Construction contract of a public body	*public body Regulation respecting construction contracts of public bodies,* s. 16
Supply contracts, service contracts and construction contracts awarded by municipal bodies involving an expenditure of $100,000 or more	*Cities and Towns Act* s . 573 (7)

“Minimum quality and price” method of awarding contracts

A public body uses this method when it is essential for the public contract to have a minimum quality threshold, but the public body does not wish to pay a premium for higher quality . Tendering is then a two-step process .

The first step consists of selecting bidders only after proof of quality . For example, for construction contracts, a minimum of three criteria is required for a quality assessment . The criteria must be specified in the tender documents and must state the elements required for the quality to be considered acceptable . This is the “acceptable level of performance” . A bidder rejected at this stage is considered to be an ineligible or non-compliant bidder .

The second step consists in inviting the bidders selected in the first step to submit a price . The lowest bidder wins the day .

Type of public contract	**Legislative source**
Supply contract (awarded at the discretion of the public body)	*discretion of the public body) Regulation respecting certain supply contracts of public bodies,* s . 26 .1
Professional services contract	*Regulation respecting certain service contracts of public bodies,* s . 25
Construction contract or mixed contract for construction work and professional services of public bodies (awarded at the discretion of the public body)	*Regulation respecting construction contracts of public bodies,* ss . 22 and 26

“Lowest adjusted price” method of awarding contracts

A quality-price formula prescribed in the schedules of each respective regulation allows for a score out of 100 to be given for bid quality . That score is then used as the adjustment factor for the bid price . The contract is still awarded to the lowest bidder, whose price has been adjusted by applying the formula .

Type of public contract	**Legislative source**
Supply contract (awarded at the discretion of the public body)	*Regulation respecting certain supply contracts of public bodies,* s . 23 and Schedule 2
Professional services contract (awarded at the discretion of the public body)	*Regulation respecting certain service contracts of public bodies,* s . 21 and Schedule 2
Construction contract or mixed contract for construction work and professional services of public bodies (awarded at the discretion of the public body)	*Regulation respecting construction contracts of public bodies,* s . 24 and Schedule 5

“Quality only” method of awarding contracts

Public bodies must award their contracts solely after soliciting a demonstration of quality .

Municipal contracts are awarded randomly among bidders that have met all the quality criteria . When a bidder is selected, it cannot be selected again until the list has been exhausted . Municipal bodies also benefit from a rule that allows for rejection of a bidder that, in the two years preceding the selection date, had an unsatisfactory performance evaluation .

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Type of public contract	Legislative source
Professional services contract for an architecture or engineering contract, excluding a forest engineering contract	*Regulation respecting certain service contracts of public bodies,* s . 24
Contract for services rendered by an architect, engineer, land surveyor or chartered professional accountant; contracts involving an expenditure of $100,000 or more awarded by a municipal body	*Regulation respecting the awarding of contracts for certain professional services,* s . 19

Bid weighting system

For bid evaluation purposes, municipal bodies may also establish a criteria evaluation grid with a certain number of points given for price and others for quality . The grid must also comply with the conditions prescribed in the Cities and Towns Act . For example, for the awarding of professional services contracts, the evaluation grid must have a minimum of four criteria .

Type of public contract	Legislative source
Supply contract, services contract and construction contract involving an expenditure of $100,000 or more awarded by municipal bodies	*Cities and Towns Act,* s . 573 .1 .0 .1

Conclusion

This portrait of Québec government contracts serves to illustrate that the predominance of the lowest bidder rule is not the result of a legal obligation, but rather the result of the exercise of discretion by the public body concerned .

Most likely the complexity and more subjective nature of the other methods of awarding contracts make the “price-only” a simpler method to apply . However, the trend noted among project owners elsewhere in Canada and other countries is that “value for money” (also called “quality/price ratio” or “cost/benefit ratio”) is the increasingly preferred concept, as it further promotes quality and sustainability, with a view to improving long-term return on investment . In this context, “price only” is obviously no longer an adequate method, and hence methods comparable to bid weighting are used .

In the case of Québec, the following issues arise: are the public service employees responsible for tendering properly aware of the various options available? Have they received the training and tools for determining the most appropriate method to apply in awarding contracts? Would they need special technical assistance? Is the decision-making process sufficiently transparent and structured?

Failure to give due consideration to these issues amounts to misunderstanding the context . The issue is whether it is realistic to require that a generalist civil servant, who is paid a respectable but modest salary but has no special legal immunity from liability claims, make discretionary decisions concerning projects of significant financial value .

Apart from these functional aspects, consideration should be given to the appropriateness of formulating a general strategy for tender criteria for public investment, applicable to both the provincial and municipal levels, as well as to the allocation of an adequate budget for proper analysis by appropriately qualified persons at the preparatory stage .

Consideration should also be given to reviewing the most preferable method that should be applied by our public bodies in awarding contracts to ensure that Québec’s infrastructures are built in the best interests of the general public, both in terms of quality, longevity and optimization of public

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