A tenderer's failure to comply with the preliminary complaint process as part of a municipality's public call for tenders leads to a fin de non-recevoir

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Author

Despina Mandilaras

Partner, Lawyer

Introduction

On June 14, 2024, the Superior Court of Québec issued a decision[1] interpreting section 938.1.2.2 of the *Municipal Code of Québec*, which came into force in 2019. This provision gives a person interested in participating in the awarding process the opportunity to file a preliminary complaint about a requirement in the tender documents that they believe does not ensure the honest and fair treatment of tenderers. To our knowledge, this is the first time a court has considered the impact on a claim for damages for loss of profits[2] when an unsuccessful tenderer fails to comply with this relatively new provision The Superior Court concluded that a tenderer's failure to submit a complaint in a timely manner should be considered as [translation] "a form of *fin de non-recevoir*, or at the very least, a break in the chain of causation between the alleged fault and the damages claimed" (paragraph 40).

Facts

The dispute at hand pitted Transport Martin Forget Inc. ("**Transport Forget**") against the Municipality of Saint-Alexis (the "**Municipality**"). On May 6, 2019, the Municipality issued a call for tenders for a snow clearing and salting contract. Transport Forget submitted the lowest bid, which was $150,000 below that of the winning tenderer. Transport Forget was excluded from the call for tenders given its failure to comply with the tender specifications requiring it to provide a Régie du bâtiment du Québec ("**RBQ**") licence number, together with an attestation that its licence was in good standing. Further to the Municipality's refusal to award the contract to Transport Forget, it claimed $300,000 in damages for alleged loss of profits.

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Transport Forget believed that its tender was compliant, that the RBQ licence requirement imposed by the Municipality was frivolous and unreasonable, that the Municipality failed to uphold the principle of equal treatment of tenderers and that the complaint process provided for in section 938.1.2.2 of the *Municipal Code of Québec* did not deprive it of its rights. As for the Municipality, it considered the irregularity in Transport Forget's tender to be major and Transport Forget's failure to comply with the complaint process concerning this requirement—both reasonable and in the public interest—was fatal to its legal action.

The evidence showed that the RBQ licence number provided in Transport Forget's tender was invalid and that Transport Forget deliberately chose not to renew said licence before submitting its tender, as it was unsure as to whether it would win the bidding process and wished to avoid needlessly paying the $1,000 annual fee required for the licence renewal.

Applicable principles

In order to determine the outcome of this dispute, the Court analyzed the case based on the decision in *Tapitec,*[3] a landmark ruling in tendering matters. It reiterated the Court's view that the decisive factor in determining whether an irregularity is minor or major is the equal treatment of tenderers. It also pointed out that municipalities can set out conditions aimed at limiting the number of tenderers, provided that this is done for an important and legitimate purpose.

As for section 938.1.2.2 of the *Municipal Code of Québec*, the Court viewed it as a mechanism for monitoring all contracts awarded by public bodies which is designed to establish a process to ensure compliance with the principles of integrity needed to protect the public interest. According to the Court, the legislator's intention is also to protect small municipalities such as the one in question (with a population of approximately 1,500) from potential legal action following the opening of tenders by ensuring that issues concerning the principle of equal treatment of tenderers are resolved prior to the tendering process. Tenderers that fail to comply with this requirement will not be entitled to claim damages for loss of profits, as in this case, except where there has been fraud or blatant bad faith, as in cases of collusion. The purpose of the provision in question is to prevent a tenderer that is aware of the requirements set out in the tender documents from contesting such requirements after the fact.

Decision

The Court found that the requirement to hold an RBQ licence number was a condition intended to limit the number of tenderers, which the Municipality was entitled to do. Although the Court recognized that there is no correlation between being able to perform snow clearing operations and holding an RBQ licence, it accepted the evidence that this condition was an appropriate and quick way for the Municipality to ascertain the credibility and organizational skills of tenderers, which was a important and legitimate objective. The Court therefore concluded that this requirement of the tender specifications was neither frivolous nor arbitrary.

The Court considered the irregularity in Transport Forget's tender to be major. Although the obligation to hold a valid RBQ licence is neither a requirement of public policy nor a substantive requirement, it is intended precisely to proscribe the lack of seriousness shown by Transport Forget when it opted not to pay the renewal fees for its RBQ licence before submitting its tender. The Municipality exercised its administrative discretion in a reasonable manner and ensured that all tenderers were treated equally. The Court found that the Municipality was right to reject Transport Forget's tender.

Although the Court dismissed the claim, it did nevertheless consider section 938.1.2.2 of the *Municipal Code of Québec*. In the Court's view, Transport Forget could have lodged a preliminary complaint about the validity of the condition imposed by the Municipality to hold an RBQ licence. Doing so would have given the Municipality the opportunity to amend its call for tenders before the

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opening of tenders. Transport Forget's failure to do this rendered its claim for damages inadmissible.

Commentary

Tenderers for public calls for tenders issued by a municipality must be aware of section 938.1.2.2 of the *Municipal Code of Québec*[4] and understand how to apply it in a timely manner. As demonstrated by the Superior Court's interpretation of this section in the judgment in question, an unsuccessful tenderer that has not complied with the complaint process set out in said section and who intends to sue for damages for an alleged loss of profits could have their claim turned down on grounds of a *fin de non-recevoir*.

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1. *Transport Martin Forget Inc.* c. *Municipalité de Saint-Alexis*, 2024 QCCS 2208
2. We came across the decision in *Sintra inc.* c. *Municipalité de Noyan*, 2019 QCCS 4293 (CanLII), which also deals with this provision, but in the context of an application for an interim injunction from the lowest tenderer attempting to prevent the awarding of the contract to a third party: the Court dismissed the claim, in particular because the tenderer had not lodged a complaint about the process provided for the awarding of the contract, in accordance with section 938.1.2.2 of the *Municipal Code of Québec*, and concluded that the *prima facie* case requirement had not been met.
3. *Tapitec* c. *Ville de Blainville* 2017 QCCA 317
4. We would also like to draw your attention to section 573.3.1.4 of the *Cities and Towns Act*, which is identical to section 938.1.2.2 of the *Municipal Code of Québec*. We have not found any decisions interpreting this section, so we urge tenderers to be cautious and comply with the complaint process applicable to calls for tenders issued by cities and towns, to avoid having their claim turned down on grounds of a *fin de non-recevoir*.

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