

Blakes Bulletin

Infrastructure

Contracts with Quebec Public Bodies: The Rules of the Game Revisited

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More than two years following its assent on June 15, 2006, the *Act respecting contracting by public bodies* (the Act) finally came into force on October 1, 2008 through the adoption on May 28, 2008 of order-in-council 530-2008.

OBJECTIVES AND PRINCIPAL CHARACTERISTICS OF THE ACT

The primary objective of the Act, which was adopted unanimously by the National Assembly, is to standardize the legal framework applicable to the adjudication and award of contracts that public bodies – including health and social services and education networks public bodies – may enter into with certain private law persons and entities. The Act principally affects public procurement contracts, provided that these involve the expenditure of public funds, but it also affects public-private partnership contracts, whether or not these involve such expenditure, as well as any other contract which the government may determine is subject to the Act.

The Act incorporates by reference the definition of “public-private partnership contracts” found in section 6 of the *Act respecting the Agence des partenariats public-privé* (the Act respecting the Agence), according to which: “a public-private partnership contract is a long-term contract under which a public body allows a private-sector enterprise to participate, with or without a financial contribution, in designing, constructing and operating a public work. The purpose of the contract can be the delivery of a public service”.

The second objective of the Act is the codification of the basic principles and the enactment of the general rules governing this legal framework, which the Act seeks to promote while ensuring compliance with intergovernmental agreements concluded by the Province of Quebec (for example, the *Agreement on the Opening of Public Procurement for Québec and Ontario* and the *Agreement on Internal Trade* concluded with the federal government and the governments of the other

Canadian provinces and territories). The basic principles stated in section 2 of the Act can be grouped around four main principles:

- **transparency** in the process of the adjudication and award of contracts;
- the **accessibility** of these processes to qualified tenderers;
- **integrity** in the treatment of tenderers; and
- **fairness** in the treatment of tenderers.

In addition to these main principles is the will to put **effective** and **efficient** processes in place that are based on a rigorous evaluation of the true procurement requirements of public bodies and which promote the government’s sustainable development and environmental policies, as well as **quality assurance systems**. The Act also promotes the principle of **accountability**, particularly by way of the online publication of certain information relating to administrative contracts awarded by public bodies that are subject to the Act, as a means of ensuring the accountability of managing officers of the public bodies and the proper use of public funds.

In addition to government departments, the Act includes in its definition of public bodies, bodies in which a majority of members or directors are appointed by the government or by a minister and at least half of whose expenditures are borne directly or indirectly by the consolidated revenue fund, bodies whose personnel is appointed in accordance with the *Public Service Act* (such as the *Conseil des relations interculturelles*), school commissions, universities, health and social service agencies, and hospitals. Contrary to the Act respecting the Agence, the definition does not include municipal bodies, as the adjudication and award of municipal contracts are regulated by a separate body of laws and regulations.

With regard to public procurement contracts and public-private partnership contracts, although the Act supplements the legislative texts applicable to administrative contracts, such as the Act respecting the Agence and the *Act respecting transport infrastructure partnerships*, the Act’s provisions take precedence over

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any contrary provision of a general or special Act, whether prior or subsequent to the entering into force of the Act, unless there is an explicit mention to the contrary. This is undoubtedly a fundamental aspect of the Act, which confirms the legislature's desire to create a Quebec public procurement contract code modelled after France's public procurement contract code, as indicated by authors Pierre Giroux and Denis Lemieux in *Contrats des organismes publics québécois* (Brossard: Publications CCH Ltée, 2007).

The delay of over two years between the adoption of the Act and its entering into force was necessary in order to develop and adopt the Act's three implementing regulations, i.e., the *Regulation respecting supply contracts of public bodies* (the Supply Regulation), the *Regulation respecting service contracts of public bodies* (the Service Regulation) and the *Regulation respecting construction contracts of public bodies* (the Construction Regulation), as the Act only provides guidelines that are applicable to public procurement contracts and public-private partnership contracts, but not the rules necessary for their implementation.

These three regulations replace the *Regulation respecting supply contracts, construction contracts and service contracts of government departments and public bodies*. The Act and its implementing regulations establish the general rules that are applicable to the public purchasers subject to the Act. However, in addition to these general rules, rules that are specific to certain public bodies may also be applicable (for example, see the *Politique de gestion contractuelle concernant la conclusion des contrats d'approvisionnement, de services et de travaux de construction des organismes publics* and the *Politique de gestion contractuelle concernant la reddition de comptes des organismes publics*, adopted by the Treasury Board and which entered into force on October 1, 2008).

Furthermore, upon recommendation of the Treasury Board, the government may authorize a public body to enter into a contract under conditions that differ from those provided by the Act and then determine the conditions applicable to such contract. The legislation also allows for the possibility of the standardization of documentation by allowing, but not obliging, a responsible minister, following consultation with the public bodies concerned, to establish model contracts and standard documents to be used by the public bodies for which the minister is responsible.

Another fundamental and innovative aspect of the Act resides in publication requirements that are incumbent upon the public bodies governed by the Act. As part of the implementation of the above basic principles and general rules, all public bodies concerned must publish certain information regarding the contracts they enter into on the electronic tendering system (known by the French acronym "SEAO"). This requirement is set out in the implementing regulations of the Act, with different rules applicable to each category of contracts as a function of their specific nature. For example, the Supply Regulation provides that, following a public call for tenders, within 15 days following the award of the contract, the public body must publish on SEAO the name of the successful tenderer as well as the value of the contract, or the estimated expense in the case of a delivery order contract (i.e., a contract under which the acquisition of goods or the provision of services is effected on demand), with the prices and general rules set out in the contract, but not the precise volumes or quantities.

Where the contract includes options for renewal, the public body must also publish the total amount of the potential expense if all options are exercised. Additionally, at least on a semi-annual basis, the public body must publish on SEAO a list of all contracts involving an expense greater than C\$25,000, whether entered into by mutual agreement or following an invitation to tender, as well as certain information regarding these contracts, including the name of the supplier and the value of the contract, or its estimated value in the case of a delivery order contract. The Service Regulation and the Construction Regulation contain similar provisions.

Finally, although the Act does not apply to contract award procedures undertaken prior to October 1, 2008, it nevertheless does apply to all contracts in effect on October 1, 2008, subject to any contractual clause that would be incompatible with a provision of the Act.

PROVISIONS SPECIFIC TO PUBLIC PROCUREMENT CONTRACTS

For the purpose of the adjudication and award of public procurement contracts by public bodies, the Act establishes a distinction between contracts for which the process of a public call for tenders is obligatory, subject to specific exceptions, and those for which the

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process is optional, permitting public bodies to enter into such contracts by mutual agreement. These rules apply to both the initial award of the contracts, and to later amendments, where such amendments are more than a simple accessory to the contract. Certain specific provisions also allow two or more public bodies to make a joint call for tenders and it is even permitted for a body that is subject to the Act to make a joint call for tenders together with a public corporation, whose contracts may be subject to a different set of rules. Finally, any contract entered into in violation of the rules of adjudication and award as established by the Act, including any indirect violation due to the splitting or division of the procurement requirements of public bodies in order to avoid any requirements of the Act, is null and void.

The distinction between the obligatory or voluntary nature of the process of public calls for tenders is based on the value of the expenditure to which the contract in question would give rise, with the threshold value for public calls for tenders provided by intergovernmental agreements. Generally, contracts with a value greater than C\$100,000 are affected by the process of public calls for tenders.

However, there are certain exceptions to the obligatory recourse to public calls for tenders such that, although the threshold value for public calls for tenders has been reached, contracts by mutual agreement may nevertheless be permitted, namely:

- (i) an emergency situation that threatens human safety or property;
- (ii) where there is only one possible contractor because of the existence of a guarantee, an ownership right or an exclusive right or because of the artistic, heritage or museological value of the required property or service;
- (iii) where the contract involves a matter of confidential or privileged nature whose disclosure could compromise its confidential nature or otherwise hinder the public interest;
- (iv) where the public body considers that it can demonstrate that, in accordance with the principles set out in the Act, a public call for tenders would not serve the public interest given the object of the contract; and
- (v) in cases determined by regulation.

As for this fifth exception, an example may be found under the Service Regulation, pursuant to which a

contract for legal services may be concluded by mutual agreement.

It is important to note that if a public body considers that it is entitled to one of the above-mentioned exceptions, it must expressly mention this while fulfilling its publication requirements, by referring to the precise provision of the Act upon which its decision is based. It is very likely that the exceptions set out above will be interpreted in light of case law already decided regarding similar concepts prior to the Act's entering into force.

It is interesting to note that with regard to public calls for tenders, as long as it is expressly stipulated as such in the tender documents, it is now possible for a public body to reserve its right to refuse any person who, in the two years prior to the tenders' opening date, has been the subject of an unsatisfactory evaluation by that body, omitted to follow through on a tender or contract, or whose contract was terminated due to its failure to respect the terms and conditions thereof. Public bodies must be prepared to demonstrate that such prerogative has been exercised in a transparent manner and that their decision was well-founded, since any discretionary use of this power would likely lead to the introduction of litigation by the persons thus eliminated from the process of public calls for tenders.

As for administrative contracts that may be awarded without an obligatory recourse to public calls for tenders, the public body must nevertheless, in the interest of sound management, demonstrate a certain amount of reflection prior to proceeding with such awards. Among other considerations, in the course of this reflection, the public body must evaluate the potential benefits of proceeding by call for tenders (whether public or by invitation), evaluate the possibility of favouring the local economy (subject to any applicable intergovernmental agreement), ensure a rotation among tenderers, and set up mechanisms to control expenditures and to monitor the effectiveness and efficiency of the award processes, all in accordance with the basic principles of the Act.

PROVISIONS SPECIFIC TO PUBLIC-PRIVATE PARTNERSHIP CONTRACTS

In contrast with public procurement contracts, public bodies subject to the Act must necessarily resort to the process of public calls for tenders in order to enter into all public-private partnership contracts, regardless of their value.

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The rules applicable to these public calls for tenders – which can involve several stages, depending on the complexity of the project and the number of potential candidates – are set out in chapter V of the Act. Although few in number, these rules establish the general framework governing the award of public-private partnership contracts by emphasizing the respect of the basic principles promoted by the Act and by the Act respecting the Agence (particularly the principles of transparency and healthy competition) and the co-operation and collaboration between interested or selected tenderers and the public bodies in determining the stages of the process, as well as for the purpose of entering into the contract with the selected tenderer at the end of the process.

Thus, for example, section 21 of the Act states that a public body may undertake discussions with selected tenderers following the first stage of the selection process of the call for tenders and at any subsequent stage, including at the end of the selection process, in order to further define the technical, financial and contractual aspects of the project that is the subject of the call for tenders. Such discussions may also involve negotiating any provision needed to finalize the contract while preserving the basic elements of the tender documents and the proposal.

The Act therefore codifies the rules put in place and authorized by the government of Quebec in the context of the consultation and selection processes of the recent public-private partnership projects for Autoroute 25, Autoroute 30 and the new acoustic concert hall for the Montreal Symphony Orchestra, including the mechanism providing for individual technical meetings, bilateral discussion workshops and the opportunity to provide comments regarding the technical and contractual documentation.

CONCLUSION

The adoption of the Act is a healthy step forward in an area of Quebec law which had until now suffered from a certain lack of clarity. It attests to the legislature's desire to standardize and harmonize the legal framework for public procurement contracts and, to a certain extent, public-private partnership contracts, by promoting the respect and implementation of basic principles, such as transparency, as well as the efficiency and accountability of public bodies. Practitioners, as well as tenderers and other concerned parties, must nevertheless remain aware as to the precise manner in which the Act will be applied by the public administration and to the interpretation that will be given to the Act by the courts.

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