



[This is an English version of the notice originally submitted
in French to the Ville-Marie Borough Council]

**Amended Notice of the Inspector
General concerning the Awarding of a
Contract by the Ville-Marie Borough,
following Call for Tenders VMP-16-023**

(section 57.1.23 of Montréal's City Charter)

September 1, 2016

Office of Inspector General
1550, Metcalfe St., Suite 1200
Montréal (Québec) H3A 1X6
Telephone: 514 280-2800
Facsimile: 514 280-2877

BIG@bigmtl.ca

www.bigmtl.ca

Montréal 

1. Scope of the Work

1.1 *Warning*

Under section 57.1.8 of Montréal's City Charter (C.Q.L.R. c. C-11.4), the Inspector General has the mandate to oversee contracting processes and the carrying out of contracts by the City or by a related legal person.

The Inspector General does not conduct any criminal or penal investigations. It conducts investigations of an administrative nature. Throughout this notice, every time the term "investigation" is used, it means an investigation of an administrative nature and at no time shall it be interpreted as referring to a criminal or penal investigation.

1.2 *Applicable Standard of Proof*

The Inspector General places upon itself the obligation of delivering quality reports which are timely, objective, accurate and presented in such a way as to ensure that the individuals and organizations under its jurisdiction are able to act on the information transmitted.

Consequently, in support of his notices, reports and recommendations, the Inspector General imposes upon himself the burden of proof of the civil standard of the balance of probabilities.¹

2. Facts

On August 19, 2016, the Office of Inspector General was informed of an issue related to the awarding of a contract by the Ville-Marie Borough. Call for tenders VMP-16-023, published on June 22, 2016, concerned various works on the borough's road network. By resolution CA16 240406, the of Ville-Marie Borough Council granted the contract to the company Eurovia Québec Construction inc. (hereinafter: "Eurovia") for a maximal amount of \$4,599,667.80.

According to the information obtained from the Ville-Marie Borough, during the validation period of the compliance of the bids received, it was established that the tender of the lowest bidder was not compliant. As a matter of fact, the bid of the company Demix Construction, a division of Groupe CRH Canada inc. (hereinafter: "Demix"), was found to be non-compliant because the authorization to enter into public contracts, issued by the Financial Markets Authority (Autorité des marchés financiers) (hereinafter: FMA) to Demix, was expired since May 27, 2016.

¹ If the evidence serves to indicate that a fact is more likely to exist than not to exist, that is a situation of preponderance of evidence (see art. 2804 of the Civil Code of Quebec).



Thus, it was recommended that the contract be awarded to the second lowest bidder, Eurovia, which possessed its authorization from the FMA in effect when submitting its bid.

Section 21.41 of the *Act respecting contracting by public bodies* (C.Q.L.R. c. C-65.1) provides that an enterprise must submit an application for renewal at least 90 days before its authorization expires. When a company respects this rule, it remains authorized to contract until the FMA rules on the application for renewal, unless the authorization is revoked in the meantime. The company remains listed in the Register of admissible enterprises until the FMA grants or denies its renewal.

Demix filed an application for renewal to the FMA on February 23, 2016 (that is, more than 90 days before the expiry of the initial certificate which was expected to end on May 27, 2016). Besides, an acknowledgement of receipt, confirming that the application for renewal was submitted to the FMA, was attached by the company to its tender form as proof of the steps taken to maintain its authorization.

Thus, the authorization to enter into public contracts issued to Demix by the FMA was still in force at the time of the submission of the bids. The Register of admissible enterprises confirms that Demix is still an enterprise authorized to contract with public bodies in Québec.

The Inspector General notes that the decision of the Ville-Marie Borough to declare the bid submitted by Demix as non-compliant is an erroneous one. This error was then reflected in the resolution of the Borough Council, which, had it known that the tender of Demix was actually compliant, would have never awarded the contract to the second lowest bidder, Eurovia.

3. Notice and conclusion

The Inspector General has the mandate, according to section 57.1.8 of Montréal's City Charter, to oversee contracting processes. He has the power to submit any notice or recommendation he considers necessary to any decision-making authority of the City.²

Considering the facts established above, there is no doubt in the mind of the Inspector General that the Ville-Marie Borough has no other choice but to rescind the contract awarded to Eurovia, in order to respect the law. Indeed, section 573.7 of the *Cities and Towns Act* (C.Q.L.R., c-C19) provides that:

“... the council **shall not**, without the previous authorization of the Minister of Municipal Affairs, Regions and Land Occupancy, **award the contract to any person except** the one who made **the lowest tender** within the prescribed time.”

[The original does not contain any bold characters]

² Section 57.1.23 *in fine* of Montréal's City Charter.

This provision has been considered as being a basic one by the Court of Appeal of Québec, in the case *Rimouski (Ville de) v. Structures GB Itée*³:

[TRANSLATION]

The basic principle stated in the *Cities and Towns Act* is that the contract must be awarded to the lowest bidder, and not the concept that the contract must be granted to the one whose bid is the most compliant with the call for tenders; one, however, not necessarily excluding the other.

[...]

[...] I would add that, in the present case, the City's conduct, even assuming its discretion and its good faith, had the effect of opposing, rather than balancing, **the two basic concepts that should dictate the exercise of its discretion, that is the lowest compliant bid** and the equal treatment of bidders, when it allowed the highest of them the opportunity to remove the initial ambiguity of its bid while denying the lowest bidder the right to do the same. In doing so, the City committed a fault.

[The original does not contain any bold characters]

Moreover, in another decision, the Court of Appeal of Québec upheld the client's right to rescind, on its own, a contract when a public order provision is not respected following its own mistake:

[TRANSLATION]

[58] With respect to the argument that the respondent cannot invoke his own turpitude, it must be answered that the City could challenge itself the legality of a clause of a call for tenders document – inserted because of a mistake of a representative of the City according to the judge's findings of fact – on the basis of the non-respect of public order.⁴

FOR THESE REASONS,

The Inspector General

IS OF THE OPINION that the Ville-Marie Borough has no other choice, considering the public order obligation to which it is subject, to award the contract to the lowest compliant bidder, to rescind the contract granted to

³ 2010 QCCA 219, para. 52 and 81.

⁴ *Entreprise P.S. Roy inc. v. Magog (Ville de)*, 2013 QCCA 617, para. 58.



Eurovia Québec Construction inc. following call for tenders VMP-16-023 under resolution CA16 240406, and to award it to Demix Construction, a division of Groupe CRH Canada inc.

TRANSMITS, under section 57.1.23 of Montréal's City Charter, a copy of this notice to the Borough secretary in order that it be submitted to the next meeting of Ville-Marie Borough Council.

The Inspector General,

Denis Gallant, Ad. E

ORIGINAL COPY SIGNED