



[This is an English version of the decision originally submitted in French to the Ahuntsic-Cartierville Borough Council on February 15, 2016]

Decision

(section 57.1.10, Montréal City Charter)

Rescinding of the Snow Removal Contract (Call for Tenders 12-12312) in the Ahuntsic-Cartierville Borough

February 15, 2016

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SUMMARY

At the time of the publication of the Report on Snow Removal and Its Practices in Montréal in November 2015, the administrative investigation conducted by the Office of Inspector General had already found, as a result of the testimony gathered, that a snow removal contract in effect in a borough had been executed in violation of the clauses prohibiting subcontracting during the previous snow removal season.

The purpose of this investigation was to determine if this snow removal contract, awarded by the Ahuntsic-Cartierville Borough to A & O Gendron inc. for a period of five years (2012-2017) for the approximate yearly amount of \$1,777,931.78, continues to be carried out in the same manner during the 2015-2016 winter season.

Testimony and documentary evidence gathered show that the contracting party, A & O Gendron inc., currently retains the services of a legal entity, Transport DM Choquette, to provide part of the services, in this case all snow removal operations for almost half of the territory covered by the call for tenders.

These facts clearly point to subcontracting, which is prohibited in the contract. Subcontracting constitutes a breach of one of the requirements of the call for tenders document under subsection 1 of section 57.1.10 of the Montréal City Charter. It is the opinion of the Inspector General that this breach is objectively “serious” under the law since it concerns the very identity of the co-contractor.

Subcontracting, as already noted in the Report on Snow Removal and Its Practices in Montréal, is an identified market control tool that encourages bargaining and the risk of collusion between contractors, which has a negative impact on taxpayers.

The conditions for applying section 57.1.10 of the Montréal City Charter having been met, the Inspector General declares the contract awarded following call for tenders 12-12312 to be cancelled.

The fact that some of the borough’s managers knew that this contract was not being respected since the time it was awarded in 2012, and that it is still in force today, is troubling.

It would be unfortunate if the Inspector General were required to intervene every time an obvious and known violation of a major aspect of a contract was found. The specifications issued by the city and the boroughs systematically name each city or borough department manager or his or her authorized representative as “Director” in the day-to-day management of contracts.

The persons named in the contracts have the primary responsibility to manage the contracts to the fullest extent in obvious cases, especially since the specifications give a “Director” sufficient means to compel a contractor to comply with the provisions of a contract.





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1. Subject

At the time of the publication of the *Report on Snow Removal and its Practices in Montréal*¹ in November 2015, the Office of Inspector General (hereinafter: OIG) indicated that this investigation was part of a longer-term process that extended beyond the simple tabling of a report of recommendations. The investigation enabled the Office of Inspector General to obtain sufficient information to conclude that several collusion and market control schemes are established in the snow removal industry in Montréal.

With this information in hand, the Inspector General indicated a desire to:

*[TRANSLATION] "...exercise, as of now, an increased supervision over the awarding and carrying out of contracts through inspections and visits when snow removal operations are underway. This vigilance will enable the inspector general to take action with respect to specific contracts, by making decisions as needed, if he notes fraudulent manoeuvres and serious failings, as provided in section 57.1.10 of the Charter."*²

One of the recommendations aimed at countering market control mechanisms that operate through contract assignment and subcontracting consisted in *[TRANSLATION]* "exercising increased supervision to ensure the respect of the call for tenders documents regarding subcontracting." The OIG found shortcomings in some boroughs.

From testimony gathered, the administrative investigation had already found that the snow removal contract awarded following call for tenders 12-12312, currently in force in Ahuntsic-Cartierville Borough, was being performed, at least for the winter of 2014-2015, in violation of the clauses prohibiting subcontracting.

2. Investigation

On September 19, 2012, the Ahuntsic-Cartierville Borough Council adopted a resolution aimed at *[TRANSLATION]* "Awarding snow removal contract N12-11 to A & O Gendron inc. for a period of five years (2012-2017) in the approximate yearly amount of \$1,777,931.78, taxes included,(...) – Public calls for tenders 12-12312 - eight tenderers."

This contract is divided into two sections: N12-11 A and N12-11 B. The present investigation focused on N12-11 A. The objective of the investigation was to determine if A & O Gendron inc., hereafter "A & O", continued to subcontract operations during the 2015-2016 winter season as the contract remains in force until 2017.

Subcontracting Prohibited

In reading over the provisions that apply to the contract, subcontracting snow removal operations, that is, snow plowing and the loading of snow from streets and sidewalks, is not permitted. Special administrative clauses stipulate the following:

¹ Report tabled before city council on November 23, 2015.



[TRANSLATION]

9. Subcontracting

The contracting party is not permitted to subcontract the operations stated in these specifications, with the exception of the transportation of snow, the towing of vehicles, and the use of equipment over and above the required equipment mentioned in sections 11.2 and 11.3 of the technical specifications.²

It should be noted that the call for tenders consists of general provisions, such as instructions to tenderers and general administrative clauses (chapters I and II), but also more specific clauses (chapter III). It is important to point out that the provisions in chapters I and II become null and void when the provisions in chapter III contradict them. Section 6 of chapter I sets out the rules of interpretation between the various documents that make up the contract:

[TRANSLATION]

6. Interpretation of the Contract

6.1 In the event of interpretation difficulties, the order of precedence of the issued documents that make up the contract is, as follows:

- addenda;
- special administrative clauses;
- general administrative clauses;
- instructions to tenderers;
- summary page;
- tender schedule;
- technical specifications:
- plans, drawings and diagrams;
- technical specifications (text);
- appendices;
- successful bid.

Despite the fact that section 16 of chapter I (instructions to tenderers) authorizes all subcontracting,³ the rule of interpretation in subsection 6.1 gives precedence to section 9 of the special administrative clauses, which prohibits subcontracting.

² Call for tenders 12-12312 – section 9 of chapter III (special clauses)

³ [TRANSLATION] 16.1 The city accepts the use of subcontractors by tenderers. However, the offer submitted must comply with the following conditions:

- a) in the case of tenders by invitation, the invited firm must act as the lead agent with the city;
- b) in the case of public calls for tenders, the firm that has taken possession of the specifications must act as the lead agent with the city.

3. Evidence Collected

The testimony and documentary evidence gathered show that the contracting party, A & O, retained the services of a legal entity, Transport DM Choquette, hereafter “Transport DM”, to carry out part of the services, in this case all snow removal operations on almost half of the territory (N12-11 A) covered by the call for tenders.

Nature of the Agreement between A & O and Transport DM

During the investigation, the Office of Inspector General met with a representative of Transport DM. The latter was steadfast in the version that he had given to the OIG last year during the more general investigation of snow removal industry practices. The Transport DM representative confirmed that an agreement existed with A & O to perform the work on section N12-11 A of snow removal contract N12-11 for a term of five years, i.e. 2012–2017.

A & O pays Transport DM by the linear metre to carry out the contract and retains three (3) to four (4) percent (%) of the linear metre rate to cover administration fees, civil liability insurance on the contract and the surety bond.

For his part, a representative of A & O mentioned to the Office of Inspector General that the company received payment from the city for the entire contract N12-11 and that Transport DM was paid by the linear metre.

Both companies confirmed the verbal nature of the agreement. Documents received by the Office of Inspector General attest to the fact that A & O has paid for the services of Transport DM from the winter of 2012-2013 to today.

Coordination/Monitoring of Sector N12-11 A

Role of the Transport DM Representative

During his meeting with the Office of Inspector General, the Transport DM representative asserted that he was the person responsible for section N12-11 A of the snow removal sector N12-11, that he is the one who coordinates all operations involving section N12-11 A and that, once the vehicle registrations have been taken care of in the fall, he no longer deals with A & O.

A representative of A & O confirmed the role of the Transport DM representative as coordinator for section N12-11 A of the snow removal contract N12-11.



Communications with Ahuntsic-Cartierville Borough Employees

According to the information obtained from the Ahuntsic-Cartierville Borough's public works department, the foremen of the City who are responsible for monitoring private contracts regularly communicate with a Transport DM representative regarding everything to do with snow plowing, sanding of sidewalks and loading of snow onto trucks. This Transport DM representative is the access person for everything related to operations in contract N12 at night, i.e. section 11A.

A department manager and a technical officer from the borough also confirmed having communicated with the Transport DM representative as part of monitoring work on this section of the contract. For his part, the Transport DM representative confirmed that he is always the one who contacts people from the borough.

The department manager also mentioned that he communicated most of the time with A & O when a problem arose regarding section N12-11 A of contract N12-11, but that in the past he had communicated with Transport DM when the representative came to the borough to file documents confirming the spreading of ice melters and abrasives.

According to information obtained from the borough, whenever snow loading operations are ordered, Transport DM is advised by A & O's secretary or by the borough dispatcher. However, the A & O representative stated that, every time loading is ordered, he notifies all the foremen for contract N-12, including Transport DM's representative.

Participation in Montréal's Annual Meeting

Shortly before the start of snow removal operations, each borough organizes a preparatory meeting with the various parties involved. In the case of Ahuntsic-Cartierville Borough, this information session took place on October 27, 2015 and a representative of Transport DM was present, according to the documentary evidence obtained. The latter also confirmed this fact with the Office of Inspector General.

Ownership of Snow Removal Vehicles

An analysis of the vehicle registrations obtained during the administrative investigation revealed that, for the winter 2015-2016, Transport DM was shown as the owner of the equipment used for section N12-11 A, whereas A & O appeared as the long-term renter.

During his interview with the Office of Inspector General, the Transport DM representative confirmed that the equipment was rented yearly by A & O from autumn to April 1.

Employees Operating the Equipment in Section N12-11 A

While the equipment is rented by A & O during the winter, Transport DM always maintains possession and use of it. In fact, Transport DM's employees operate the snow removal equipment used in section N12-11 A of the snow removal contract N12-11. Moreover, they are all paid by and subject to the functional authority of Transport DM.

The Transport DM representative added that no A & O employee operates the snow removal equipment used for section N12-11 A.

An A & O representative confirmed that the employees operating the equipment rented by A & O are employed by Transport DM and paid by that company.

Ahuntsic-Cartierville Borough's Knowledge of Subcontracting

Five borough employees who perform the duties of department manager, foreman and technical officer all stated that they were aware that A & O had been awarded the snow removal contract N12-11 by the Ahuntsic-Cartierville Borough and that Transport DM was "subcontracted" to carry out section N12-11 A of the contract.

All these employees were also aware that the person in charge of this section was a Transport DM representative who worked as foreman in this section.

Ahuntsic-Cartierville Borough's manager in charge of snow removal mentioned to the Office of Inspector General that it was clear from the time that the contract was awarded to A & O in 2012 that Transport DM carried out part of the contract that was subcontracted to them. This department manager informed the Office of Inspector General that, several weeks after the awarding of the contract, his predecessor at the time told him that work on section N12-11 A was subcontracted to Transport DM Inc.

The director of public works at Ahuntsic-Cartierville Borough stated in writing that he was unaware that Transport DM was subcontracted to carry out part of this contract until he received a request on December 2, 2015, from the Office of Inspector General, to produce information.

He also mentioned that he was unaware of the identity of the foreman responsible for snow removal in this section or who this foreman worked for. He added that he did not know whether Transport DM or A & O employees operated the snow removal equipment used in section N12-11 A of sector N12-11.

Notice to the Concerned Party

On February 5, 2016, the Office of Inspector General issued a notice to A & O, the borough's co-contractor, inviting the company to forward to the OIG, no later than February 12, 2016, comments regarding the relevant facts⁴ obtained as part of the administrative investigation.

On February 10, 2016, an A & O representative issued comments regarding some of these facts.⁵

⁴ See the document appended to the decision.

⁵ See the document appended to the decision.



4. Analysis

The Inspector General's power of intervention, as set out in section 57.1.10 of the *Montréal City Charter*, reads as follows:

*57.1.10. The inspector general may cancel any contracting process involving a contract of the city or of any legal person described in subparagraph 1 of the fifth paragraph of section 57.1.9, or **rescind or suspend** the carrying out of such a contract if the inspector general:*

*(1) finds that **any of the requirements specified in a document of the call for tenders** or a contract **has not been met** or **that the information provided in the contracting process is false**; and*

*(2) is of the opinion that the **seriousness of the breach** observed justifies the cancellation, rescinding or suspension.*

(...)

The conditions entitling the Inspector General to intervene are cumulative. Firstly, one of the requirements of the call for tenders' document or contract must not have been met or the information provided by the tenderer in this case must have been found to be false. Only when one or other of these is established can the inspector general rule on the seriousness of the breach.

In the opinion of the Inspector General, there is no doubt that the contracting party cannot subcontract a third party to plow streets and sidewalks, load and transport snow⁶, which is the very essence of the contract:

[TRANSLATION]

9. Subcontracting

The contracting party is not authorized to subcontract the operations set out in these specifications, with the exception of the transportation of snow, the towing of vehicles, and the use of equipment over and above the required equipment mentioned in sections 11.2 and 11.3 of the technical specifications.⁷

2. Object of the Contracts

*The objective of this call for tenders is the **plowing of snow from streets and sidewalks, the loading and the transportation of snow** in the location indicated by the Director, as well as the spreading of ice melters and abrasives on sidewalks.⁸*

Snow removal: plowing of streets and sidewalks, removal of snow from streets and sidewalks, and transportation of this snow to the disposal site.⁹

⁶ While subcontracting of the transportation of snow can be authorized upon request, no such request was made by the contracting party.

⁷ Call for tenders 12-12312 – section 9 of chapter III (special clauses)

⁸ S. 2 (special administrative clauses)

⁹ S.1 (specific administrative clauses)

While section 9 allows for the possibility of subcontracting the transportation of snow, which is one of the three components of snow removal, the evidence collected clearly shows that Transport DM does much more: the company also plows streets and sidewalks and loads snow onto trucks from the streets and sidewalks of section N12-11 A of snow removal contract N12-11.

That being said, the specifications define what constitutes subcontracting:

[TRANSLATION]

Definition

*Section 1.10 Subcontracting: any person, company or corporation whose services are retained by the contracting party **to provide all or part of the goods or services requested** in the call for tenders;¹⁰*

The following question begs to be answered: Does Transport DM provide part of the services requested in the call for tenders, i.e. *plowing of streets and sidewalks, loading of snow onto trucks from the streets and sidewalks, and transportation of the snow*, although A & O is the contracting party?

Given the evidence collected, the Inspector General can only conclude that Transport DM provides all snow removal operations, that is, plowing of the streets and sidewalks, loading of snow onto trucks and transportation of snow on a defined territory, section N-11 A of the contract.

In the opinion of the Inspector General, the following facts show that Transport DM supplies *part of the services requested* in the call for tenders, a “turnkey” service to the borough in section N-11 A:

1. Although Transport DM Inc. has no contract with the borough, the company’s representative attended the information session about the borough’s snow removal operations, which was held on October 27, 2015 at 555 Chabanel Street West, 6th Floor.
2. He is the foreman for section N12-11 A.
3. He coordinates the snow plowing of streets and sidewalks, the loading and transportation of snow, as well as the spreading of ice melters and abrasives on the sidewalks of section N12-11 A of snow removal contract N12-11.
4. He regularly communicates and interacts with the foremen, a department manager and a technical officer of Ahuntsic-Cartierville Borough.
5. The employees who carry out the work on section N12-11 A of snow removal contract N12-11 are employed by Transport DM and paid by that company. They are under the functional authority of the designated foreman, i.e. the Transport DM

¹⁰ S. 1.10 (general clauses).



representative. They do not receive any instructions from A & O, the contracting party.

A & O's involvement in snow removal operations in this sector is limited to two coordination components:

6. When loading operations are ordered, A & O's secretary or the borough dispatcher notifies Transport DM.
7. When a problem arises regarding section N12-11 A of contract N12-11, the borough's public works department manager usually communicates with A & O.

And when A & O becomes involved, it acts exactly as if the **subcontracting were authorized**. In fact, section 16.6 of chapter I of the specifications, general application, deals with how authorized subcontracting is to be carried out. This provision assigns exclusive responsibility to the contracting party to coordinate the subcontractors' tasks:

[TRANSLATION]

16.6 "The contracting party is fully responsible to the city for the performance of the contract and provides **complete coordination of the tasks performed by the subcontractors**. To this end, the tenderer is responsible for communicating the contents of the contract to the subcontractors involved to ensure that the latter comply with all the provisions of the contract that affect them.¹¹

In addition, the fact that the equipment used to do the work in section N12-11 A of contract N12-11 is owned by Transport DM and that the Quebec Automobile Insurance Board (Société de l'assurance automobile du Québec) considers it to be "rented long-term" to A & O has no effect on the identity of the party doing the snow removal, Transport DM, because the equipment is still in the latter's possession and control.

Finally, A & O pays Transport DM almost all the amount set out in the contract for section N12-11 A. Strictly speaking, therefore, the contracting party, A&O, is completely absent from the snow removal operations of sector N12-11 A. In our opinion, this constitutes a clear violation of the contract.

The facts clearly show subcontracting, which is prohibited as indicated above. Therefore, one of the *requirements specified in a call for tenders' document has not been met* under paragraph 1 of section 57.1.10 of the *Montréal City Charter*.

The following question now needs to be asked: is the Inspector General *of the opinion that the **seriousness of the breach** observed justifies cancellation, rescinding or suspension* as understood under paragraph 2 of the said section?

In the opinion of the Inspector General, the breach observed is objectively "serious" and concerns the **very identity** of the co-contractor. The breach in question is unrelated to performance delays, a maintenance defect or the faulty operation of the equipment.

¹¹ Section 16.6 of the instructions to tenderers.



Moreover, subcontracting in the snow removal industry in Montréal is an identified market control tool that encourages bargaining and the risk of collusion between contractors, resulting in a negative impact on taxpayers.

The conditions for applying section 57.1.10 of the *Montréal City Charter* having been met, the Inspector General declares the contract awarded following call for tenders 12-12312 to be rescinded.

The Inspector General cannot reach a conclusion regarding these facts without commenting on the borough and the fact that some managers were aware that the contract was not being respected.

It would be unfortunate if the Inspector General were required to intervene every time an **obvious and known** violation of a major aspect of a contract was found. The specifications issued by the city and boroughs systematically name each *city or borough department manager or his or her authorized representative* as “Director” in the day-to-day management of contracts.

The persons named in the contracts have the primary responsibility to manage the contracts to the fullest extent in obvious cases, especially since the specifications give a “Director” sufficient means to compel a contractor to comply with the provisions of a contract.

In the aftermath of the *Report on Snow Removal and its Practices in Montréal*, the Inspector General invites the City’s decision-making authorities to enhance monitoring of this sector of activity.

5. Conclusion and Decision

In conclusion, the Inspector General is of the opinion that the conditions set out in section 57.1.10 of the *Montréal City Charter* are established. Given the seriousness of the breach by the contracting party, the Inspector General has no other choice but to rescind the contract awarded following call for tenders 12-12312.



FOR THE FOLLOWING REASONS,

The Inspector General

RESCINDS snow removal contract N12-11 awarded to A & O Gendron Inc. for a term of five years (2012-2017) in the approximate yearly amount of \$1,777,931.78, taxes included, which was authorized by the Ahuntsic-Cartierville Borough Council on September 19, 2012 under Resolution CA12 090259;

TRANSMITS, in accordance with section 57.1.10 of the *Montréal City Charter*, a copy of this decision to the mayor of the city, and to the clerk to be sent by the latter to the city council involved, in this instance the Ahuntsic-Cartierville Borough Council.

Denis Gallant, Ad. E.
Inspector General