



[This is an English version of the report originally transmitted  
in French to the Montréal City Council on May 10, 2019]

## **Rescinding of contract regarding the proposal for finishes for the refurbishment of La Fontaine Park chalet-restaurant (contract n° 18-1922)**

**(Section 57.1.10 of the *Charter of Ville de Montréal,  
metropolis of Québec*)**

May 10, 2019

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## SUMMARY STATEMENT

*The Office of Inspector General conducted an investigation after receiving denunciations that an employee of the Parks, Mount Royal and Sports Department (Service des grands parcs, du Mont-Royal et des sports, "SGPMRS") had drafted a contract for interior design and that this contract had been subsequently awarded to her spouse's company. The contract was said to have been awarded at the very end of the project's design process and to have resulted in significant costs and delays.*

*The project in question was the refurbishment of La Fontaine Park chalet-restaurant, including renovation of the building's public bathrooms and skaters' locker room. In the fall of 2017, the project was at the stage of selection of the finishes for these rooms for the purpose of the upcoming publication of call for tenders 5939 for construction work. A landscape architect from the SGPMRS expressed her disagreement with the concept proposed by the architecture firm in the file. In her opinion, the proposal did not respect the heritage character of the building and needed to be reviewed.*

*Both the architecture firm and the external project manager responsible for the file objected to such a revision. The publication of call for tenders 5939 was planned less than a month later and they argued that it would be impossible to implement the scope of the changes requested by the landscape architect while respecting this deadline.*

*Interpreting this position as a refusal to cooperate, the landscape architect suggested to her division manager that they include interior designers in the project to review the concept of the rooms' layout, which he accepted. When the landscape architect shared this idea with the external project manager, he again disagreed because of schedule related constraints. Ultimately, the landscape architect, the SGPMRS division manager and the external project manager agreed to wait until spring 2018 to include interior designers, i.e. after the award of the construction work contract resulting from call for tenders 5939.*

*In late March 2018, the division manager reminded the landscape architect of this agreement and she initiated the steps required for the award of a contract (contract No. 18-1922). The value of such a contract was estimated to be less than \$25,000 and they decided to solicit four (4) interior design firms. After drafting the invitation letters detailing the mandate to be fulfilled and establishing the criteria used to identify relevant firms, the landscape architect made her choice. Among the firms invited was Desjardins Bherer, the firm owned by the landscape architect's spouse.*

*The SGPMRS division manager approved this selection but indicated that the landscape architect should disclose the situation to the Office of Comptroller General. She therefore completed the appropriate disclosure form the day before the invitation letters were to be sent. Her statement indicated that she had played a secondary or peripheral role in the contractual process by simply taking part in it, whereas the facts show that she was at the heart and in charge of it.*

*A commitment was made by the SGPMRS division manager and the landscape architect that she would withdraw from the project if Desjardins Bherer were to win contract No. 18-1922. However, even though the contract was ultimately awarded to her spouse's firm, the facts*



show that she was involved in the execution of said contract, including participating in a meeting at which her spouse was also present.

The contractual process was marked by other irregularities, which did not prevent Desjardins Bherer from winning contract No. 18-1922. Amongst these irregularities, it is noted that, as the landscape architect and the SGPMRS division manager themselves both admitted, none of the four (4) firms invited were specialised in institutional and public projects even though they had themselves required such a specialisation in the invitation letters.

In addition, by signing the addendum published during the tendering period, which was to be considered as part of the tender documents, the landscape architect then appeared as having participated in the drafting of these documents. Pursuant to Section 5 of the City's by-law on contract management (Règlement sur la gestion contractuelle, "RGC") in force at the time, Desjardins Bherer thus had to include a statement disclosing the personal connection between the firm's president and the landscape architect in its tender. The president of Desjardins Bherer admitted that such a statement was not included.

Lastly, the president of Desjardins Bherer told the Office of Inspector General's investigating officers that his spouse, i.e. the landscape architect, had disclosed to him that an addendum would be published, as well as its content before its publication.

In the end, Desjardins Bherer was included in the chalet-restaurant refurbishment project as of May 28, 2018. Despite delivery by Desjardins Bherer of their own proposal for the layout and choice of finishes within about a six (6)-week period, approval of some of their recommendations by the SGPMRS division manager, combined with the time and cost involved in issuing and carrying out change orders to the construction work, contributed to a rise in costs and postponing work completion by almost seven (7) months. According to a decision-making summary presented to the municipal elected officials, the costs associated with the inclusion of an interior designer in the project amounted to more than \$ 340,000.

Section 57.1.10 of the Charter of Ville de Montréal, metropolis of Québec states two (2) cumulative conditions for the Inspector General to intervene. She must find non-compliance with one of the requirements specified in the tender documents or contract, and she must be of the opinion that the seriousness of the breaches observed justifies rescinding of the contract.

As mentioned above, the president of Desjardins Bherer himself admitted that he failed to include a declaration disclosing his personal connection to the landscape architect as required by Section 5 of the RGC in force then. With respect to the seriousness of the breach, the consequences set out in the RGC for such a breach, i.e. granting a discretionary power to the City to rescind the contract as well to exclude the contracting party from all City contracts for one (1) year, indicate clear disapproval of such a conduct by the municipal administration. Indeed, it can not be tolerated that a bidder or a contracting party benefit from an unfair advantage compared to its competitors by virtue of an existing personal connection with a person who participated in drafting of the tender documents.

Thus, the Inspector General is of the opinion that the conditions set out in Section 57.1.10 of the Charter of Ville de Montréal, metropolis of Québec are established, and she rescinds contract No. 18-1922 awarded to Desjardins Bherer. In accordance with the provisions of the RGC in force then, the Inspector General recommends that Desjardins Bherer be added to the



*Register of Ineligible Persons (Registre des personnes inadmissibles) for a period of one (1) year from the date of this decision.*

*The investigation also revealed that the SGPMRS landscape architect breached her obligation of confidentiality under the RGC in force at the time.*

*Finally, it follows from the facts gathered that the municipal employees concerned adopted a somewhat casual demeanor with regard to their disclosure of a conflict of interest to the Office of Comptroller General. The landscape architect produced a statement that was not completely frank and gave a misleading view of the situation to the Office of Comptroller General. Furthermore, despite the commitments made to the later and its recommendations, the landscape architect did not withdraw completely from the file and the division manager did not fully ensure that she did. In doing so, they left the impression of, at the very least, an appearance of a conflict of interest in the carrying out of contract No. 18-1922.*

*Their actions also give the impression that, due to the low monetary value of contract No. 18-1922, the situation did not require the same level of ethical concern on their part and that the mere disclosure of a personal connection on an administrative form was enough to eliminate any conflict of interest. Far from it.*

*On the contrary, the Code of Conduct for City employees requires ongoing attention on their part in order to maintain the high standards of integrity expected of them by citizens of the City.*





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## 1. Scope and extent of work

### 1.1 *Warning*

Article 57.1.8 of the *Charter of Ville de Montréal, metropolis of Québec* (R.L.R.Q. c. C-11.4, hereinafter, “Charter of Ville de Montréal”) mandates the Inspector General to oversee contracting processes and the carrying out of contracts by the City or by an associated legal person.

The Inspector General does not conduct criminal investigations, but investigations of an administrative nature. In this report, each time the term “investigation” is used, this refers to an administrative investigation and should in no way be interpreted as referring to a criminal investigation.

### 1.2 *Applicable standard of evidence*

The Inspector General strives to deliver quality reports that are timely, objective, accurate, and presented in a way that will ensure that the people and agencies under her jurisdiction are able to act in accordance with the information provided.

Consequently, in support of her opinions, reports and recommendations, the Inspector General imposes upon herself the burden of proof of the civil standard of the balance of probabilities<sup>1</sup>.

### 1.3 *Notices to interested parties*

Before making the results of her investigation public and, if applicable, having recourse to the powers conferred upon her under Article 57.1.10 of the *Charter of Ville de Montréal*, in conformance with her duty of procedural fairness, the Inspector General transmits a Notice to Interested Parties (hereinafter, the “Notice”) indicating the relevant facts gathered in the course of the investigation.

Upon receipt of the Notice, the persons concerned can present, in writing, any comments, representations or observations they believe relevant to, or likely to influence, the Inspector General’s decision.

Such a Notice was sent on April 16, 2019 to the successful bidder for Contract No. 18-1922, Gestion René Desjardins Inc., an entity also doing business under the name Desjardins Bherer (hereinafter, “Desjardins Bherer”), as well as the City department concerned – the Parks, Mount Royal and Sports Department [*Service des grands parcs, du Mont-Royal et des sports*] (hereinafter, “SGPMRS”). Since the facts

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<sup>1</sup> Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof. (See Article 2804 of the *Quebec Civil Code*.)



found in the course of the investigation would appear to indicate an infraction of the City's by-law on contract management [*Règlement sur la gestion contractuelle*] (hereinafter, "RGC") by the SGPMRS landscape architect, the Notice was also sent to her.

The Inspector General has taken the facts and arguments invoked by the recipients of the Notice into account and they will be addressed in this Decision.

## 2. Context of the Office of Inspector General's investigation

### 2.1 *Denunciations received*

The Office of Inspector General received two (2) denunciations in September and November of 2018 alleging a conflict of interest in the awarding an interior designer contract. According to the denunciation received in November 2018, a SGPMRS employee had written the interior design mandate and the contract was subsequently given to her spouse's company. Said contract was awarded at the very end of the project design process and resulted in major costs and delays.

The Office of Inspector General's investigation was therefore designed to shed light on these allegations.

### 2.2 *The La Fontaine Park Chalet-restaurant refurbishment project*

The project in question involved refurbishment of the La Fontaine Park Chalet-restaurant, including rearrangement of the public bathrooms and skaters' room located in the building.

It began in December 2015, with the preparation of drawings and specifications for publication in November or December 2017 of call for tenders No. 5939 for refurbishment of the La Fontaine Park Chalet (hereinafter, "Call for Tenders 5939"). The schedule was respected and Call for Tenders 5939 was published on December 14, 2017; bids were received on February 7, 2018; and the contract was awarded by the City Council on March 26, 2018 for a maximum of \$3,909,958.04 including taxes and contingencies.

A number of intervenors were assigned to preparation of the drawings and specifications. Apart from the SGPMRS employees, some City employees from the Real Estate Management and Planning Department [*Service de la gestion et de la planification immobilière*] (hereinafter, "SGPI") and the Plateau—Mount-Royal Arrondissement, as well as employees of external architecture and engineering firms and an external project manager, were assigned to this task.

The employee who was the subject of the denunciations is a SGPMRS landscape architect who joined the project team in the fall of 2017, a bit prior to publication of Call for Tenders 5939.

The investigation carried out by the Office of Inspector General indicates that the process of choosing the finishes for the chalet-restaurant public washrooms and skaters' room was a stumbling block between certain members of the SGPMRS and the other internal and external project intervenors. As will be explained in the following sections of this Decision, this divergence of opinions resulted from the inclusion of an interior designer in the project in May 2018, that in turn caused several monetary and other consequences.

The interior design mandate named in the denunciation was Contract No. 18-1922, which was awarded by SGPMRS to Desjardins Bherer, the firm owned by the spouse of the SGPMRS landscape architect. Contract No. 18-1922, in the maximum amount of \$24,604.65, taxes included, covered a “proposal and plan for finishes for the La Fontaine Park chalet-restaurant washrooms and skaters' room”.

### **2.3 *La Fontaine Park master plan***

In parallel with Call for Tenders 5939 drawing and specification preparation process, a master plan was drawn up for the La Fontaine Park – a document proposing a concerted development vision for the Park designed to provide overall cohesion for all aspects of future interventions (hereinafter, the “Master Plan”). A series of projects with an estimated value of \$120 million are planned over the next ten (10) years, and these will be based on the Master Plan contents.

In 2016, extensive public consultations were held on the directions the Master Plan should take. The Plan preparation phase then began in 2017 and the aforementioned SGPMRS landscape architect and an external consultant were assigned to it. The Master Plan was finally adopted by the City's Executive Committee on October 31, 2018, and by the City Council on November 19, 2018.

In addition to her role as co-author of the Master Plan, the landscape architect was also given the task of overseeing its subsequent implementation.

For the purposes of this case, it is particularly important to understand that the Master Plan neither addresses nor specifically defines the buildings' finishes or other interior details. Instead, it gives general guidelines and allows creative leeway to the professionals in charge of the projects.

Nevertheless, the SGPMRS landscape architect eventually evoked the Master Plan's overall guidelines as the reason for refusing the finishes initially proposed by the architecture firm in the fall of 2017. She subsequently based her position on Master Plan quotations to justify awarding a contract to some interior designers.

Lastly, it should be noted that even though it had been mentioned on several occasions, the Master Plan was not communicated to the external project manager, the architecture firm or the engineering firm in charge of preparing the drawings and specifications, or to the SGPI employees assigned to the project.



The SGPMRS landscape architect told the Office of Inspector General's investigating officers that she could not communicate the Master Plan to this team since it had not yet been made public. However, the investigation showed that on April 23, 2018, she forwarded the Master Plan's "preliminary orientations" – over 30 pages – to an SGPI colleague working on another project in La Fontaine Park so that he could transfer it "...to the consultants to guide them in their design".

### 3. Contract No. 18-1922 awarding and execution process

As mentioned in the introduction, the inclusion of an interior designer resulted from a dispute with regard to the choice of finishes in the La Fontaine Park chalet-restaurant public washrooms and skaters' locker room. This section will thus address the issue of the finish selection process culminating in the fall of 2017. This will be followed by all the steps associated with the preparation and signing of Contract No. 18-1922 in the months of April and May 2018. Lastly, the events that occurred during execution of the contract since May 2018, will be addressed.

To facilitate the reader's understanding, a time line showing the event chronology has been prepared and attached as an appendix to this Decision.

#### 3.1 Process of choosing finishes for the public washrooms and skaters' room

In September 2017, the SGPMRS employee who had been following up the project until that time called his landscape architect colleague to get her opinion on the presentation by the external architecture firm of their proposal for the washrooms and skaters' locker room. This step was one of the last before publication of the construction Call for Tenders 5939, and the drawings and specifications were considered 80% or more complete at that time. However, according to the SGPMRS landscape architect, her colleague had some doubts with regard to the proposed finishes, and her participation was intended to avoid the bad experience they had in 2016 at Maisonneuve Park in relation to the choice and durability of the finishes chosen for that project.

Said proposed finish presentation was made in a meeting held on October 26, 2017. As requested by a Plateau-Mont-Royal Arrondissement representative, the arrangement proposed by the architecture firm was to be "lively" [*vivant*], "playful" [*ludique*], "family-friendly" [*familial*] and "dynamic" [*dynamique*].

However, the SGPMRS landscape architect had some criticisms with regard to the toilet partitions. Referring to the Master Plan guidelines, she argued that the material they were planning to use – a solid-colour laminate – did not reflect the buildings' exterior quality; that it was not high-end or durable enough; and that it represented a significant loss of value with respect to the existing materials. She further observed that the old marble partitions had not been recovered elsewhere in the project. Lastly, she questioned adding the colour blue to the project.

At the conclusion of the meeting, in light of the critiques made, it was agreed to allot \$100,000 to improve the toilet partitions through the use of higher quality materials.

On November 2, 2017, saying that a consensus was reached with the SGPMRS landscape architect in particular and her division manager, her colleague confirmed approval of the finishes for the counters and toilet partitions, and expressed a preference for two types of ceramics from among the ones offered.

In the next meeting, held on November 17, 2017, the architecture firm presented the new product suggested for the toilet partitions. A disagreement quickly arose between the architecture firm's representative and the SGPMRS landscape architect who was still highly critical of the concept. She felt that there was too much blue while she wanted to see some white; that the floor design was inadequate given the changes to ceramic; and that the materials lacked "nobility" [*noblesse*]. She also noted that the marble from the old partitions was still not being reused.

According to the architecture firm's representative, it was not possible to make changes of that magnitude and still meet the previously defined schedule for publication of the construction Call for Tenders 5939, which was less than one (1) month away. She noted that the design had been approved by SGPMRS for the most part, and that the drawings were 99% complete. She explained that the marble used for the old partitions would be stored for use in a later project.

Faced with what she considered a refusal to cooperate, the SGPMRS landscape architect left the meeting at that point, saying that she would inform her supervisor about the situation for follow-up. The meeting nevertheless continued and her SGPMRS colleague was given two choices of partitions by the architecture firm for later approval.

After this meeting, the SGPMRS landscape architect complained to her division manager and told him she did not know what to do. Relying on a recommendation from the Maisonneuve Park rehabilitation project, she proposed having an interior designer intervene to review the room arrangement design. The division manager responded favourably to her request, also believing that the La Fontaine Park project needed to be revised.

When the landscape architect shared this idea with the external project manager, the latter refused for the reason that it would delay publication of Call for Tenders 5939 and would thus prevent the project from being on schedule. She then proposed postponing the idea until after the contract for Call for Tenders 5939 was awarded, i.e. just before construction work started, so that change orders could be generated as construction was underway. The external project manager responded favourably, as did the SGPMRS division manager.

### **3.2 Preparation of request for bids and selection of invited firms**

According to the SGPMRS landscape architect, her division manager reminded her of the idea of the interior design mandate at the time the contract resulting from Call for



Tenders 5939 was awarded, i.e. at the end of March 2018. She then took steps to award an interior design contract.

### *3.2.1 Type of contracting process*

The interior design contract value was estimated to be less than \$25,000 and could thus be awarded by mutual agreement. The SGPMRS landscape architect and her division manager elected to invite four (4) firms to bid.

### *3.2.2 Role played by the landscape architect*

The investigation revealed that the latter was the person responsible for the contracting process and was at the heart of all the steps. It was thus she who:

- wrote the letters of invitation to bid,
- chose the four (4) firms invited to bid, including a firm owned by her spouse,
- contacted the bidders one week before the letters of invitation to bid were sent to gauge their interest in submitting a bid,
- took various administrative steps in relation to the request for bids including obtaining the relevant templates and request for bid number, as well as those associated with sending out the letters of invitation to bid.

### *3.2.3 The initial content of the request for bid documents*

The request for bid documents prepared by the SGPMRS landscape architect to be sent to the potential bidders consisted of:

- a letter of invitation describing the context, mandate, deliverables and schedule, as well as the content and presentation expected from the bidders' proposals,
- the current "RGC"<sup>2</sup>, and
- the drawings and specification that were included in the construction Call for Tenders 5939.

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<sup>2</sup> It should be noted that both the letters of invitation and the attachments thereto mentioned the Contract Management Policy [*Politique de gestion contractuelle*]. However, at the time the letters of invitation were sent – April 18, 2018, this policy was deemed to be the RGC by virtue of Article 278 of *An Act mainly to recognize that municipalities are local governments and to increase their autonomy and powers*. Consequently, the present decision will refer to the policy attached to the letters of invitation as being the RGC.

Some comments are appropriate here about the letters of invitation. Firstly, with regard to the portion of the letters of invitation covering the context, a Master Plan extract was cited stating the desire to “include interior designers specializing in public and institutional building architectural refurbishment projects” [...*intégrer des designers d'intérieur spécialisés dans les domaines publics et institutionnels aux projets de réfection architecturale des bâtiments*]. Emphasis was also placed on the importance of existing and reusable “noble” materials, rehabilitation of large marble partitions, and the light and neutral aspect of the existing space. These were several items inserted into the letters of invitation by the SGPMRS landscape architect that reiterate her criticisms made in the fall of 2017.

The letters of invitation specified that the mandate was to propose new finishes or improve upon those proposed by the design architects. Emphasis was placed on the short completion times; the desire to avoid increased costs; and respect for the already-established project budget. The interior designer to be included in the project was thus constrained to work in cooperation with the professionals already on the project, including the external architecture firm.

It was then explicitly specified that the bidder must confirm that he could complete all the tasks mentioned within a budget of less than \$25,000.00, all taxes and associated expenses included.

Lastly, it was written that any questions with regard to the request for bids should be addressed to the SGPMRS *Bureau des soumissions*, and that the bids' opening would take place on April 26, 2018, on SGPMRS premises, when the deadline expired.

#### 3.2.4 Choice of firms invited to bid

The SGPMRS landscape architect claimed she identified the firms to be invited based on their nominations over the past years for *Grands Prix du Design*. She explained that each of the firms invited had something special to offer. However, among the firms invited by the SGPMRS landscape architect, she told the Office of Inspector General's investigating officers that she knew only one – Desjardins Bherer – whose president is her spouse.

Despite the quotation included in the preceding subsection related to the desire to include interior designers specializing in the public and institutional fields, none of the four (4) invited firms had, up until that time, contracted with Ville de Montréal.

What's more, although there is a *Grands Prix du Design* category entitled: Institutional, Cultural, Public and Health, none of the prizes or nominations associated with the four (4) invited firms was in this category. They were nominated or awarded a prize in the residential or commercial categories instead.

Furthermore, in its response to the Notice, Desjardins Bherer stated that laureates in the “Institutional, Cultural, Public and Health” categories “are almost always architectural firms and not interior designers”.



Given these findings, and taking into account the established objective of including interior designers specializing in the public and institutional fields, the Inspector General finds that the criteria used to select the invited firms is not in line with the needs expressed by the landscape architect in the letter of invitation.

### 3.2.5 *Role played by the SGPMRS landscape architect's division manager*

With respect to the role of the SGPMRS landscape architect's division manager, the evidence shows that he was aware of her actions throughout the process, including the fact that she was planning to invite her spouse's firm to bid, and that she was the one who prepared the letters of invitation to bid. He nevertheless approved the choice of the invited firms, signed said letters of invitation, and did not intervene to remove the landscape architect from the case.

The letters of invitation were sent out on April 18, 2018, on the eve of the startup meeting for the contract resulting from Call for Tenders 5939.

## 3.3 *Disclosure to the Comptroller General's office*

### 3.3.1 *Obligation to disclose and application*

The Ville de Montréal Employee Code of Conduct [*Code de conduite des employés de la Ville de Montréal*] provides that "... (said persons) shall disclose to their immediate supervisor and to the Comptroller General's office any actual, potential or apparent conflict of interest."<sup>3</sup> [*...ceux-ci doivent divulguer à leur supérieur hiérarchique et au Bureau du Contrôleur général toute situation de conflit d'intérêts réel, potentiel ou apparent.*] Such a disclosure is normally made using a form for disclosure of ties to a related individual, i.e. "... a person related to the employee by blood or through marriage, civil union, common-law marriage, or adoption"<sup>4</sup> [*...une personne ayant un lien par le sang, le mariage, l'union civile, l'union de fait et l'adoption avec l'employé*].

Depending on the situation, the employee must fill out certain sections of the form, giving details about the contract-awarding process, his or her role in the process, and reasons for which this situation could be considered conflicting.

The employee then submits the form to his or her manager allowing the latter to become aware of the employee's disclosure and to indicate, in the section reserved for this purpose, any measures the manager puts in place as a result. The employee in question must again sign the form and agree by so doing to respect the measures listed by his or her manager.

<sup>3</sup> Ville de Montréal Employee Code of Conduct, RCG 12-026-2, Annexe A, Chapter 3, Section 1, Paragraphs 4 and 5.

<sup>4</sup> Previously cited Ville de Montréal Employee Code of Conduct, Chapter 2, Section 5.



Lastly, the completed form is sent to the Comptroller General's office who, as the entity responsible for the application of the Employee Code of Conduct must acknowledge the information contained therein. There are then three possible outcomes: it approves the measures put in place by the manager with no changes; it approves them with comments and additional recommendations; or it indicates disapproval with comments and recommendations. The finalized form is then sent to the employee and manager in question.

### 3.3.2 Disclosure made in this case

In the present case, at the request of the SGPMRS division manager, the landscape architect declared her ties to a related person, namely her spouse's firm. This disclosure was made on the eve of mailing the letters of invitation for Contract No. 18-1922. At that time, she filled out both the section reserved to the employee and that reserved to her superior, the division manager, who subsequently signed it. The completed form was sent to the Comptroller General's office that same day. Some items need to be highlighted.

First, the description of the role played in the contracting process by the SGPMRS landscape architect, countersigned by her division manager, attributes to her only a secondary or peripheral supporting role:

Architecte paysagiste responsable du parc La Fontaine, j'ai un rôle d'avisier pour le projet de réfection du chalet-restaurant. Mon rôle est, entre autre, de veiller à l'application des orientations du plan directeur du parc. La contribution d'un designer d'intérieur professionnel au projet de réfection des intérieurs des bâtiments provient d'une orientation pour le corpus architectural du parc. À cet effet, j'ai participé à la rédaction de l'appel d'offres pour un contrat de moins de 25 000,00\$ pour l'addition d'un professionnel en design d'intérieur dans le cadre du projet. Le SGPMRS sollicite quatre firmes, dont la firme DesjardinsBherer, qui est détenu par [REDACTED] mon conjoint.

Extract from the "Divulgence d'une relation avec une personne liée" form given by the Comptroller General's office to the Office of Inspector General on November 28, 2018.

However, the facts presented in the preceding sections show that such a description does not actually reflect the extent of her involvement in developing the request for bids.

More than just "participating in preparing the call for tenders", it appears from subsections 3.1 and 3.2 above that the idea was hers, and that she was subsequently responsible for each of the steps in preparing the request for bids. Similarly, including an interior designer may well be the result of "...a guideline for the architectural corpus of the Park", but it was she who was the principal author of the Master Plan from which said guideline originated. It is likewise deceptive to write that it was her department that solicited her spouse's firm while it was she who chose the criteria for inviting the firms and subsequently identified them.

Next, in the section reserved to the manager, the SGPMRS landscape architect wrote that "...when the bids are received, an internal selection committee will be formed (a



manager, a landscape architect and the SGPI project manager), not including Mrs. [xxx], to choose the consultant in a completely neutral manner” [...dès la réception des soumissions, un comité de sélection sera formé à l'interne (un gestionnaire, un architecte paysagiste et le chargé de projet de la SGPI), excluant Mme [xxx] afin de procéder au choix du consultant en tout neutralité [sic].]

However, as the division manager admitted to the Office of Inspector General's investigating officers, no such committee was ever formed.

With regard to the Comptroller General's position, he wrote that he was generally in agreement with the measures put in place by the division manager but that his comments and recommendations should be taken into account. According to the information he said he obtained from the division manager, the latter agreed to the inclusion of Desjardins Bherer on the list of invited firms, and the contract was only for a partnering mandate for a very specific situation. Despite these assurances, the Comptroller General noted that he made the SGPMRS division manager particularly aware of the possible challenges the presence of an employee's family member could have on a contract-awarding process.

He also issued a reminder that the SGPMRS landscape architect should respect her duty of confidentiality with regard to information she may become aware of in the performance of her duties, and that she should not favour or use her function to influence or attempt to influence another person's decision in a way that would favour the interests of the firm owned by her spouse.

Lastly, if the SGPMRS landscape architect's spouse were to obtain the contract, the Comptroller General specified that, apart from responses to project technical aspects, supervision and management of any dispute concerning the contract would have to be addressed by the SGPMRS team leader or division manager instead.

As will be demonstrated in the following sections, the SGPMRS landscape architect did not comply with these last two items in the Comptroller General's office comments and recommendations despite her admission to the Office of Inspector General's investigating officers that she had received said comments and recommendations.

Lastly, it should be noted that the form was sent to the Comptroller General's office on April 17, 2018. The letters of invitation for Contract No. 18-1922 were sent out the next day, April 18, 2018, without waiting for comments or recommendations from the Comptroller General's office on the matter of the disclosure. This reply came a week later on April 24, 2018.

### **3.4 Events during the bidding period**

As previously mentioned, the letters of invitation for Contract No. 18-1922 were sent out to bidders on April 18, 2018. The initial bid reception date was April 26, 2018.

However, between April 17 and 26, 2018, other internal and external members of the project team became aware of, and manifested their opposition to, the inclusion of an interior designer initiated by the SGPMRS landscape architect and her division manager, and put forward one or more of the following reasons for their position:

- the appearance of a conflict of interest between the SGPMRS landscape architect and Desjardins Bherer;
- the incorporation of an interior designer came too late and would be likely to result in an increase in costs since the contract resulting from Call for Tenders 5939 had already been awarded, and the startup meeting was held on April 19, 2018;
- the fact that SGPI should have made an internal expert available to SGPMRS; or
- the fact that the architecture firm in this case did not have a chance to submit a new concept based on the new expectations formulated by the SGPMRS landscape architect.

In other words, as one member of the project team summarized: by obliging the architecture firm in this case to revise the proposals that would eventually be made by the interior designer firm, the City was in the position of paying twice for the same service.

In light of these criticisms, the SGPMRS division manager initially agreed to abandon the planned inclusion of an interior designer and the process leading to Contract No. 18-1922, but he quickly changed his mind and the contracting process continued. With respect to this, it should be noted that the SGPMRS landscape architect again played an important role when, on April 25, 2018, the division manager submitted a draft response to the SGPI criticisms, arguing in favour of including an interior design firm in the project, for her review.

While they did not manage to have the entire contracting process invalidated, the formulated criticisms did lead to the drafting of an addendum (hereinafter, “Addendum 1”). The addendum, written by the SGPMRS landscape architect, replied to the recriminations to the effect that there would be confusion between the architect and the interior designer when it came to the power to approve drawings and specifications and issue change orders to the construction contractor. The requirement to produce modified drawings and specifications was thus withdrawn from the letter of invitation. The bid opening date was also postponed to May 2, 2018.

Also, in addition to writing Addendum 1 and taking administrative steps to produce it, the SGPMRS landscape architect signed it, as did her division manager. Which is to say that, from the Addendum 1 publication date – April 24, 2018 – she appeared in the request for bid documents as having participated in their preparation. The impact of this change will be addressed in the following sections.

We must also discuss one final event that occurred during the bidding period. When the Office of Inspector General’s investigating officers met with the president of Desjardins Bherer, he said that his spouse, the SGPMRS landscape architect, told him in person



that he would receive an addendum that very day, and the contents of said addendum as well, before it was published. Neither one of them contradicted this fact in their response to the Notice. Such communication is serious in general, but even more so in the particular context of this case. It will be analysed in Section 5 of this Decision.

### 3.5 Reception and analysis of bids

When the bidding period ended on May 2, 2018, only one bid had been received – that of Desjardins Bherer. It was sent from the SGPMRS's general call for tenders inbox to the SGPMRS landscape architect.

The bid was then analyzed by the SGPMRS division manager and not by a selection committee as he had agreed to in the form submitted to the Comptroller General's office. He explained this change to the Office of Inspector General's investigating officers saying that only one bid had been received; that it complied with the stipulations in the letter of invitation; that they were under time pressure to integrate the interior designer into the project; and that they had no time to go back and issue another call for tenders.

According to the SPGMRS division manager, mutual agreement contracts like Contract No. 18-1922 have no formal evaluation grid. Also, according to him, the evaluation criteria were included in the letter of invitation as follows:

#### Le contenu et la présentation de la proposition

L'offre de services professionnels devra inclure :

- Une lettre d'intention qui traite de la compréhension du mandat et de l'approche préconisée;
- Une fiche de présentation d'au plus trois projets pertinents à la présente démarche;
- La description et l'identification de l'équipe de travail et la répartition des tâches;
- Le détail de l'affectation des ressources et des taux horaires;
- Un échéancier.

#### *Extract of letter of invitation to bid sent to Desjardins Bherer*

In terms of the first criterion – understanding the mandate and recommended approach – the SGPMRS landscape architect told the Office of Inspector General's investigating officers that she had informed her spouse, in the fall of 2017, that there was a possibility of an interior design firm participating in the project. She also told him what she didn't like in the architecture firm's proposal at that time. She nevertheless claimed that her spouse prepared his bid by himself with no involvement on her part and without showing it to her.

With regard to the second criterion – “A presentation of at most three projects relevant to the present process” – it is important to keep in mind that the letter of invitation emphasized the desire “...to include interior designers specializing in the public and institutional fields in building architecture refurbishment projects”. For its part, the Desjardins Bherer bid presented two (2) residential projects and one commercial project, namely renovation of the players' spa for a professional hockey team in Montreal.

The SPGMRS division manager, the landscape architect, and the president of Desjardins Bherer all conceded to the Office of Inspector General's investigating officers that Desjardins Bherer did not strictly meet the previously completed project criterion. The SPGMRS division manager also indicated that none of the other three (3) firms met the criterion either.

The SGPMRS landscape architect nevertheless claimed that Desjardins Bherer had the relevant expertise for the project even if institutional work was new to them, while the division manager indicated that all the invited firms had a good reputation, and that small firms had to be given a chance to enable them to build a portfolio of City projects. Both the landscape architect and the division manager claimed that the players' spa renovation project was relevant for the purposes of Contract No. 18-1922 since it involved work in toilets associated with the players, even though they were not public or institutional.

The other three (3) criteria were well and truly included in the Desjardins Bherer bid.

Furthermore, as previously mentioned, the RGC then in force had been attached to the letters of invitation. Article 3 actually mentions that: "This policy [by-law] applies to all City contracts and associated processes. It must be reflected and adapted as necessary in all such contracts, regardless of their value, to ensure compliance" [*Cette politique [règlement] s'applique à tous les contrats municipaux et les démarches en lien avec ceux-ci. Elle doit être reflétée, en faisant les adaptations nécessaires, dans tous ces contrats, peu importe leur valeur, pour en assurer le respect*]. Thus, Desjardins Bherer's bid was also required to comply with the obligations created by virtue of the RGC.

Among these, Article 5 of the RGC provides that: "...when submitting his bid, the bidder must declare in writing all his personal or business ties with the persons or firms indicated in the tender documents as having participated in preparing said documents. By submitting his bid, his signatory solemnly affirms that the information provided with respect to the requirements of this article are complete and accurate" [*...au moment du dépôt de sa soumission, le soumissionnaire fait état, par écrit, de tous ses liens personnels ou d'affaires avec les personnes ou firmes indiquées aux documents d'appel d'offres comme ayant participé à l'élaboration des documents dudit appel d'offres. En déposant sa soumission, son signataire affirme solennellement que les renseignements fournis pour répondre aux exigences de cet article sont complets et exacts*].

With regard to this matter, even though the letter of invitation was only signed by the SPGMRS division manager, Addendum 1 includes, as previously mentioned, the names and signatures of both the latter and the landscape architect. Addendum 1 indicates that it is an integral part of the bid documents. Therefore, beginning with the publication of Addendum 1, the landscape architect was indicated in the request for bid documents as having participated in their preparation.

Desjardins Bherer's bid does not contain any written declaration of personal ties between its president and his spouse, the SGPMRS landscape architect, all of which is contrary to Article 5 of the RGC. The division manager conceded that he did not check to see whether Desjardins Bherer had included any such declaration in its bid.



Despite these irregularities with regard to previous projects and the declaration required by virtue of the RGC, the SPGMRS division manager nevertheless judged that Desjardins Bherer's bid was in line with what was requested in the letter of invitation and approved it. Noting that there was only one bidder, and that it was the firm of the landscape architect's spouse, the SPGMRS division manager asked her to contact the other three (3) invited firms to find out why they did not bid.

### **3.6 Awarding of Contract No. 18-1922**

The decision having been taken to award Contract No. 18-1922 to Desjardins Bherer, the SGPMRS landscape architect prepared SIMON notes (internal notes explaining the contracting process) on May 7, 2018. According to her, the line of demarcation vis-à-vis her involvement in the case was the Contract No. 18-1922 startup meeting held on May 28, 2018, so she was therefore able to prepare the SIMON notes without being in a conflict of interest. The notes were signed by the division manager on May 10, 2018.

Between May 11 and 24, 2018, the SGPMRS landscape architect continued to be involved in the case by approaching Desjardins Bherer to obtain the information required, including GST and PST numbers, to enter the company into the City of Montréal supplier registry.

The letter of award of Contract No. 18-1922 was signed and sent by the SPGMRS division manager to Desjardins Bherer on May 25, 2018.

Finally, in terms of the professional services agreement as such, it was the SGPMRS landscape architect who wrote it, and it was subsequently signed by Desjardins Bherer and the division manager's hierarchical colleague, in his name, on June 14, 2018.

### **3.7 Execution of Contract No. 18-1922**

Contrary to the Comptroller General's office recommendations to the effect that the landscape architect should only respond to technical questions if her spouse's firm was awarded Contract No. 18-1922, and contrary to the SPGMRS division manager's commitment to the effect that she would be removed from the case if that were to occur, the facts exposed above show that her involvement continued.

In fact, the SGPMRS landscape architect herself conceded to the Office of Inspector General's investigating officers that she was asked some questions on the conformity of certain choices of finishes, and that she was copied on e-mails on this subject. But, according to her, it involved answers to technical questions, which respected the warnings of the Comptroller General's office. She also added that, because of her role as person responsible for La Fontaine Park, she answered some questions in relation to coordination of Park operations and site works.

### 3.7.1 May 28, 2018 startup meeting

As previously mentioned, the Contract No. 18-1922 startup meeting was held on May 28, 2018. The landscape architect was not present at that meeting.

The letter of invitation for Contract No. 18-1922 indicated that "...the revised finishes must be within the previously established project budget" [...*la révision des finis devra s'inscrire dans le budget déjà établi au projet*], and that there was an aim to "...avoid schedule delays and increased costs" [...*éviter les délais de réalisation et l'augmentation des coûts*].

In his response to the Notice, Desjardins Bherer president maintains that he received very little or no information from the external project manager and the architecture firm in said meeting. It was not clear in what way Desjardins Bherer could still intervene, and which finishes had already been ordered and could therefore not be changed. According to him, they only obtained the construction schedule a few days later, and the budget for the finishes at the end of June 2018.

### 3.7.2 Second meeting on June 19, 2018 and its results

In the subsequent meeting on June 19, 2018, Desjardins Bherer presented their concept for the choice of finishes. The landscape architect did not attend.

An architecture firm representative noted that Desjardins Bherer's presentation repeated several aspects that the landscape architect wanted to correct and include in the fall of 2017. According to Desjardins Bherer, this could be explained by the fact that they strictly conformed to the mandate defined in the letter of invitation for Contract No. 18-1922, and they claim they developed their proposal without informing the SGPMRS landscape architect or discussing it with her.

Several participants also noted that Desjardins Bherer had not evaluated the financial impact or technical feasibility of their proposals. In their response to the Notice, Desjardins Bherer replied that since they only received the budgets at the end of June, they were not be able to present financial impact of their proposals until the following meeting in July.

After this meeting, still on June 19, 2018, the evidence shows that the president of Desjardins Bherer informed the SGPMRS landscape architect that the meeting went well. He then sent her the presentation file and drawings produced by Desjardins Bherer.

The next day June 20, the SGPMRS landscape architect called the external project manager to follow up on the meeting held the day before with Desjardins Bherer and to get the latter's impressions about the meeting.



### 3.7.3 *Third meeting on July 5, 2018*

On July 5, 2018, the SGPMRS landscape architect attended the third meeting held as part the execution of Contract No. 18-1922 addressing the question of the choice of materials proposed by Desjardins Bherer and their impact on the budget. Her spouse and president of said firm was also present. The SPGMRS division manager participated briefly in the meeting and says he did notice that the landscape architect was there but did not intervene to get her to leave the room.

### 3.7.4 *Other implications*

The evidence further revealed that in June 2018, the SGPMRS landscape architect received several e-mails dealing with the issue of finishes, and explicitly mentioning a follow-up with regard to Desjardins Bherer's mandate.

After the Contract No. 18-1922 startup meeting, the SGPMRS landscape architect participated in two (2) site meetings held on June 12 and July 10, 2018, as part of execution of construction contract 5939. According to the minutes of these meetings, the question of finishes and interior designers was addressed in the June 12 meeting, but no intervention on the part of the SGPMRS landscape architect on this matter was noted.

Finally, it should be noted that on July 10, 2018, the landscape architect wrote to the external project manager informing him that a SGPMRS colleague would take over for the site progress meetings. At the same time, she asked to be removed from the convocation list, while declaring herself available for any requests for information regarding La Fontaine Park logistics.

## 3.8 *Impacts of including the interior designer firm in the project*

Apart from the cost of Contract No. 18-1922 itself – a maximum of \$24,604.65 including taxes – including interior designers in the project resulted in several additional costs, some of which are associated with the new proposed finishes, others with construction delays, and others yet on expenditures made necessary because of lateness of the works.

First, according to a table produced by SGPI analyzing the cost of the Desjardins Bherer interior finish modification proposals, the costs would be raised to \$589,148.38 including taxes and late deliveries. For its part, SGPI recommended only some of these proposals for a cost of \$228,719.66 including taxes and late deliveries.

Ultimately, according to Decision Summary 1185965006 submitted to the City Council on January 28, 2019, "...the changes to the north and south toilet and skaters' room finishes resulted in additional work totaling \$174,891.48 including taxes" [...]*les modifications des finis des toilettes nord et sud et de la salle des patineurs ont*



*occasionné des coûts de travaux additionnels totalisant 174 891,48 \$, taxes incluses*], and were paid out of contingencies already provided for on the project.

Next, construction completion initially scheduled for November 30, 2018, was postponed until June 18, 2019. As a result, according to the previously cited Decision Summary, additional expenses of \$570,672.00 including taxes had to be incurred to cover the costs of the one hundred and twenty-nine (129) working day lateness, ninety-five (95) of which were attributable to the “...changes to the finishes in the north and south toilets and skaters’ room” [...*modification des finis des toilettes nord et sud ainsi que dans la salle des patineurs*]. This ninety-five (95) working day delay resulted in an additional expense of \$167,649.35 including taxes.

It should be noted that the SPGMRS division manager estimated the number of days’ delay due to inclusion of an interior designer on the project at forty-seven (47) days, but this calculation was not mentioned to those responsible for preparing the Decision Summary in question.

Although not attributable solely to the change instructions and delays resulting from the interior designer’s proposals, additional costs were incurred by implementing temporary accommodations for citizens to mitigate closure of the Chalet during the winter of 2018-2019, including leasing and maintenance of trailers and comfort stations.

Under another contract, Contract No. 18-1980, supplemental fees of \$14,999 including taxes had to be paid to the architecture firm to analyze Desjardins Bherer’s proposals for the host building, negotiate changes, do research on the products and assemblies, incorporate the changes into the drawing set, and produce the associated instructions.

Some non-negligible impacts on La Fontaine Park users and skaters, who were deprived of the chalet-restaurant for the entire winter of 2018-2019, also need to be taken into account.

## 4. Responses to Notices to Interested Parties

In conformance with her duty of procedural fairness, the Inspector General summarized all the facts detailed above in the Notice sent to Desjardins Bherer, the SGPMRS and the SGPMRS landscape architect. The Inspector General notes the following points from the responses received.

### 4.1 Desjardins Bherer’s response

First, the president of Desjardins Bherer admits that his bid did not include a declaration of a personal tie with the SGPMRS landscape architect as required by the RGC. However, she told him that she had filled out the disclosure form required by the Comptroller General’s office and that she was then withdrawn from the case.



The answer seems to imply that this internal disclosure on the part of the landscape architect lessened the importance for Desjardins Bherer disclosing the tie linking its president to her in turn. But such a pretence is unfounded since the obligation imposed on the bidder by the RGC is independent of the existing obligation for the landscape architect because of the Employee Code of Conduct.

Desjardins Bherer then claimed that after obtaining Contract No. 18-1922, the firm had prepared the furnishing and choice of finish proposal on its own, without consulting or informing the landscape architect. If the resulting proposal closely resembled what the landscape architect wanted to see, it was because Desjardins Bherer based their proposal solely on the content of the letter of invitation.

However, the Inspector General notes that Desjardins Bherer's response to the Notice did not contradict the fact that the landscape architect had told him in the fall of 2017 what she did not like in the external architecture firm's initial proposal. She therefore still believes that these discussions influenced Desjardins Bherer and gave them an advantage in the contracting process for Contract No. 18-1922.

With regard to the landscape architect's involvement in execution of Contract No. 18-1922, Desjardins Bherer response to the Notice presents some facts that support, in their eyes, her withdrawal from the case. In addition, Desjardins Bherer says that during the Contract No. 18-1922 startup meeting, the SGPMRS team leader was introduced as being their point of contact at SGPMRS and that the landscape architect was not in attendance. Desjardins Bherer also mentioned that no direct exchange had occurred between the firm and the landscape architect on the subject of conformance of the choice of finishes with the Master Plan, and that any e-mail she may have received did not come directly from them.

On the other hand, the president of Desjardins Bherer admits having sent the landscape architect his furnishing and choice of finish proposal after the June 19, 2018 meeting. Similarly, he admits that, to his surprise, his spouse had attended the following meeting on July 5, 2018. Consequently, the Inspector General can only conclude that the landscape architect continued to be involved in the case after Contract No. 18-1922 was awarded.

The majority of Desjardins Bherer's comments had to do with their execution of Contract No. 18-1922 and the impacts of their involvement in the project. Essentially, they claim that they fulfilled their obligations under Contract No. 18-1922 and delivered their furnishing and choice of finish proposal within the required time frame despite the City having held the startup meeting twenty-one (21) days later than they had planned in their offer of services, and that the construction schedule, the list of finishes already chosen and ordered that could not be intervened upon, and the associated budgets were sent to them late. Desjardins Bherer therefore believes that the delays and increased costs are scandalous but that they are not their fault, blaming the construction contractor, external project manager, and architecture firm instead.

It should be noted, with regard to this, that the investigation conducted did not address the quality of the services rendered by Desjardins Bherer. With respect to the delays, cost increases and their origin, the Office of Inspector General has confidence in what

was prepared by the City project team and presented to the decision-making authorities via the Decision Summary addressed in subsection 3.8 above. That document identifies inclusion of the interior designers as the element that caused the cost explosion, but it does not impute responsibility for this fact to them personally.

Lastly, some of the facts stated in the Notice were not denied or even commented upon by Desjardins Bherer. Among them is the fact that the landscape architect told him that an addendum would be published before it actually was, as well as the fact that Desjardins Bherer did not strictly meet the letter of invitation criteria, including the one requiring specialization in the institutional and public sectors. The Inspector General therefore deems these facts to be admitted by Desjardins Bherer.

#### **4.2 SGPMRS landscape architect's response**

Most of the landscape architect's comments address the process of choosing finishes in the fall of 2017. She focuses mainly on the reasoning underlying her position with respect to the external architecture firm's initial proposal. Since she believes that La Fontaine Park is an exceptionally valuable sector worthy of provincial citation, all development efforts, including refurbishment of the chalet-restaurant, should be carried out through a process that is sensitive to the existing character and respectful of the integrity of the architectural whole. She felt that the project was not headed in the right direction at that time, and that corrective actions needed to be taken using interior designers.

The decision to have an interior designer intervene can be justified, but the Inspector General's investigation does not address this decision. As will be analyzed in section 5, it is rather the way that the landscape architect chose to go about implementing her idea of including interior designers that is questionable and resulted in breaches of the RGC in effect at that time and of the Employee Code of Conduct.

A second point that stands out from her response to the Notice is that she consulted with the external project manager and her division manager in the course of the steps she took as part of the contracting process. Both of these individuals agreed with her that an interior designer should be included on the project after the contract resulting from Call for Tenders 5939 was awarded. Similarly, she filled out the disclosure to the Comptroller General's office at the request of the division manager, and the tie with her spouse's firm was therefore known. She sent a draft of the letters of invitation to the external project manager who returned them to her with comments that she subsequently incorporated.

This is a form of responsibility shirking that hides the fact that she initiated the plan to include an interior designer on the project in question, she chose the invited firms, including her spouse's, and she managed the overall contracting process for Contract No. 18-1922.

Next, the choice of invited firms could be explained, according to her, by the specialty in interior design to form a multidisciplinary team for the project. Given that Grands Prix du



Design award recipients in the institutional and public categories are architectural firms, and that there were already external architects involved in the case, she told herself that she could fill out the team with other types of professionals. Nevertheless, in the Inspector General's opinion, that could not explain how the firms selected achieved the objective she herself had set in the letter of invitation – inclusion of interior designers *specialized in the institutional and public sectors*.

With regard to her involvement in execution of Contract No. 18-1922 when she should have been withdrawn, she justified it by writing that she had an operations and construction coordinating role in her position as person responsible for La Fontaine Park. She likewise alleged that it was at the team leader's request that she attended the July 5, 2018 meeting at which her spouse was also present.

In the eyes of the Inspector General, these explanations are inadequate. On one hand, the landscape architect did not deny that she had discussed Desjardins Bherer's proposal with her spouse following their June 19 presentation, and that she, herself, contacted the external project manager specifically on this subject the following day. On the other hand, even if the team leader had asked her to attend the July 5 meeting as she claims, something the Office of Inspector General was unable to corroborate, she could simply have refused to participate, thereby respecting the instruction to step away from the case.

Lastly, as with Desjardins Bherer's response, the landscape architect's response to the Notice neither denies nor comments on several of the facts set forth there. The Inspector General considers the following elements in particular to have been admitted by the landscape architect:

- The fact that in the fall of 2017 she had discussed the possibility with her spouse of having an interior designer participate in the project, and what she did not like in the architecture firm's proposal;
- The fact that Desjardins Bherer did not strictly meet the letter of invitation criteria which included specialization in the institutional and public sectors;
- The fact that she told her spouse that an addendum would be published before it actually was; and
- The fact that she and the president of Desjardins Bherer had discussed the architecture firm's proposal after the June 19, 2018 meeting.

### **4.3 The SGPMRS**

The SGPMRS responded that they took note of the deviations described in the management of the interior finish case, and that the department would await the report's conclusions.

## 5. Analysis

The facts detailed above lead the Inspector General to the following findings with regard to Desjardins Bherer, the SGPMRS landscape architect, and the process for including an interior designer in the project.

### 5.1 Findings with regard to Desjardins Bherer

#### 5.1.1 Desjardins Bherer contravened the RGC

As mentioned in subsection 3.5 above, Article 5 of the RGC then in force provides that all bidders shall declare in writing, at the time they submit their bid, any and all personal ties to the individuals indicated in the call for tenders documents as having participated in preparing the documents for said call for tenders.

The notion of “participating in preparing the call for tenders documents” is defined as “any action by virtue of which a person, at the request of the City, prepares or produces a document or part thereof intended for use in, or attachment to, tender call documents”.

As defined this way, the SGPMRS landscape architect must undeniably be considered as having participated in preparing the request for bid documents. In addition, while only her division manager appears as signatory of the letters of invitation, she also signed Addendum 1 herself.

Thus, starting with the publication Addendum 1, all the firms invited to bid had to declare their personal or business ties with the SPGMRS division manager or landscape architect in order to comply with Article 5 of the RGC then in force. Despite the personal tie uniting their president to the landscape architect, Desjardins Bherer failed to include any such declaration in their bid. Furthermore, in their response to the Notice, Desjardins Bherer admitted that it was at fault on this point.

By virtue of Articles 29 and 32 of the RGC then in force, if the City discovers that information contained in the sworn declaration made pursuant to Article 5 is incomplete or inaccurate, they can rescind the contract without prejudice and prohibit the co-contractor from receiving any call for tenders or signing any contract with the City by mutual agreement for a period of one (1) year.

Paragraph 2 of Article 35 of the current version of the RGC provides that “...this policy that became a by-law on January 1, 2018, continues to apply to any action taken prior to this by-law taking effect” [...*cette politique devenue règlement le 1<sup>er</sup> janvier 2018, continue de s’appliquer à tout acte posé avant l’entrée en vigueur du présent règlement*]. Consequently, Desjardins Bherer should be excluded from any contract with Ville de Montréal for one (1) year.

Additionally, Article 5 of the current version of the RGC, which replaced the obligation to declare personal ties in the older version of the RGC, provides that bidders must declare that they are not in a situation that would give them unwarranted advantage. Such



situation is defined as being one where the bidder had access to information with regard to the call for tenders that are not made available or accessible to the other bidders, and that are of a kind to give the bidder an unwarranted advantage.

In this case, one bid evaluation criteria was the letter of intent covering "...understanding of the mandate and recommended approach" [...*de la compréhension du mandat et de l'approche préconisée*]. The facts show that the person who wrote said mandate – the landscape architect – discussed with her spouse in the fall of 2017, before she sent the letters of invitation, the things she did not like about the architecture firm's original proposal and wanted to see changed. But the description of the mandate and context contained in the letter of invitation is far from being as explicit in terms of changes to be made to the design as the comments the landscape architect made to her spouse.

Even though Desjardins Bherer claims they prepared their bid alone, this situation undeniably gave them an unwarranted advantage vis-à-vis the other bidders.

### 5.1.2 *The Desjardins Bherer contract should be rescinded*

Article 57.1.10 of the *Charter of Ville de Montréal* sets forth two (2) cumulative criteria allowing the Inspector General to intervene to rescind a contract with the City:

- 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.

In this case, the preceding subsection shows non-compliance with Article 5 of the RGC. Because of Article 3 of said RGC, this applies to "...all City contracts and associated processes. It must be reflected and adapted as necessary in all such contracts, regardless of their value, to ensure compliance" [...*tous les contrats municipaux et les démarches en lien avec ceux-ci. [Il] doit être reflété, en faisant les adaptations nécessaires, dans tous ces contrats, peu importe leur valeur, pour en assurer le respect*]. This was also attached to the bidders' letters of invitation. To sum up, non-compliance with the RGC constitutes "non-compliance with one of the call for tender or contract documents" [*le non-respect d'une des exigences des documents d'appel d'offres ou d'un contrat*] described by the first criterion.

In terms of the seriousness of this breach, several elements militate in favour of cancellation. On one hand, we note that the City Council itself provided two separate sanctions for breach of Article 5, namely the discretionary ability to rescind the contract in question and prohibit the co-contractor from contracts with the City for a period of one (1) year. While these sanctions are not the most severe under the RGC that was in effect, they nevertheless indicate a definite degree of reprobation on the part of the City administration with regard to such a breach. In effect, it would not be tolerable for a

bidder or co-contractor to enjoy an unwarranted advantage with regard to a completion by virtue of an existing tie with a person who participated in the contracting process.

On the other hand, a recent decision was rendered by a Quebec court to the effect that a bid containing a declaration required by virtue of a contract management policy that was completed but not signed constituted a major defect resulting in rejection of the bid.<sup>5</sup> Let alone the fact that, in this case, no declaration was submitted by Desjardins Bherer, as they themselves acknowledge.

In addition, the fact that the tie between Desjardins Bherer and the landscape architect was known to the SPGMRS division manager, and that there were no other bidders, does not mitigate the seriousness of the breach. Firstly, at the time they submitted their bid, Desjardins Bherer could not have known that they would be the only bidder.

Secondly, the firm did not know who was going to analyze their bid. On that subject it is appropriate to recall that before the contracting process began, the division manager committed to forming a neutral and independent selection committee, excluding the landscape architect. The members of such a committee could not possibly have been aware of the existing tie between the latter and Desjardins Bherer.

In short, the Inspector General believes that both conditions required by Article 57.1.10 have been met in this case and she will proceed with rescinding Contract No. 18-1922 awarded to Desjardins Bherer.

## **5.2 Findings with regard to the SGMRS landscape architect**

### *5.2.1 The landscape architect contravened the RGC*

Article 16 of the RGC then in force provides as follows:

“Any intervenor, employee, cabinet staff member, or elected official shall act with loyalty and maintain the confidentiality of any information they become aware of in performing their duties or executing their contract, as the case may be, unless the law or a court rules otherwise” [*Tout intervenant, employé, membre du personnel de cabinet ou élu doit agir avec loyauté et respecter la confidentialité des informations dont il a connaissance dans l'exercice ou à l'occasion de ses fonctions ou, le cas échéant, de l'exécution de son contrat, à moins que la loi ou un tribunal n'en dispose autrement*].

Since the landscape architect is an employee, she was required to maintain confidentiality with respect to any information she was aware of in performing her duties. In the present case, she was at the heart of the contracting process leading up to Contract No. 18-1922, as was mentioned in subsections 3.1 and 3.2.

The investigation showed that it was she who wrote Addendum 1. According to what her spouse and president of Desjardins Bherer declared to the Office of Inspector General's

<sup>5</sup> *Marc-André Paysagiste v. Ville de Nicolet*, 2018 QCCQ 2477.



investigating officers, she told him in person that an addendum would be issued later that same day, and indicated its contents. It should be noted that, in their responses to the Notice, neither the landscape architect nor the president of Desjardins Bherer denied this fact.

This means that as part of an ongoing contracting process, she revealed information that was, until then, confidential and not known to the other bidders. It is true that in retrospective, this disclosure did not give any theoretical advantage to Desjardins Bherer since no other firm submitted a bid. However, the landscape architect could not have known this fact at the time of her disclosure to her spouse.

What's more, on the same day as her disclosure, she received the response to her declaration of conflict of interest from the Comptroller General's office reminding her as a matter of fact of her obligation of confidentiality with regard to information she might become aware of in performing her functions. The Comptroller General's office's response also specified that she should not show favour or take advantage of her function to influence or attempt to influence the decision of another person to promote the interests of the firm owned by her spouse. Her disclosure of the fact that an addendum would be published later that same day, and the contents of said addendum, was directly inconsistent with these two cautionary warnings.

In addition to this action, we must also remember that the landscape architect said she had discussed with her spouse in the fall of 2017 the possibility of including an interior designer in the project, and the things she did not like about the architecture firm's proposal at the time. After the second meeting held as part of execution of Contract No. 18-1922, when she should have been removed from the case, her spouse and she discussed the presentation that Desjardins Bherer had just given. Taken together, these actions tend to show that the landscape architect and her spouse actively discuss their day-to-day professional life, and this fact alone leaves serious doubt in the air about the credibility of her affirmation to the effect that she did not discuss Contract No. 18-1922 with her spouse throughout the contracting process.

### *5.2.2 The landscape architect's declaration to the Comptroller General's office is deceptive*

As mentioned in subsection 3.3, addressing her declaration of conflict of interests to the Comptroller General's Office, the landscape architect's description of her role in the contracting process is deceptive and attributes to her only a secondary support or peripheral role. The facts revealed by the investigation clearly demonstrate that she was, instead, the contracting process instigator and its principal architect.

It is absolutely inconceivable that, in 2018, a City employee was able to, and thought it proper to, prepare a request for bids and choose to invite her spouse's firm and, what's more, to do so without frankly and fully declaring this situation to the Comptroller General's office.



Knowing that the Comptroller General's office's ability to assess the situation depends to a great extent on the facts that she disclosed, the lack of transparency she showed muddies the waters considerably. In particular, this effectively limited the efficacy of the actions the Comptroller General's office could take as watchdog over the application of the Employee Code of Conduct. It is a good bet that the Comptroller General's office's response would have been completely different if they had been aware of all the facts presented herein at the appropriate time.

### *5.2.3 The landscape architect failed to follow the Comptroller General's office's recommendations*

As previously mentioned, the Comptroller General's office made recommendations in response to her declaration, with regard to measures to take for continuance of the case. In addition to reminders about confidentiality that were already addressed, the Comptroller General's office indicated that if Contract No. 18-1922 were to be awarded to Desjardins Bherer, the landscape architect would be able to respond to certain project technical aspects.

However, supervision and any disputes concerning Contract No. 18-1922 should be addressed by the division manager or another individual. With regard to this subject, the SPGMRS division manager said that he had made a commitment to the other project team participants to remove the landscape architect from the case if Desjardins Bherer were to be involved.

The facts revealed in subsection 3.7 show the opposite instead. In terms of her discussion with her spouse and the information obtained from him about the project after the second meeting in June 2018; her follow-up the following day with the external project manager; and her attendance at the third meeting in July, the investigation showed that the landscape architect made no attempt to remove herself from the case; quite the opposite. Her e-mail on July 10 asking to absent herself from project coordination and communication meetings was late, at best: the essential part of the Desjardins Bherer mandate was already completed.

The landscape architect's testimony to the Office of Inspector General's investigators gives the impression that she felt her disclosure to the Comptroller General's Office was enough to dispel any conflicts of interest. The fact that she forwarded her disclosure the day before the letters of invitation were sent out to bidders seems to indicate that clearly. In other words, she felt that she had done her part and conformed to the rules in place, and that the contracting process could take its course without even waiting for feedback from the Comptroller General's office.

It is very important to be clear that, in the Inspector General's opinion, this is not the case. Ethics is not a matter of a one-day disclosure in an administrative form. It is an ongoing obligation that must be lived and conveyed on a daily basis. The conflict of interest and the apparent conflict of interest between the landscape architect and Desjardins Bherer far from ended with the award of Contract No. 18-1922.



Having herself elected to invite her spouse's firm to bid, it was her duty as a minimum to disclose the situation frankly and fully to the Comptroller General's Office, follow the recommendations made, and withdraw completely from the execution of Desjardins Bherer's contract, which she did not do. Taking the Employee Code of Conduct lightly in that manner is simply unacceptable.

### **5.3 Findings with regard to the process of including an interior designer in the project**

#### *5.3.1 The wish to include an interior designer at the end of the project created a feeling of urgency*

Apart from the ethical and contractual failings described in this Decision, the facts reveal that choosing to include an interior designer on the project after the contract resulting from Call for Tenders 5939 was awarded, and more than one (1) month after the startup of said contract, proved to be disastrous.

By developing a Master Plan that would have been adopted concomitant with the initially planned end of the La Fontaine Park chalet-restaurant refurbishment, the landscape architect and the SPGMRS division manager say that they wanted to ensure cohesion between the two projects and respect the building's historical heritage importance. This position can be justified.

However, by implementing inclusion of interior designers at such an advance stage of the project, the landscape architect and her division manager created a feeling of urgency. This, in turn, resulted in increased risk factors on two (2) different fronts.

First, the file seems to show that the feeling of urgency led to a minimization of the scope of considerations in relation to contractual integrity. With the focus on incorporating interior designers into the project as quickly as possible, it became secondary to wait for the Comptroller General's office response to the landscape architect's disclosure before sending the letters of invitation, and it was becoming impossible to issue another call for tenders when only Desjardins Bherer submitted a bid.

Next, from a cost point of view, according to the division manager's own words to the Office of Inspector General's investigating officers, there is a huge difference between the prices that could be obtained from a construction contractor during a call for tenders and after a contract was awarded. In sum, the first case will generate prices that are more advantageous for the City, while avoiding delays and other costs associated with issuing a change order when construction work is underway.

So, when the landscape architect joined the project in the fall of 2017 and she and her division manager came to the conclusion that the choice of finishes proposed was not in line with their vision of the project, it was then that a definitive choice should have been made with regard to whether or not to include an interior designer.

### 5.3.2 Defects in the contracting process for Contract No. 18-1922

Over and above Desjardins Bherer's contractual breach analyzed in subsection 5.1 above, the facts indicated other irregularities in relation to the contracting process for Contract No. 18-1922.

First, as mentioned in subsection 3.2.4, the choice of invited firms did not correspond to the needs and objectives that the landscape architect and her division manager themselves established in the letters of invitation. While the Master Plan indicates the importance of including interior designers specializing in the public and institutional sectors, they based their choice on nominations or prizes obtained in another sector in soliciting four (4) firms with no such specialization. This is at least incongruous.

Next, the letter of invitation required the presentation of three (3) relevant projects. But as the landscape architect and the division manager said themselves, at best only one (1) of the projects presented by Desjardins Bherer could be deemed relevant. Although the project involved refurbishing a skaters' spa room, it was carried out in a commercial context, not public or institutional. If someone establishes the criteria in a contracting process himself or herself, the basis is to invite bidders who can meet the criteria and to ensure subsequently they are respected in the concern for fairness.

Lastly, once the landscape architect and her division manager agreed that Desjardins Bherer would be part of the invited firms, it was inconceivable and untenable that she remain at the controls of the contracting process. From that moment on, in order to avoid any conflict of interest – actual or apparent – the landscape architect should have been removed from the case and another employee should have been assigned to review the entire contracting process completed up to that point, and to steer the rest of it.

### 5.3.3 The SPGMRS division manager had the duty to remove the landscape architect from the case following the award of Contract No. 18-1922

The landscape architect is not the only person who should have followed the Comptroller General's office recommendations after the conflict of interest disclosure. As a manager, part of the responsibility in this sense lay with the division manager.<sup>6</sup>

What's more, the division manager made two commitments in reference to the disclosure: to set up a selection committee, and to remove the landscape architect from the case if Desjardins Bherer were awarded Contract No. 18-1922. The first commitment was simply not kept, while the second was kept only partially at best.

It appears from the facts gathered that the division manager did actually ask the landscape architect to withdraw from the case in May 2018, but on July 5, 2018, he noted her presence in a meeting with Desjardins Bherer. He should not have allowed the meeting to continue without asking the landscape architect to leave the room.

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<sup>6</sup> Previously cited *Ville de Montréal Employee Code of Conduct*, Chapter 2, section 2.



As mentioned in subsection 5.2.3 with regard to the landscape architect, the division manager's testimony to the Office of Inspector General's investigating officers indicate some degree of minimization of the situation since the value of Contract No. 18-1922 was less than \$25,000.

Employees must apply the same principles of sound, transparent, and ethical contract management regardless of the value of the contract in question. They have a responsibility to preserve the bond of trust that exists between the City and its citizens.

Furthermore, when a commitment is made to the Comptroller General's office and the latter makes a recommendation, it must be applied strictly. Once again, sending a disclosure form is not the end of the situation.

## 6. Conclusion

First, as described above, the Inspector General's investigation enabled her to conclude that Desjardins Bherer contravened Article 5 of the RGC then in force, and she believes that said breaches are serious enough to justify rescinding Contract No. 18-1922 in conformance with Article 57.1.10 of the *Charter of Ville de Montréal*. This breach of the RGC also results in listing Desjardins Bherer in the Register of Ineligible Persons for a period of one (1) year.

Next, the facts revealed by the investigation find that the landscape architect contravened the obligation of confidentiality also provided for in the RGC. It will be up to the appropriate City authorities to determine the sanctions to be applied.

Finally, this case shows that the City employees concerned were lax in applying the rules of ethics in contracting matters because of the low value of Contract No. 18-1922. This not only led to an underestimation of the impact of the inclusion of an interior designer at that stage of execution of the contract resulting from Call for Tenders 5939, but also had the effect of undermining the high standards of integrity the public has the right to expect on the part of the City. It is not without reason that the RGC applies to **all** contracts entered into by the City.

As such, the way the employees concerned treated disclosure and implementation of subsequent commitments and recommendations of the Comptroller General's office so lightly is completely unacceptable.



FOR THESE REASONS,

The Inspector General

**RESCINDS** Contract No. 18-1922 awarded to Desjardins Bherer regarding a proposal and planning of finishes for the washrooms and skaters' room in the La Fontaine Park chalet-restaurant.

**INFORMS** Ville de Montréal of Desjardins Bherer's breach of Article 5 of the RGC in its version in force at the time of the facts described above.

**RECOMMENDS** that, in conformance with the provisions of the RGC, in its version in force at the time of the facts described above, Desjardins Bherer be listed in the Register of Ineligible Persons for a period of one (1) year beginning with this Decision.

**INFORMS** Ville de Montréal of the SGPMRS landscape architect's breach of the RGC, Article 16, in its version in force at the time of the facts described above.

**FORWARDS**, pursuant to Article 57.1.10 of the *Charter of Ville de Montréal*, copies of this Decision to the Mayor and to the City Clerk's office, so that the latter can forward it to the City councillors concerned.

**FORWARDS** a copy of this Decision to the Comptroller General's office.

The Inspector General,

Brigitte Bishop

**ORIGINAL SIGNED**



## APPENDIX – CHRONOLOGY OF EVENTS

### Preparation of Call for Tenders 5939

October 26, 2017: Meeting on choice of finishes and initial participation by landscape architect.

November 17, 2017: 2<sup>nd</sup> meeting on choice of finishes during which the landscape architect left the room.

December 14, 2017: Publication of construction Call for Tenders 5939.

March 26, 2018: Construction contract resulting from Call for Tenders 5939 awarded. Landscape architect begins process of preparing interior designer contract.

September 2017: The SGPMRS landscape architect joins the project.

November 2, 2017: The SGPMRS landscape architect's colleague confirms approval of certain finish choices, saying consensus existed with the landscape architect and her division manager.

Nov.-Dec. 2017: Discussions between the landscape architect, her division manager, and the external project manager with regard to including an interior designer. The idea was postponed to the spring of 2018.

### Contracting process for Contract No. 18-1922

April 18, 2018: Call for Tenders by invitation for interior design launched.

April 17-26, 2018: Various internal and external participants voice their opposition to Contract No. 18-1922.

May 1, 2018: Desjardins Bherer submits bid, which is transmitted to the SGPMRS landscape architect.

May 7, 2018: Landscape architect prepares SIMON notes for award of Contract No. 18-1922 to Desjardins Bherer, and contacts firms that did not submit a bid.

April 17, 2018: Landscape architect discloses to the Comptroller General's office.

April 19, 2018: Construction contract 5939 startup meeting.

April 24, 2018: Landscape architect prepares Addendum 1 and informs her spouse before it is published. Response of Comptroller General's office to April 17, 2018 disclosure received.

May 2, 2018: Deadline for receipt of bids for Contract No. 18-1922.

May 25, 2018: Division manager sends award of contract letter to Desjardins Bherer.

### Execution of Contract No. 18-1922

May 28, 2018: Contract No. 18-1922 startup meeting.

June 19, 2018: Desjardins Bherer's initial presentation of their concept as part of Contract No. 18-1922. Presentation subsequently sent to landscape architect.

July 5, 2018: Follow-up meeting on finishes as part of Contract No. 18-1922 attended by landscape architect and her spouse, the president of Desjardins Bherer.

June 14, 2018: Professional services agreement for Contract No. 18-1922 signed.

June 20, 2018: Landscape architect contacts external project manager on the subject of the presentation of finishes made the day before by Desjardins Bherer.

January 28, 2019: Adoption of Decision Summary 1185965006 authorizing additional expenditures for the contract resulting from Call for Tenders 5939.