



[This is an English version of the decision originally submitted in French to Montréal's City Council on September 25, 2017]

Recommendation Report Concerning the Awarding of a Contract for the Supply of Vehicle Storage Batteries (Call for Tenders 15-14023 and 16-15500)

(s. 57.1.23 of the Charter of Ville de Montréal)

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SUMMARY

This investigation by the Inspector General of Montréal (the City) concerns the procedure followed by the City which resulted in the awarding of a three (3) -year framework agreement to Uni-Select Québec Inc. (Centre de pièces Gagnon) for the supply of motor vehicle and equipment storage batteries in an amount not to exceed \$1,143,199.11, including taxes (resolution CG16 0706).

The investigation revealed several serious breaches by City representatives when awarding the contract. However, at no time did the companies involved commit any reprehensible acts.

The City's Procurement Department (Service de l'approvisionnement de la Ville de Montréal) launched an initial call for tenders (15-14023) on November 25, 2015, for which the lowest compliant bidder was Power Battery Sales Ltd. (East Penn). As early as January 2016, the Procurement Department informed the East Penn representative that the company would be recommended as the winning bidder and, with the company's agreement, entered into a temporary procurement agreement enabling the City to source batteries from East Penn pending the official awarding of the contract by the decision-making bodies.

However, in February 2016, representatives from the Municipal Shops and Rolling Stock Department (Service du matériel roulant et des ateliers) - the requesting department - indicated that they had reservations about the technical specifications of the call for tenders and the tender submitted by East Penn. They contended that the specifications did not meet their department's needs, although they did articulate them to the Procurement Department representatives while the call for tender documents were being prepared.

A conference call was held with representatives from the City's Municipal Shops and Rolling Stock Department and the Procurement Department in mid-April 2016. At the end of this conference call, it was unanimously decided to terminate call for tenders 15-14023 and to restart the bidding process.

Yet, the investigation showed that the Procurement Department did not cancel call for tenders 15-14023 and decided instead to launch in parallel a new call for tenders (16-15500), without informing East Penn. In fact, East Penn remained awaiting a contract pursuant to call for tenders 15-14023. The Procurement Department led the East Penn representative to believe that the decision-making bodies would award the contract to the company, and, on two occasions, requested an extension of the tendered bid validity period and renewed the temporary procurement agreement. East Penn bid, which was originally valid for a period of one hundred and twenty (120) days, to mid-April 2016, would ultimately be maintained for more than nine (9) months—to September 30, 2016—without the East Penn representative ever being informed that the tendering process had been interrupted.

When questioned as to why call for tenders 15-14023 was not cancelled, the Procurement Department section head stated that, upon discussing the matter with his director, it was deemed preferable to maintain the option of awarding the contract to East Penn in case the lowest price tendered in response to call for tenders 16-15500 was too high and did not suit the requesting department.

Moreover, the investigation revealed that even when East Penn's representative contacted the Procurement Department to inquire about the file's progress, he was misled and kept in the dark about the situation until November 4, 2016, while call for tenders 16-15500 had been launched on August 3, 2016. East Penn's representative was still not aware of the true extent of the situation on November 4, 2016. It was not until December 12, 2016, that the Procurement Department section head informed him that the decision-making bodies had decided to proceed with call for tenders 16-15500.

The facts show that the Procurement Department misled East Penn in its legitimate expectations. The Inspector General concluded that the Procurement Department had acted contrary to the most fundamental requirements of good faith and had failed in its obligation to inform by not keeping the bidder



apprised of major developments concerning the file, thereby permanently compromising the awarding of the contract.

The Inspector General notes that the Procurement Department never indicated the fact that the City had already published call for tenders 15-14023 in the decision summary for call for tenders 16-15500. Thus, the elected officials—the ultimate overseers of contracting process' compliance—were never informed of the situation.

The Inspector General does not believe that free rein can be given to the framework agreement stemming from call for tenders 16-15500, as the circumstances in which it was launched seriously undermine the integrity of tendering process 15-14023 and are not commensurate with the behaviour expected of a municipality.

The Inspector General therefore recommends the termination of the framework agreement entered into with Centre de pièces Gagnon for the supply of storage batteries and the launch of a new tendering process by the Procurement Department.



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1. Scope of work

1.1 *Warning*

Under section 57.1.8 of the *Charter of Ville de Montréal* (CQLR c C-11.4), the Inspector General has the mandate to oversee contracting processes and the carrying out of contracts by the City or by a related legal person.

The Inspector General does not conduct any criminal or penal investigations. It conducts investigations of an administrative nature. Throughout this report, wherever the term “investigation” is used, it means an investigation of an administrative nature and under no circumstances shall it be interpreted as referring to a criminal investigation.

1.2 *Applicable standard of proof*

The Inspector General places upon himself the obligation of delivering quality reports that are timely, objective, accurate and presented in a manner to ensure that the individuals and organizations under his jurisdiction are able to act on the information provided.

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

2. Context of the investigation

2.1 *Contracting process covered by the investigation*

Pursuant to the mandate conferred by the legislator, the Inspector General has conducted an audit of the process followed by the City to award a contract for the supply of motor vehicle and equipment storage batteries.

This contract was covered by two (2) separate calls for tenders launched successively by the City’s Procurement Department (*Service de l’approvisionnement de la Ville de Montréal*) in response to the needs of the City’s Municipal Shops and Rolling Stock Department (*Service du matériel roulant et des ateliers*, hereinafter: “MSRS”).

Call for tenders 15-14023 was launched on November 25, 2015, followed by a new call for tenders (16-15500) published on August 3, 2016, through the Québec government’s electronic tendering system (*Système électronique d’appels d’offres du gouvernement du Québec—SEAO*).

¹ Evidence is sufficient if it renders the existence of a fact more probable than its non-existence (see article 2804 of the *Civil Code of Québec*).



According to a preliminary examination of the file, the Inspector General noted that call for tenders 15-14023 had not been cancelled and that the lowest compliant bidder² was still awaiting the official contract award by the City's decision-making bodies when the second call for tenders was launched and was won by one of its competitors.³

It is in this context that the Office of Inspector General of Montréal (hereinafter: OIG) initiated its investigation. The objective was to understand how two (2) calls for tenders launched for the same purpose could have been active at the same time on SEAO and to shed light on the contracting process followed by the City to ensure compliance with rules governing contract awards.

The investigation revealed serious breaches by the City's representatives that warrant the Inspector General's intervention and that should be brought to the attention of the City Council and the Agglomeration Council, which has jurisdiction over the awarding of the contract.

2.2 Notices to interested parties

Before releasing the results of his investigation, the Inspector General sent each of the parties concerned a Notice to Interested Parties (the "Notice"), in accordance with his duty of procedural fairness.

The two (2) City administrative units involved in the tendering process—the Procurement Department and MSRS—each received a Notice on June 1, 2017, indicating the relevant facts gathered during the Inspector General's investigation to enable them to take cognizance of these facts and provide their comments and representations in writing to the OIG.

The winning bidder for the contract pursuant to call for tenders 16-15500 (*Centre de pièces Gagnon*) and the lowest compliant bidder for call for tenders 15-14023 (East Penn) also received a copy of the Notice. The Inspector General wished to point out that the investigation did not reveal any wrongdoing by these companies, their management or their employees. The Notice was sent to them in view of their status as interested parties to the outcome of the investigation, notably in consideration of the consequences that an intervention by the Inspector General could have on them.

Centre de pièces Gagnon, East Penn and MSRS each contacted the OIG in the days following mailing of the Notice to confirm that they had examined the facts gathered by the administrative investigation and that they had no comments.

² The winning bidder in this instance is Power Battery Sales Ltd., also operating under the name East Penn. This company will be referred to as East Penn in this report.

³ *Uni-Sélect Québec Inc.*, which also operates under the name *Centre de pièces Gagnon*. This company will be referred to as *Centre de pièces Gagnon* in this report.

For its part, the City's Procurement Department sent the Office its written response to the Notice on June 12, 2017. The facts and arguments submitted were considered by the Inspector General and will be addressed in this report.

3. Facts revealed during the investigation

3.1 Call for tenders 15-14023

3.1.1 Context surrounding the launch of call for tenders 15-14023

MSRS is an administrative unit of the City that is responsible for procuring the vehicles required by the City's other units and departments and by the various boroughs, as well as managing the City's vehicle fleet, and overseeing the maintenance and repair of these vehicles.

The purpose of call for tenders 15-14023 was to enter into a framework agreement for the supply of different types of storage batteries required to repair and maintain the City's vehicles and equipment managed by MSRS.⁴

Prior to the launch of call for tenders 15-14023, the most recent framework agreement dated back to 2013. Following call for tenders 12-12454, the City's Agglomeration Council adopted a resolution at that time to award a five (5)-year contract⁵ to the lowest compliant bidder—which was East Penn.

This framework agreement, which is valid until March 2018, allows for the winning bidder to submit a written request for price indexation based on the Industrial Product Price Index (IPPI)⁶ on the agreement anniversary date and in each subsequent year. The IPPI measures price variations for major commodities sold by manufacturers in Canada and is produced by Statistics Canada.

The framework agreement between the City and East Penn ended prematurely, but cordially, in 2015 as Statistics Canada had stopped producing the IPPI specified in the call for tender documents and the parties had failed to come to an agreement on the indexation rate for storage batteries.

The various witnesses met by the OIG explained that the parties had mutually agreed to terminate the contract and that all deemed preferable that the City return to tenders.

⁴ Call for tenders 15-14023, Specific Administrative Clauses, section 1.

⁵ Resolution CG13 0066 dated March 21, 2013. According to the decision summary, the estimated amount of the agreement was just over one million dollars (specifically \$1,021,370.35).

⁶ In call for tenders 12-12454, section 6 of the Specific Administrative Clauses specifies the use of the following IPPI: Table 2-17 – Industrial product price indexes, by commodity and commodity aggregations – Electrical and communication products, Wet cell storage batteries and parts (v53434301).



This is the situation that led to the launch of call for tenders 15-14023.

3.1.2 *Discussions regarding MSRS needs*

The investigation showed that, while not directly involved in drafting the technical specifications for call for tenders 15-14023, MSRS representatives had several discussions with representatives from the City's Procurement Department to determine MSRS's needs with respect to the new call for tenders being launched. This was stated by the MSRS director and one of its division head in interview with the OIG.

The witnesses said that MSRS required the previous call for tender documents (12-12454) to be revised so that call for tenders 15-14023 would include new requirements and better correspond to the new business model in place at MSRS.

The MSRS director confirmed to the OIG that the main objective of the new business model was to boost the department's performance by reducing vehicle downtime due to maintenance activities. He stated that the delivery time for batteries under call for tenders 12-12454 would result in [Translation] "a lot of time lost due to storage, double handling, transportation to MSRS shops, occupational accident risks and breakdowns at a higher total cost to the City."⁷ The framework agreement resulting from call for tenders 12-12454 thus did not meet MSRS's business requirements.

The MSRS director stated that purchased batteries must be picked up at the warehouse and brought to the servicing point where the vehicle is located. He mentioned that the previous framework agreement was particularly inefficient, to the point where, according to him, MSRS was procuring batteries outside of the framework agreement half of the time.

During meetings with the Procurement Department representatives, the MSRS representatives therefore pointed out that it was necessary to include certain requirements in the technical specifications. A MSRS division head told the OIG that he had indicated during these discussions the fact that MSRS wanted the batteries to be delivered within four (4) hours, directly to the City's closes and that the tenderers' prices should include delivery fees.

3.1.3 *Launch of call for tenders 15-14023 and receipt of tenders*

Call for tenders 15-14023 was published through SEAO and in *Le Devoir* daily newspaper on November 25, 2015. To be awarded on the basis of the lowest compliant bidder, the contract resulting from call for tenders 15-14023 would have a term of five (5) years, with a possible extension of two (2) years.

⁷ Letter from the MSRS director to the Office of Inspector General dated April 5, 2017.

Upon the launch of call for tenders 15-14023, the City procurement officer responsible for the file sent an email on November 27, 2015, to several companies that might be interested in the call for tenders, including East Penn. The purpose of this email was to inform the companies of the call for tenders 15-14023 and the submission deadline. The Procurement Department had previously used this strategy to [Translation] “help the City obtain the maximum number of competitive and profitable bids.”⁸

As regards the content of the tender documents, Section 15 of the Specific Administrative Clauses of call for tenders 15-14023 deals with order delivery deadlines:

15. Délai de livraison

Le délai de livraison exigé par la Ville est de cinq (5) jours ouvrables pour les commandes de réapprovisionnement inventaire ou d'achat direct régulier. Aucun frais de livraison ne pourra être ajouté à la facture pour ces commandes.

Par exception et sur demande d'un représentant de la Ville, l'adjudicataire devra traiter et livrer des commandes à délai rapide (moins de quatre (4) heures). Dans ce cas, l'adjudicataire pourra alors facturer des frais de livraison selon le prix unitaire indiqué à l'article 52, du bordereau de soumission.

Le soumissionnaire doit indiquer le délai de livraison auquel il s'engage à compléter la livraison des marchandises à l'endroit prévu à cette fin à la page des renseignements complémentaires.

The technical specifications of call for tenders 15-14023 thus provided for two (2) types of battery orders that MSRS could place with the winning bidder:

- “Inventory replenishment” or “direct regular orders” to be delivered within five (5) business days for which no delivery charges may be added; and
- “fast-turnaround orders” deliverable within four (4) hours for which the winning bidder may bill delivery charges in accordance with the unit prices indicated in its bid form.

In the bid form to be completed and returned, bidders had to specify their agreed delivery time for “inventory replenishment” and “fast-turnaround orders.”

9. Délais de livraison :

Veillez nous confirmer vos délais de livraison :

Délais pour les commandes de réapprovisionnement inventaire ou d'achat direct régulier, sans frais de livraison :
_____ jours civils

Délais pour les commandes à délais rapide avec frais de livraison : _____ heures

⁸ This is indicated in the draft decision summary prepared for call for tenders 15-14023 (1165983001).



As can be seen from the excerpt reproduced below, the bid form reiterated that fast-turnaround orders must be delivered within four (4) hours. The form indicated that four hundred (400) fast-turnaround orders were to be expected for the contract term. Moreover, addendum 1 of December 11, 2015 stated that the maximum number of batteries to be supplied for fast-turnaround orders would be three (3) per purchase order.

No. article	Description	(A) Qté unitaire prévisionnelle	(B) Prix unitaire	(C) = (A) X (B) Montant total
52	Frais de transport pour des commandes à délai rapide (moins de quatre (4) heures)	400		0,00 \$

As for the delivery points, Section 19 of the Specific Administrative Clauses of call for tenders 15-14023 stated that deliveries would be made [Translation] “upon request and according to need, to various locations within City limits in accordance with the delivery instructions indicated on the purchase order”. A list of twenty-five (25) possible delivery addresses was attached to the tender documents.

The bids received by the City in response to call for tenders 15-14023 were opened on December 21, 2015. A total of five (5) bids were submitted. As indicated in the notes on the comparative price chart prepared by the procurement officer in charge of the file, all the bids received were declared compliant.

Of the bids received, that of East Penn—for \$980,944.48—was the lowest. The draft decision summary for call for tenders 15-14023 (1165983001) confirmed the bid from East Penn to be the lowest and was deemed acceptable further to technical and administrative analysis.

3.1.4 Temporary procurement agreement and extension of East Penn bid's validity period

On January 15, 2016, the procurement officer responsible for the file announced in an email to a representative of East Penn that the company would be recommended as the winning bidder for the contract resulting from call for tenders 15-14023. Although his email did not confirm the official contract award, it noted that the [Translation] “firm is on the right track.”⁹

In the same email, the procurement officer asked the East Penn representative whether he would object to a temporary agreement pending the official awarding of the contract, so that MSRS could begin procuring batteries from East Penn at the price indicated on its bid form. The call for tender documents allowed the City to issue a “servicing agreement”

⁹ Moreover, the last page of the comparative price chart prepared by the procurement officer in charge of the file bore the note [Translation] “recommended bidder” next to East Penn’s column.

from the opening of bids to the start of the contract validity period following a resolution by the governing body.¹⁰

The same day, the East Penn representative replied to the procurement officer that he had no objection to creating a temporary procurement agreement. Such an agreement was thus signed by East Penn and the City for the supply of storage batteries. The agreement was valid from January 26, 2016, to March 24, 2016, and allowed a total maximum billing of \$21,743 pending the official awarding of the contract by the decision-making bodies.

The Procurement Department section head told the OIG that he planned to have the awarding of the contract stemming from call for tenders 15-14023 approved by the decision-making bodies either in late February or early March 2016.

However, the contract stemming from call for tenders 15-14023 had still not been awarded to East Penn at the end of March 2016. The call for tender documents require that the bids submitted by companies be valid for one hundred and twenty (120) days after the bid opening date.¹¹ As this period was about to expire on March 31, 2016, the procurement officer contacted the East Penn representative by email to request an extension of the validity period of the company's bid to June 24, 2016. In his email, the procurement officer again confirmed that the [Translation] "steps required to obtain a resolution to award the contract will be pursued following receipt of a positive response."¹²

On April 4, 2016, the East Penn representative acquiesced to the procurement officer's request and agreed to maintain the offer submitted by the company in response to call for tenders 15-14023 in its entirety, until June 24, 2016. A new temporary procurement agreement, valid from April 5 to June 24, 2016, was signed by East Penn and the City pending the official awarding of the contract, as the old one had expired on March 24.

3.2 Decision by the City to relaunch the tendering process

3.2.1 Receipt of East Pen bid by MSRS representatives

When he met with the OIG, the MSRS division head in charge of the file explained that he received the East Penn bid documents in February 2016. According to him, this was the first time he saw the specifications. He stated that he then noted the needs expressed by MSRS to the Procurement Department (fast-turnaround order times, delivery of batteries directly to City shop facilities and inclusion of delivery charges in prices) had not been integrated into the specifications.

¹⁰ Call for tenders 15-14023, Specific Administrative Clauses, section 10.

¹¹ Call for tenders 15-14023, Specific Administrative Clauses, section 3.

¹² Letter dated March 31, 2016, emailed to the procurement officer in charge of the file and addressed to the East Penn representative.



The MSRS division head indicated that he did not wish to move forward with call for tenders 15-14023 as the bid received did not meet with his department's requirements. This version of the facts was confirmed by the MSRS director in the letter dated April 5, 2017, sent to the OIG. In this letter, he noted that following receipt of the bid from the selected supplier, they realized that their needs had not been taken into account in call for tenders 15-14023 and stressed that the [Translation] "four-hour delivery time and delivery to our shop facilities had not been taken into consideration."

For his part, the Procurement Department section head recounted that when the time came to prepare the file to be presented to the decision-making bodies responsible for awarding the contract to East Penn, the MSRS representatives said that "it did not suit them", that the information listed on the bid form did not meet the needs of the department in terms of expected fast-turnaround order quantities—it was too low in their opinion.

The specifications for call for tenders 15-14023 provided for two (2) types of orders that MSRS could lodge with the prospective awardee: "Inventory replenishment or direct regular orders" and "fast-turnaround orders." For the latter type of order, the tender documents stipulated that batteries were to be delivered within four (4) hours, in accordance with the requirements specified by MSRS. The bid form indicated that four hundred (400) fast-turnaround orders were to be expected for the contract term and the addendum issued on December 11, 2015 specified that a maximum of three (3) batteries would be requested for each fast-turnaround order.

However, the Inspector General noted that in the bid form submitted by East Penn, the company undertook to deliver batteries for fast-turnaround orders in a five (5)-hour delay. Here is the excerpt from East Penn's bid form:

9. Délais de livraison :

Veillez nous confirmer vos délais de livraison :

Délais pour les commandes de réapprovisionnement inventaire ou d'achat direct régulier, sans frais de livraison :
_____ 5 _____ jours civils

Délais pour les commandes à délai rapide avec frais de livraison : _____ 5 _____ heures

The procurement officer in charge of the file noticed that the information on the bid form submitted by East Penn did not meet the requirements of the tender documents. On January 15, 2016, he even asked the East Penn representative if they could respect the maximum four (4)-hour turnaround time specified in the tender documents for fast-turnaround orders. This request was made by email on January 15, 2016 and the East Penn representative replied that they agreed to comply with the four (4)-hour turnaround time. Following this email, a temporary procurement agreement was made pending the official awarding of the contract.

When confronted by the OIG on the fact that East Penn had agreed to process fast-turnaround orders within four (4) hours, the MSRS representatives explained that the question of delivery times was not the only element that did not meet MSRS requirements. The matter of delivery charges also concerned them, as East Penn added these charges

to the battery cost while MSRS wanted bidders to submit all-in pricing that included delivery.

The Inspector General wishes to emphasize that on March 31, 2016, after MSRS representatives had looked at the specifications and East Penn bid, the procurement officer in charge of the file asked an East Penn representative to extend the company's bid validity period to June 24, 2016, without informing them of the resistance expressed by MSRS concerning their bid.

3.2.2 Conference call of April 12, 2016

Ten (10) days after East Penn had been asked to extend the bid validity period, a conference call was held to make a decision concerning call for tenders 15-14023. This conference call took place at 1:30 p.m. on April 12, 2016, and involved the MSRS director and division heads as well as the Procurement Department director and section head.

The witnesses who took part in this conference call confirmed to the OIG that the discussion lasted approximately one (1) hour. They indicated that this was a "rather heated" call during which the MSRS representatives made it clear to the Procurement Department representatives that they did not wish to proceed with call for tenders 15-14023 as it did not meet the needs that had been indicated on repeated occasions to the Procurement Department prior to launching the call for tenders.

When he met with the OIG, the MSRS division head responsible for the file stated that the Procurement Department representatives questioned their needs, while MSRS relied on past experience and the inefficiency of the previous framework agreement. He noted that the Procurement Department representatives warned the MSRS representatives during the conference call about the additional delay that would result as well as the risk of closing the market and ending up with higher prices if the decision was made to restart the contracting process.

For his part, the Procurement Department section head stated that the MSRS representatives were categorical in their desire to go back to tenders. He added that he pointed out to the MSRS representatives that they were not bound to the fast-turnaround orders forecast indicated on the bid form and that they could obtain a higher number of deliveries without having to return to tenders. The section head also confirmed that the Procurement Department's primary concern was that tendered prices were likely to be higher if the contract awarding process was restarted.

Despite the warnings of the Procurement Department representatives, the MSRS representatives persisted in their desire to go back to tenders. In this respect, the MSRS director maintained that, during the conference call, his department's representatives informed the Procurement Department representatives that if they proceeded with call for tenders 15-14023, they would not use the framework agreement and would order batteries from other suppliers.

The witnesses met unanimously confirmed that at the end of the conference call the decision was made to restart the tendering process for the procurement of storage



batteries. The Procurement Department director then confirmed to the MSRS representatives that he would terminate call for tenders 15-14023 and issue a new one.

3.2.3 Second request to extend East Penn bid's validity period to June 23, 2016

On June 23, 2016—more than two (2) months after the conference call that led to the decision to terminate call for tenders 15-14023—the East Penn representative attempted to follow up with the procurement officer to inquire about the file's progress. The temporary procurement agreement between East Penn and the City was set to expire the next day, on June 24, 2016. In his email, the East Penn representative specifically asked, [Translation] “Have there been any developments regarding the official awarding of the contract?”¹³

As the procurement officer in charge of the file was on vacation and had been transferred to another City department, call for tenders 15-14023 was assigned to another procurement officer. In response to the request for information received on June 23, 2016, the new procurement officer sent the East Penn representative a new request to extend, to September 30, 2016, the validity period of the bid submitted by the company in response to call for tenders 15-14023. This was the second such request.

The extension request sent to the East Penn representative stated that the [Translation] “steps required to obtain a resolution to award the contract will be pursued following receipt of a positive response”¹⁴ and required an answer from the company that same day.

As he was out of the office on June 23, 2016, and due to the Québec national holiday, the East Penn representative asked the procurement officer if he could send the response upon his return to the office on June 27, 2016. The procurement officer wrote back that he could send his response on June 27, 2016, but should date it June 23. Thus, the East Penn representative sent his acceptance of the extension request on June 27, 2016, backdated to June 23.

The bid submitted by East Penn on December 21, 2015, in response to call for tenders 15-14023 was thus fully maintained until September 30, 2016, and a new temporary procurement agreement was made to enable MSRS to make purchases from East Penn pending the official awarding of the contract. This agreement was valid from July 15 to September 30, 2016.

Therefore, the East Penn representative with whom the Procurement Department had been in contact was not advised that a new call for tenders would be launched by the City and that call for tenders 15-14023, with which he was involved and which he believed to be in progress, would be consequently cancelled.

¹³ June 23, 2016 email from the East Penn representative to the procurement officer in charge of the file.

¹⁴ Letter dated June 23, 2016, emailed to the procurement officer in charge of the file and addressed to the East Penn representative.

When he met with the OIG, the Procurement Department section head confirmed that when his department asked the East Penn representative to extend the validity period of the company's bid, the latter had not been informed of the City's decision to terminate the contracting process that was already underway.

3.3 Call for tenders 16-15500

3.3.1 Launch of call for tenders 16-15500

As agreed by MSRS and the Procurement Department during the April 12, 2016 conference call, a new call for tenders number 16-15500 was published through SEAO and *Le Devoir* daily newspaper on August 3, 2016.

Call for tenders 16-15500 had exactly the same purpose as call for tenders 15-14023—i.e. to enter into a framework agreement for the supply of different types of storage batteries required to repair and maintain the City's vehicles and equipment managed by MSRS.¹⁵

However, the term of the contract stemming from this new call for tenders differed from the previous one. This time, the contract to be awarded to the lowest compliant bidder would have a term of three (3) years, with a possible extension of two (2) years.¹⁶

Unlike for call for tenders 15-14023, an MSRS division head confirmed to the OIG that he had looked at the specifications for call for tenders 16-15500 before it was published to review it and ensure that all of his department's requirements had been taken into account.

The documents for call for tenders 16-15500 contained the following provisions for delivery times:

18. Délai de livraison et cueillette

Le soumissionnaire doit indiquer le délai de livraison auquel il s'engage à compléter la livraison des marchandises à l'endroit prévu à cette fin à la page des renseignements complémentaires. Ce délai sera effectif à compter de la date de la réception du bon de commande émis par la Ville.

Demandes régulières (sans frais de livraison)

L'adjudicataire doit être en mesure d'exécuter une livraison à l'intérieur de sept (7) jours pour les commandes de réapprovisionnement inventaire.

Demandes régulières (avec frais de livraison)

L'adjudicataire doit être en mesure d'exécuter une livraison pour les commandes régulières (hors inventaire) dans un délai de quatre (4) heures suivant la date et l'heure de réception du bon de commande par l'adjudicataire.

L'adjudicataire doit noter sur le bon de livraison et la facture le nom de l'acheteur, la date et l'heure de livraison.

Cueillettes

Les articles peuvent faire l'objet de cueillette par des employés de la Ville. À cette fin, le soumissionnaire doit dresser la liste des points de vente qui faciliteront le déplacement d'un requérant pour la cueillette des marchandises.

¹⁵ Call for tenders 16-15500, Specific Administrative Clauses, section 1.

¹⁶ Call for tenders 16-15500, Specific Administrative Clauses, sections 5, 6 and 10.



Therefore, there are still two (2) types of battery orders involving delivery:

- “regular orders (no delivery charges)” for inventory replenishment, to be delivered within seven (7) business days and for which no delivery charges may be added; and
- “regular orders (with delivery charges)”, which are extra-inventory orders, to be delivered within four (4) hours and for which the winning bidder may bill delivery charges based on the unit prices indicated in its bid form.

As was the case with the documents for call for tenders 15-14023, the bid form for call for tenders 16-15500 required bidders to specify the delivery times with which they agreed to comply for both types of orders:

9. Délais de livraison :

À titre informatif, veuillez nous spécifier votre délai de livraison à compter de la date de réception de la commande pour :

Une commande réapprovisionnement inventaire : _____

Une commande régulière : _____

However, the forecast quantity indicated on the bid form of call for tenders 16-15500 is markedly higher than that which appeared on the bid form of call for tenders 15-14023. For a contract with a three (3)-year term, the new tender documents indicate an estimated one thousand six hundred (1,600) orders to be processed within a four (4)-hour timeframe (compared to four hundred (400) orders for a five (5)-year contract under call for tenders 15-14023):

No. article	Description	(A) Qté unitaire prévisionnelle (36 mois)	(B) Prix unitaire	(C) = (A) X (B) Montant total
50	Frais de transport pour des commandes à délai rapide (moins de quatre (4) heures)	1 600		0,00 \$

As for the batteries’ delivery points, similarly to call for tenders 15-14023, section 23 of the Specific Administrative Clauses of call for tenders 16-15500 stated that battery deliveries are to be made [Translation] “upon request and according to need, to various locations within City limits in accordance with the delivery instructions indicated on the purchase order”. A list of possible delivery addresses was attached to the tender documents. The only difference: the appendix categorizes addresses into “primary delivery addresses (80%)” and “secondary delivery addresses (20%).”

Call for tenders 16-15500 identifies a total of twenty-six (26) delivery addresses—one more than call for tenders 15-14023.¹⁷ Of these twenty-six (26) addresses, twenty-three (23) were already listed as delivery addresses in call for tenders 15-14023. The three (3) different addresses identified in call for tenders 16-15500 are listed as secondary delivery addresses. In other words, all the primary delivery addresses were already included in call for tenders 15-14023.

One last difference from call for tenders 15-14023: in call for tenders 16-15500, the City kept the option of returning periodically excess parts from its inventory to the supplier without restocking fees.¹⁸

3.3.2 Decision by the Procurement Department not to cancel call for tenders 15-14023

As indicated previously, MSRS and the Procurement Department decided, on April 12, 2016, to relaunch the tendering process. Yet, the investigation conducted by the OIG revealed that the City's Procurement Department did not cancel call for tenders 15-14023 until January 23, 2017.

When questioned on this subject by the OIG, the Procurement Department section head stated that call for tenders 15-14023 had not been cancelled on SEAO as, upon discussing the matter with his director, it was deemed preferable to maintain the option of awarding the contract to East Penn in case the lowest price tendered in response to call for tenders 16-15500 was too high and did not suit MSRS. MSRS would thus have had the opportunity to choose between the lowest bidder for call for tenders 15-14023 and the lowest bidder for call for tenders 16-15500.

The Procurement Department section head explained that he thought that when MSRS representatives would see the prices submitted in response to the new call for tenders, they would reconsider and want to avail themselves of the price submitted by East Penn in response to call for tenders 15-14023.

3.3.3 Results of call for tenders 16-15500

Bids received in response to call for tenders 16-15500 were opened on August 31, 2016. A total of just two (2) bids were submitted, and that of *Centre de pièces Gagnon*—in the amount of \$1,143,199.11—was the lowest compliant bid.

East Penn did not submit a bid in response to call for tenders 16-15500. The East Penn representative questioned by the OIG about the reason why the company did not bid replied that the company had not seen the publication of the new call for tenders through

¹⁷ Eight (8) of them are identified as primary addresses, while eighteen (18) are classified as secondary delivery addresses.

¹⁸ Call for tenders 16-15500, Specific Administrative Clauses, section 19.



SEAO. He explained that East Penn was awaiting the official awarding of the contract stemming from call for tenders 15-14023, that the company had agreed to extend the bid validity period to September 30, 2016, and had entered into a temporary procurement agreement, and that everything led him to believe that the contract would eventually be awarded to East Penn.

The East Penn representative pointed out that there was therefore no reason to monitor SEAO to see whether a call for tenders would be launched. He stated that he usually makes a note in his agenda when contracts are about to expire to ensure that a bid is made, but as call for tenders 15-14023 was underway, he did not believe a new call for tenders would be published.

The East Penn representative also added that the Procurement Department had informed him when call for tenders 15-14023 was launched. He did not understand then why he was not informed of the fact that call for tenders 15-14023 had been cancelled and the process restarted. There was a genuine sense of bewilderment.

Incidentally, it is useful to recall here that there was nothing on SEAO to indicate that call for tenders 15-14023 had been cancelled and that a new solicitation had been undertaken.

The East Penn representative was surprised to find out that the delivery time criterion for fast-turnaround orders led to the issue of the new call for tenders and the cancellation of call for tenders 15-14023. He noted that East Penn is a battery manufacturer that generally offers next-day delivery and that the company had reached an agreement with a courier service to meet the four (4)-hour delivery requirement for fast-turnaround orders.

When he met with the OIG, the Procurement Department section head said that he believed it was East Penn's responsibility to check on SEAO whether a call for tenders had been issued. He stated that he saw when opening the bids that East Penn had not submitted a tender, but contented that the company should have noticed the publication of the new call for tenders through SEAO.

When confronted with the fact that his department did not think to advise bidders of call for tenders 15-14023 that a new call had been issued, the Procurement Department section head pointed out that procurement officers do not call suppliers to tell them that a call for tenders has been published through SEAO. However, this was done when call for tenders 15-14023 was launched. Moreover, the section head provided a different explanation in his response to the Notice. He stated that East Penn did not receive a notice of call for tenders 16-15500 publication through SEAO because there had been a change of procurement officer.

3.4 Repeated and unsuccessful attempts by East Penn to inquire about the outcome of call for tenders 15-14023

More than ten (10) months after the opening of bids for call for tenders 15-14023, the East Penn representative had yet to from the City concerning the expected contract award. On October 31, 2016, he sent an email to the procurement officer in charge of the file, as the

validity period of East Penn's bid had expired on September 30, following two (2) requests for extension by the Procurement Department.

In his email, the East Penn representative asked whether there had been any developments regarding the file. A few days later, on November 4, 2016, the procurement officer confirmed that the extension had expired and indicated that the City was evaluating bids received in response to call for tenders 16-15500.

As he did not understand the situation, the East Penn Canada representative contacted the procurement officer again, who then referred him to his boss—the Procurement Department section head.

The East Penn representative explained to the OIG that he had tried to reach the section head by phone, without success. As he could not leave a message in his voice mail, which did not appear to be functioning, he wrote him an email on November 7, 2016 to inquire about the situation. In particular, he sought to understand why call for tenders 15-14023, for which East Penn had been awarded a temporary procurement agreement, had apparently been replaced by call for tenders 16-15500, while call for tenders 15-14023 still indicated [Translation] “Pending contract conclusion” on the SEAO website.

The following day, on November 8, he sent another email to the Procurement Department section head as he still had not heard anything. On November 9, 2016, the Procurement Department section head replied that he would contact him [Translation] “without fail”¹⁹ the next day.

However, the East Penn representative had still not received any call by November 11, 2016. He sent another email to the section head and finally got a call back in the afternoon.

The East Penn representative told the OIG that the Procurement Department section head had informed him of the fact that MSRS wanted battery deliveries to be made in a shorter timeframe—within three (3) hours. The section head told the OIG that he had explained the situation regarding call for tenders 15-14023 to the East Penn representative and that the directors would make a decision. He agreed to inform him of the decision.

The Procurement Department section head then attempted to justify to the OIG the reason why the City had chosen to proceed with call for tenders 16-15500. According to his initial account, East Penn had apparently withdrawn from the bidding process. Indeed, the section head stated that he did not feel comfortable asking the East Penn representative to further extend the company's bid validity period pending management's decision. He claimed that the East Penn representative thus gave up the process and said [Translation] “Well, then I'll end this here,” indicating that the company would modify its prices given that there was no longer a temporary procurement agreement in effect and the bid submitted for call for tenders 15-14023 was no longer valid. It is in this context that the

¹⁹ Email dated November 9, 2016, from the Procurement Department section head to the East Penn representative.



section head produced the file so that the decision-making bodies could award the contract to *Centre de pièces Gagnon*, the lowest bidder for call for tenders 16-15500.

However, the investigation revealed another version of the events. Conversely, the Procurement Department section head told the OIG that he had sent MSRS the price submitted by the lowest bidder for each of the calls for tenders to show the difference between prices and to allow MSRS to choose a bidder. He reiterated that MSRS was ultimately able to choose whatever price suited it.

The East Penn representative sent an email to the Procurement Department section head on December 6, 2016 to inquire about the status of the file, as he had not heard anything since November 11:

Suite à notre conversation téléphonique du 11 novembre dernier, vous deviez me recontacter pour me donner des nouvelles quant à l'avancement de ce dossier. Je suis toujours en attente. Pouvez-vous svp communiquer avec moi pour faire le point?

[Translation] “Further to our telephone conversation on November 11, you were to contact me again to inform me on the progress of the file. I am still waiting. Could you please communicate with me to review the situation?”

It was not until December 12, 2016 that the Procurement Department section head informed the East Penn representative of the fact that the City’s decision-making bodies were going to award the contract to another company, as [Translation] “management has decided to go ahead with the new call for tenders.”²⁰

On December 22, 2016, the City’s Agglomeration Council adopted a resolution to enter into a new three (3) -year framework agreement with *Centre de pièces Gagnon* for a maximum amount of \$1,143,199.11, taxes included.²¹

The procurement officer informed the East Penn representative on January 16, 2017, in a letter sent by fax, that call for tenders 15-14023 had been cancelled [Translation] “following changes concerning the City’s requirements.”²² However, the cancellation of call for tenders 15-14023 was not officially published through SEAO until January 23, 2017.²³

²⁰ Email dated December 12, 2016, from the Procurement Department section head to the East Penn representative.

²¹ CG16 0706.

²² Letter dated January 16, 2017, emailed to the procurement officer in charge of the file and addressed to the East Penn representative.

²³ This is the cancellation date indicated in SEAO.

4. Applicable principles

This file provides the Inspector General with an opportunity to restate certain principles applicable to contracting via a public call for tenders—particularly with respect to the obligations incumbent upon a public client. The following sections of the report will thus deal with these principles and enable the Inspector General to make observations and recommendations on the case under study.

4.1 Formation of a contract following a call for tenders

According to constant jurisprudence which has been reiterated on several occasions by the Supreme Court of Canada and upheld over the years by the courts of Québec, a public tendering process potentially leads to two (2) contracts in distinct stages of the process. These contracts are commonly referred to as Contract A and Contract B.

First, upon presentation of bids in response to a call for tenders, a contractual relationship may be established between the client and each of the bidders that submitted an offer to contract.²⁴ This is the formation of Contract A, which is a preliminary contract to the contract to be awarded at the end of the tendering process.

A bid accepted by the public client results in the formation of Contract B, which is the contract for procurement, services or construction.²⁵ The formation of Contract B with the winning bidder of the call for tenders ends the contractual relationship established between the client and each of the other bidders pursuant to Contract A.²⁶

The Supreme Court has stated that “whether or not Contract A arose depends upon whether the parties intended to initiate contractual relations by the submission of a bid in response to the invitation to tender.”²⁷ The Court concluded that such intention exists when the client solicits bids through an official tendering process comprising documentation and complex conditions and: 1) when the client offers to examine bids with a view to entering

²⁴ *The Queen (Ont.) v. Ron Engineering*, [1981] 1 S.C.R. 111, pp. 122–123; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, para 19; *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69; *Canada (Procureur général) c. Constructions Bé-Con Inc.*, 2013 QCCA 665, para 31.

²⁵ *The Queen (Ont.) v. Ron Engineering*, [1981] 1 S.C.R. 111, pp. 122–123; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619.

²⁶ *Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] 1 S.C.R. 116.

²⁷ *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, para 23; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69, para 17.



into Contract B, and 2) the bidder accepts this offer by submitting a bid as valid consideration.²⁸

Although this is not a procurement, services or construction contract covered in the tender documents, Contract A creates certain obligations for the client and bidders which are separate from the obligations stemming from Contract B.²⁹ The obligations set out in Contract A are governed by the terms and conditions stipulated in the tender documents, as well as the statutory provisions applicable to the public organization involved, as required.³⁰

However, the courts also recognize that Contract A entails certain implicit obligations for the client. The competition induced by the tendering procedure requires the bidders to devote time, effort and money to prepare a bid in accordance with the technical specifications in a context of unforeseeable competition and uncertainty as to whether they will be awarded Contract B.³¹ Thus, the client's implicit obligations under Contract A include accepting only bids that are compliant with the tender documents and treating bidders fairly and equitably.³²

Recently, in the matter *Minibus Paquin Inc. c. Dessercor Inc.*, the Court of Appeal of Quebec confirmed that the client must also act in good faith under Contract A, with respect to the obligations incumbent upon it during the call for tenders, and upon the filing, opening and examination of bids, and the decision whether or not to select a bid.³³ Moreover, in 2003, in the matter *Confédération des caisses populaires et d'économie Desjardins du*

²⁸ *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, para 23.

²⁹ *Id.*, para 19.

³⁰ *Inter-Cité Construction Itée c. Québec (Procureure générale) (Ministère des Transports)*, 2015 QCCS 4365, para 18, submitted for appeal, October 5, 2015.

³¹ *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, para 41.

³² *The Queen (Ont.) v. Ron Engineering*, [1981] 1 S.C.R. 111; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69; *3051226 Canada Inc. c. Aéroports de Montréal*, 2008 QCCA 722, Application for leave to appeal to the Supreme Court denied, October 9, 2008, No. 32687, para 51; *Confédération des caisses populaires et d'économie Desjardins du Québec c. Services informatiques Decisionone*, 2003 CanLII 29394 (QCCA), para 50.

³³ *Minibus Paquin Inc. c. Dessercor Inc.*, 2014 QCCA 921. The Court of Appeal overturned the lower court decision (2013 QCCS 1921) and quoted with approval paragraph 14 of this decision. See also: *MYG Informatique Inc. c. Commission scolaire René-Lévesque Inc.*, 2006 QCCA 1248.

Québec c. Services informatiques Decisionone,³⁴ the Court of Appeal wrote the following with respect to good faith:

[Translation] “The call for tenders therefore results in two separate contracts that must each comply with the same rules regarding their validity and **respect the new legal provisions incorporated in the *Civil Code of Québec* which deal with the important role of good faith in the freedom to contract.**”

[Boldface added]

4.2 *Whys and wherefores of the client’s obligation of good faith*

In a recent decision concerning the cancellation of a call for tenders by a public client, Judge Brossard of the Superior Court rendered an in-depth analysis of the whys and wherefores of the client’s obligation of good faith under Contract A. This is the decision rendered on September 21, 2015, in *Inter-Cité Construction Itée c. Québec (Procureure générale) (Ministère des Transports)*.³⁵

In the opinion of the Inspector General, a careful study of this decision is necessary as the information contained therein and its application are highly relevant to the case under study.

In this matter, the *Ministère des Transports du Québec* (hereinafter “MTQ”) had issued a call for tenders for construction work. Five (5) months after the opening of the bids and after a long period of communications—at times sporadic and at times more frequent—with the lowest compliant bidder, the MTQ informed the contractor that it was cancelling the call for tenders. The reason it gave was its inability to obtain within the deadlines certain federal authorizations necessary to carry out the project. The contractor submitted a claim for damages to the Superior Court to recoup expenses incurred in preparing its bid and the costs arising from having to keep personnel and machinery assigned to the project on standby.

At the end of his analysis, Judge Brossard ruled in part in favour of the contractor and ordered the MTQ to pay damages in the amount of \$1.3 million. He concluded that, despite the fact that Contract B had not been formed, the MTQ failed in its implied duty of good faith stemming from Contract A and committed a breach that resulted in liability.

Judge Brossard reiterated upfront that pursuant to sections 6, 7 and 1375 of the *Civil Code of Québec*, good faith is [Translation] “a general principle of contract law that forms the

³⁴ 2003 CanLII 29394 (QCCA), para 54.

³⁵ 2015 QCCS 4365, submitted for appeal, October 15, 2015. The outcome of the appeal was not known at the time of writing.



basis of all contracts.”³⁶ Legal doctrine also affirms that the duty of good faith in contractual relationships aims to instill a certain contractual morality.³⁷

Various duties applicable to Contract A stem from the general principle of good faith. These include the duty of **cooperation**, **information** and **consistency**, which aim to avoid frustrating the legitimate expectations of a co-contractor and create a climate of trust for contractual relationships.³⁸

Referring to the teachings of the Supreme Court of Canada in *Bank of Montreal v. Bail Ltée*,³⁹ Judge Brossard restated the principal elements of the duty to inform:

[Translation] “The primary elements of the duty to inform are the cognizance, real or presumed, of the information by the debtor, the critical nature of the information, and the creditor’s inability to inform itself or its legitimate confidence in the debtor. This duty to inform imposes a positive obligation to inform, in the event that a party finds itself in a vulnerable information position. Moreover, the information provided must be complete.

While this may appear to be evident, it should be noted that the information provided must be accurate and not contain false information.”⁴⁰

As to duty of consistency, Judge Brossard explained that the parties must act in keeping with the legitimate expectations created by the contractual relationships. The parties may therefore not act in contradiction to these expectations by misleading its co-contractor using its legitimate trust or by creating false expectations, as this would be contrary to good faith requirements.⁴¹

³⁶ *Inter-Cité Construction ltée c. Québec (Procureure générale) (Ministère des Transports)*, 2015 QCCS 4365, para 95, submitted for appeal, October 15, 2015.

³⁷ Jean-Louis BAUDOIN and Pierre-Gabriel JOBIN, *Les obligations*, 7th ed., P.G. JOBIN and Nathalie VÉZINA, Cowansville, Éditions Yvon Blais, 2013, para 127.

³⁸ *Inter-Cité Construction ltée c. Québec (Procureure générale) (Ministère des Transports)*, 2015 QCCS 4365, paras 96–98, submitted for appeal, October 15, 2015. The judge cited in this regard: Jean-Louis BAUDOIN and Pierre-Gabriel JOBIN, *Les obligations*, 7th ed., P.G. JOBIN and Nathalie VÉZINA, Cowansville, Éditions Yvon Blais, 2013, para 155; *Confédération des caisses populaires et d'économie Desjardins du Québec c. Services informatiques Decisionone*, 2003 CanLII 29394 (QCCA), para 61;

³⁹ [1992] 2 S.C.R. 554.

⁴⁰ *Inter-Cité Construction ltée c. Québec (Procureure générale) (Ministère des Transports)*, 2015 QCCS 4365, paras 101–102, submitted for appeal, October 15, 2015.

⁴¹ *Id.*, para 103. The judge cited in this regard: *Hydro-Québec c. Construction Kiewit cie*, 2014 QCCA 947, para 92.

In applying these principles, Judge Brossard asserted that at several stages of the tendering process, from progression to cancellation, the MTQ did not act in a manner consistent with good faith requirements as it did not behave in a reasonable and acceptable manner in the circumstances. Indeed, the tender documents indicated that the MTQ had the environmental authorizations for the activities planned in the contract.

The judge thus concluded that the MTQ failed to fulfil its duty to inform the bidders when it launched the call for tenders, and that it had misled them by creating false expectations and breaching their legitimate trust—as they were not in a position to verify the approvals the MTQ had to obtain for the project nor were they able to confirm whether the MTQ had obtained such approvals.⁴²

Judge Brossard subsequently noted that from the time of the opening of the bids to the cancellation of the call for tenders five (5) months later, the MTQ had failed to fulfil its duties of information, cooperation, consistency and transparency to the lowest bidder.⁴³ First of all, it did not promptly inform it that it did not have the required federal authorizations, while the contractor was expecting it would be awarded the contract quickly so that it could start the work.⁴⁴ The judge stressed that the situation was further aggravated by the fact that the MTQ remained silent and waited for the contractor to contact it before it revealed it had difficulty obtaining the requisite authorizations—and even then, the MTQ downplayed the seriousness of the difficulties and potential delays.⁴⁵ The judge also pointed out that when the MTQ became aware that it would not receive the approvals in time to meet the project timetable, certain discussions were held internally regarding the opportuneness to cancel the call for tenders while leaving the lowest bidder in the dark about the situation.⁴⁶ When contacted by the contractor, the MTQ made no mention of the difficulties it was having and let it be believed that the authorizations would be received in the weeks that followed.⁴⁷ In Judge Brossard's opinion, the MTQ had a duty to share with the contractor information that rendered it impossible to perform the contract in accordance with its bid, particularly as the contractor was maintaining a state of readiness so that it could begin the work at any time.⁴⁸

The MTQ waited for the validity period of the contractor's bid to expire before informing it that the work would begin later than originally expected—but even then, it did not advise the contractor of the difficulty it was having in obtaining the approvals that could result in

⁴² *Inter-Cité Construction Itée c. Québec (Procureure générale) (Ministère des Transports)*, 2015 QCCS 4365, paras 130–135, submitted for appeal, October 15, 2015.

⁴³ *Id.*, para 139.

⁴⁴ *Id.*, paras 140–141.

⁴⁵ *Id.*, paras 142–143.

⁴⁶ *Id.*, paras 145–148.

⁴⁷ *Id.*, paras 148–149.

⁴⁸ *Id.*, paras 147–148.



the cancellation of the call for tenders.⁴⁹ The MTQ took another three (3) months from the expiration of the bid validity period before cancelling the call for tenders.

Judge Brossard concluded that the MTQ's actions toward the lowest bidder went [Translation] "against the requirements of good faith, as it continued to the very end to thwart the lowest bidder's legitimate expectations instead of demonstrating transparency and cooperation."⁵⁰ The judge noted that when a client fails to meet one of its implied duties under Contract A, the absence of bad faith or malicious intent cannot be used as a defence.⁵¹

4.3 *Right of a client to cancel a public call for tenders*

The tender documents generally include a so-called reservation clause, which allows the client not to accept any of the bids received in response to a public call for tenders and to undertake a new solicitation without any liability for damages.

Several provisions in the documents for call for tenders 15-14023 contain reservation clauses: [Translation]

Instructions to bidders

29.3 The City reserves the right not to accept any of the bids received and assumes no obligation whatsoever with respect to the bidder or bidders.

General Administrative Clauses

1.1 The City is not obligated to follow through with the call for tenders.

The lessons learned from other courts show that a client may cancel a call for tenders and launch a second one, but that the client must have valid reasons for doing so.

In *9075-5715 Québec inc. c. Longueuil (Ville de)*,⁵² the Court of Appeal of Quebec was asked to rule on whether the client's decision to cancel the first call for tenders and launch a new one violated a contractual obligation. The Court of Appeal reiterated on this occasion that the reservation clauses grant clients [Translation] "the discretionary power not to award a contract following a call for tenders and to launch a new tendering process, but that this power must be exercised in good faith."⁵³

⁴⁹ *Id.*, paras 150–152.

⁵⁰ *Id.*, para 155.

⁵¹ *Id.*, para 92.

⁵² 2012 QCCA 246.

⁵³ *9075-5715 Québec inc. c. Longueuil (Ville de)*, 2012 QCCA 246, para 6.

In citing the Supreme Court of Canada,⁵⁴ the Court of Appeal noted that under Québec law, a client that is able to avail itself of a reservation clause [Translation] “is not relieved of its duty to treat bidders equitably, fairly, and in good faith.”⁵⁵

Lastly, the Court of Appeal confirmed that the client [Translation] “may not decide to cancel a call for tenders and launch another without a valid reason.”⁵⁶ This position has been upheld several times by the courts.⁵⁷ Even if a reservation clause is present, [Translation] “such behaviour could constitute a breach of the duty to act in good faith—including treating bidders equitably—by unfairly giving a second chance to the other bidders.”⁵⁸

In the matter *Inter-Cité Construction Itée c. Québec (Procureure générale) (Ministère des Transports)*,⁵⁹ summarized previously, Judge Brossard of the Superior Court also confirmed that the client may not, without a valid reason, unilaterally choose not to award the contract and subsequently launch a new call for tenders **with the same conditions**, and that the reservation clause does not give it absolute discretion in this regard.⁶⁰ He noted that it is only in [Translation] “certain specific situations that entail a substantial change to the contract conditions originally considered” that the client may cancel the call for tenders and launch a new one.⁶¹

5. Analysis and conclusion

Several events took place successively in this file. A timeline presenting the chronology of events has been prepared to help understand the Inspector General’s analysis (see appendix to the report).

⁵⁴ *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860.

⁵⁵ 9075-5715 *Québec inc. c. Longueuil (Ville de)*, 2012 QCCA 246, para 6.

⁵⁶ *Id.*, para 9.

⁵⁷ 9153-5955 *Québec Inc. c. St-Liguori (Municipalité de)*, 2015 QCCS 4378; *Inter-Cité Construction Itée c. Québec (Procureure générale) (Ministère des Transports)*, 2015 QCCS 4365, submitted for appeal, October 15, 2015.

⁵⁸ 9075-5715 *Québec inc. c. Longueuil (Ville de)*, 2012 QCCA 246, para 9.

⁵⁹ 2015 QCCS 4365, submitted for appeal, October 15, 2015. The outcome of the appeal was not known at the time of writing.

⁶⁰ *Id.*, para 45.

⁶¹ *Id.*, para 93.



5.1 Analysis of the behaviour of the City's Procurement Department regarding East Penn

First, the Inspector General concluded that a contractual relationship was created between the City and each of the bidders, including East Penn, when bids were submitted in response to call for tenders 15-14023, thereby giving effect to Contract A. The City solicited bids through a public call for tenders and offered to examine the bids it received with a view to entering into Contract B—the framework agreement for the supply of storage batteries. Moreover, the bidders accepted the City's offer by submitting a bid.

The Inspector General believes that the investigation revealed serious breaches by the City, and by the Procurement Department in particular, with regard to good faith. In the Inspector General's opinion, the behaviour of Procurement Department representatives toward East Penn is contrary to the implied obligations stemming from Contract A and incumbent upon the client.

In its interactions with the East Penn representative, the Procurement Department flagrantly and seriously failed in its duty to inform (or information obligation).

Indeed, a conference call was held on April 12, 2016 with the MSRS director and division heads as well as the Procurement Department director and section head. As confirmed to the OIG by all the witnesses present at the meeting, its purpose was to make a decision regarding call for tenders 15-14023, as MSRS had declared itself to be dissatisfied with the technical specifications and East Penn bid since February 2016. At the end of this conference call, the decision was made to return to tenders; the Procurement Department director confirmed that call for tenders 15-14023 would be terminated and a new call for tenders published.

Thus, as of April 12, 2016, the Procurement Department director and section head—the latter being the supervisor of the procurement officer in charge of the file—were well aware that call for tenders 15-14023 would be terminated. However, the evidence gathered during the investigation showed that they did not inform the East Penn representative of this major development that would directly impact the company.

East Penn had been awaiting the awarding of the contract by the decision-making bodies since January 15, 2016. East Penn knew it was the lowest bidder since the opening of the bids on December 21, 2015, and that the company's bid had been declared compliant with administrative and technical requirements. Moreover, on January 15, 2016, the East Penn representative had received confirmation from the procurement officer assigned to the file that East Penn would be recommended for the contract stemming from call for tenders 15-14023.

East Penn even agreed—at the procurement officer's request—to modify the delivery times for fast-turnaround orders indicated on the submitted bid form so they would correspond with the requirements of the tender documents. Lastly, in accordance with the provisions of the tender documents, the City availed itself of the option to enter into a temporary procurement agreement with East Penn pending the official awarding of the contract. The temporary procurement agreement was valid from January 26 to March 24, 2016.



But there is more. Aware that the bid validity period indicated in call for tenders 15-14023 was about to expire, the procurement officer asked the East Penn representative on March 31, 2016, whether he would agree to maintain the bid as submitted until June 24, 2016. He confirmed that the steps required to obtain the resolution were underway and a new temporary procurement agreement was made from April 5 to June 24, 2016.

The facts thus show that the Procurement Department misled East Penn in its legitimate expectations. The Inspector General notes that these expectations were raised by the Procurement Department itself, when the procurement officer confirmed to the East Penn representative that the company would be recommended for the contract and that the steps required to obtain the resolution by the decision-making bodies were underway. It was legitimate for East Penn to expect the process to continue, as the procurement officer had also requested an extension of the bid validity period.

At no time did the procurement officer inform the East Penn representative of the reservations expressed by MSRS, or of the file's significant developments which permanently compromised awarding of the contract.

The Inspector General believes that as of April 12, 2016, the Procurement Department failed in its positive obligation to inform East Penn, when it was aware of the scope of the situation regarding call for tenders 15-14023 and that East Penn was in a vulnerable position in view of the information available to it. East Penn had legitimate trust in the context of its interactions with the procurement officer and was dependent on the Procurement Department to keep it informed of the situation.

What's more, the Inspector General is of the opinion that, through its actions, the Procurement Department conveyed false information as of April 12, 2016, information meant to mislead the East Penn representative into believing that the contract awarding process for call for tenders 15-14023 was underway—while this was not the case at all.

The Procurement Department representatives created false expectations for East Penn by not cancelling call for tenders 15-14023, as planned following the April 12, 2016, conference call.

Call for tenders 15-14023 was not cancelled on SEAO until January 23, 2017—more than nine (9) months after the decision was made. The East Penn representative was not officially informed of the cancellation of call for tenders 15-14023 until January 16, 2017, via a fax sent to his attention. He had received informal notification that the City would proceed with call for tenders 16-15500 on December 12, 2016.

If the Procurement Department director and section head were aware on April 12, 2016 that a new call for tenders would be launched, why did they not inform the East Penn representative that the contract awarding process in which the company was involved had been cancelled?

The Procurement Department section head told the OIG—not only during his meeting with the Office but also in his response to the Notice—that, following discussion with his director, call for tenders 15-14023 had not been cancelled. They decided it was preferable for MSRS to maintain the option of choosing between the lowest bid for call for



tenders 15-14023 and the lowest bid for call for tenders 16-15500 in case the prices tendered were higher. The section head explained that they believed MSRS would reconsider and avail itself of call for tenders 15-14023.

The Inspector General believes a client may not allow itself to behave in such a manner by misleading bidders that have invested time, money and effort to develop a bid in response to a call for tenders. A client cannot give free rein to two (2) calls for tenders to see which of the bids will be lower. When the Procurement Department launches a call for tenders to meet a need, it must proceed on the basis of the bids it receives and cannot play the field on the market like it did in this case.

If the Procurement Department wanted to restart the contracting process, it should have had valid reasons to do so—but at the very least, it should have cancelled call for tenders 15-14023. The presence of a reservation clause in the call for tender documents did not relieve the Procurement Department of its duty of good faith toward East Penn.

While the Inspector General will not get into the debate as to whether the Procurement Department had valid reason to relaunch the tendering process, he does point out that, despite what the MSRS representatives contended, the Procurement Department representatives had integrated the needs expressed with respect to delivery times for fast-turnaround orders into call for tenders 15-14023. The wording used in the two (2) calls for tenders differs slightly. Nevertheless, the requirements of the tender documents regarding battery delivery times and the inclusion of delivery charges in the bid prices are identical in calls for tenders 15-14023 and 16-15500. It is true East Penn bid indicated that fast-turnaround orders would be handled in five (5) hours, while the requirement was for four (4) hours. However, the procurement officer in charge of the file had noted this irregularity and asked the East Penn representative, on January 15, 2016, if they would comply with the call for tender documents, which East Penn agreed to do.

A comparison of calls for tenders 15-14023 and 16-15500 indicates the following differences:

- the forecast quantities indicated on the bid form;
- the term of the contract;
- the classification of addresses into primary delivery addresses (80%) and secondary delivery addresses (20%);
- a difference of three (3) delivery addresses out of a total of twenty-six (26), identified as secondary addresses in call for tenders 16-15500; and
- the option for the City to periodically return excess parts from its inventory to the supplier without restocking fees.

The Inspector General wonders if the East Penn representative was not made aware of the City's decision to relaunch the contracting process as it was to the advantage of the Procurement Department that he be kept in the dark. This way, the Procurement Department was insuring to keep East Penn's bid for call for tenders 15-14023 and to

enable MSRS to change its mind if the prices submitted in response to call for tenders 16-15500 were higher. Was East Penn deliberately not informed? Was this also the reason why the Procurement Department did not inform firms, which might have been interested in submitting a bid for call for tenders 16-15500, of its existence, as was the case for call for tenders 15-14023? The Inspector General seriously questions whether this was the case.

The Procurement Department section head stated to the OIG that it was East Penn's responsibility to check on SEAO whether a new call for tenders had been launched. However, the Procurement Department section head appears to have shirked his duties of good faith, information, cooperation, consistency and transparency toward East Penn. There was no indication on SEAO that call for tenders 15-14023 had been cancelled and that a new solicitation had been undertaken and, under the circumstances, there was nothing to indicate to East Penn that a new call for tenders would be launched for the same services as the Procurement Department maintained its legitimate expectation that it would be awarded the contract stemming from call for tenders 15-14023.

Besides, in addition to not cancelling call for tenders 15-14023 prior to launching call for tenders 16-15500 as it should have done, the Procurement Department continued to create false expectations on the part of the East Penn representative and provided him with false information when he started asking questions about developments concerning the file.

Two (2) months after the April 12, 2016 conference call, the East Penn representative attempted to follow up with the procurement officer to inquire about the file's progress, as the temporary procurement agreement and the bid validity period were set to expire the following day. The new procurement officer in charge of the file then sent the East Penn representative a new request to extend the bid validity period and explained that the steps required to obtain a resolution to award the contract would proceed if they accepted. East Penn bid, which was originally valid for a period of one hundred and twenty (120) days, to mid-April 2016, was thus maintained for more than nine (9) months—to September 30, 2016, and a new temporary procurement agreement was made to enable the procurement of batteries from East Penn from July 15 to September 30, 2016.

The East Penn representative remained totally unaware of the situation until November 4, 2016—more than ten (10) months after the opening of bids for call for tenders 15-14023. After the East Penn representative had taken the initiative to contact the procurement officer again to inquire about the status of the contract award, the procurement officer replied that the City was evaluating the bids received in response to call for tenders 16-15500. This was the first time that the East Penn representative learned that a new call for tenders had been launched, while MSRS and the Procurement Department had agreed to restart the contract awarding process on April 12—almost seven (7) months before. The Inspector General notes that call for tenders 16-15500 was launched on August 3, 2016 and that the bids were opened on August 31, 2016.

But there again, the true scope of the situation was not revealed to the East Penn representative. The procurement officer instead referred him to his boss—the



Procurement Department section head. Then followed several unsuccessful attempts by the East Penn representative to contact the section head.

This began with an unreturned phone call, followed by an email on November 7, 2016, which went unanswered. The East Penn representative then sent another email dated November 8, 2016, to which the Procurement Department section head replied, on November 9, that he would contact him [Translation] “without fail” the next day,⁶² though he ultimately didn’t. It was only after a fourth attempt, by email, on November 11, 2016, that the East Penn representative was contacted by the Procurement Department section head. The Procurement Department section head told the OIG that, during this phone call, he explained the situation regarding call for tenders 16-15500 to the East Penn representative and undertook to inform him once the directors had made a decision.

Thus, on November 11, 2016, the East Penn representative still did not know that the call for tenders in which the company was taking part had been cancelled. He only knew that another call for tenders had been launched. As he was still awaiting news on December 6, 2016, he then wrote an email to the Procurement Department section head to obtain an update on the file. It was not until December 12, that the section head wrote to him to say that management had decided to go ahead with the new call for tenders and that the file had been submitted to the decision-making bodies for approval, with no further details. On January 16, 2017, the East Penn representative received a letter by fax informing him that call for tenders 15-14023 had been cancelled due to [Translation] “changes concerning the City’s requirements.”⁶³

East Penn remained in the dark about the City’s decision to relaunch the contracting process right up to the end. The investigation showed that East Penn was at no time informed of the real reason that led to the cancellation of the call for tenders. He was never given any details other than the mention of changes to the requirements.

While East Penn had been waiting to execute the contract since January 15, 2016, and its representative had twice agreed to extend the validity of the bid in the hope that the decision-making bodies would award the contract soon, the Procurement Department took until January 23, 2017 to officially cancel call for tenders 15-14023 on SEAO.

The Inspector General concluded that the Procurement Department acted in a manner contrary to the most basic requirements of good faith several times during the contracting process.

Finally, the Inspector General is also concerned by the Procurement Department’s lack of transparency toward the elected officials charged with adopting the official contract award

⁶² Email dated November 9, 2016, from the Procurement Department section head to the East Penn representative.

⁶³ Letter dated January 16, 2017, emailed to the procurement officer in charge of the file and addressed to the East Penn representative.

resolution. At no point in its decision summary 1161541006 prepared for call for tenders 16-15500 did the Procurement Department indicate the fact that the City had already published call for tenders 15-14023 and that it had decided not to proceed with it. It merely indicates that the last contract for the supply of batteries had been awarded on March 21, 2013. The elected officials—the ultimate overseers of contracting process' compliance —never received the information, as no decision summary was ever presented to them for call for tenders 15-14023. This summary had been prepared by the Procurement Department, but was never submitted to the decision-making bodies due to the reservations expressed by the MSRS representatives beginning in February 2016.

5.2 Conclusion and recommendations

Under section 57.1.23 of the *Charter of Ville de Montréal*, the Inspector General may, at any time, send a report presenting findings or recommendations that, in his opinion, warrant being brought to the attention of the council concerned.

57.1.23. Not later than March 31 each year, the inspector general shall send the city clerk and the mayor a report, to be tabled before the council at the first regular sitting following its receipt, presenting the results of the activities carried out under the inspector general's mandate and making recommendations, if applicable. The inspector general shall also send the report to the Anti-Corruption Commissioner and the *Autorité des marchés financiers*.

The inspector general may also, at any time, send the mayor and the clerk any report presenting findings or recommendations that, in the opinion of the inspector general, warrant being brought to the attention of the council. The mayor shall table the report before the council at the first regular sitting following its receipt.

The inspector general may include any notices or recommendations in these reports that, in his or her opinion, must be brought before the council.

In addition, the inspector general may, at any time, submit any notice or recommendation he or she considers necessary to any decision-making authority of the city.

The conduct of the Procurement Department representatives leaves the Inspector General perplexed. There is no doubt in his mind that the actions taken regarding East Penn are contrary to the requirements of good faith—particularly with respect to the duty of information, cooperation, transparency and consistency. The Procurement Department misled East Penn in its legitimate expectations that it had itself created for the company's representative.

The facts show that the Procurement Department even contributed to creating false expectations on the part of East Penn as of April 12, 2016, by remaining silent about the scope of the situation and by continuing to extend the East Penn bid validity period and the temporary procurement agreement on two (2) occasions, for more than nine (9) months, while it was well aware that a new call for tenders would be launched. The Procurement Department waited until the East Penn representative had to inquire about



developments himself. For his part, the section head demonstrated laxness by failing to return calls and reply to emails, and by not fully informing East Penn of the reasons why the decision had been made to restart the contracting process.

For all the reasons discussed in this report, the Inspector General does not believe that free rein can be given to the framework agreement stemming from call for tenders 16-15500, as the circumstances in which it was launched and awarded seriously undermine the integrity of tendering process 15-14023 and are not commensurate with the behaviour expected of a municipality when awarding a contract.

The Inspector General therefore recommends the termination of the framework agreement entered into with *Centre de pièces Gagnon* for the supply of storage batteries and the launch of a new tendering process by the Procurement Department.

The Inspector General wishes to emphasize that the manner in which the Procurement Department handled the file is likely to have caused harm to two (2) companies **that did not commit any reprehensible acts.**

FOR THESE REASONS,

The Inspector General

RECOMMENDS that the City's Agglomeration Council terminate the contract awarded to ***Uni-Select Québec Inc. (Centre de pièces Gagnon)*** for the supply of motor vehicle and equipment storage batteries in an amount not to exceed **\$1,143,199.11**, including taxes (resolution **CG16 0706**).

TRANSMITS, in accordance with section 57.1.23 of the *Charter of Ville de Montréal*, a copy of this decision to **the mayor of the City** and to the **City Clerk's Office**, to be sent by the latter to the City Council concerned, in this instance, **Montréal's City Council and Agglomeration Council**.

Denis Gallant, Ad. E.

Inspector General

ORIGINAL SIGNED

APPENDIX – CHRONOLOGY OF EVENTS

