



Decision

Rescinding of Contract for the Renovation, Replacement and Addition of Signage in the Saint-Laurent Borough

(Call for Tenders 15-031)

(s. 57.1.10 of Montréal's City Charter)

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SUMMARY

The Office of Inspector General conducted an investigation to determine whether the Saint-Laurent Borough complied with the requirements of call for tenders 15-031 regarding the licences necessary to perform the work described in the tender documents.

The Saint-Laurent Borough awarded one (1) contract for a period of three (3) years, from 2015 to 2017, inclusive, for the renovation, replacement and addition of exterior signage on public municipal buildings and in green spaces in that borough.

The tender documents include two (2) licence requirements, as follows: (1) the contractor, the sub-contractor and any labour shall have all the licences required by law; and (2) the contractor shall have a general contractor's licence.

The evidence gathered during the investigation shows that the successful and sole bidder in this call for tenders, Enseignes Dominion, does not meet the licence requirements specified in the tender documents. The company does not have a general contractor's licence, but rather a specialized contractor's licence. Moreover, the successful bidder does not have all the licence subclasses required by law in order to carry out the work described in the tender documents as a specialized contractor.

In the opinion of the Inspector General, both criteria allowing him to rescind the contract under section 57.1.10 of Montréal's City Charter are met. The requirements of the specifications in the case at hand are very clear: the bidder must have a general contractor's licence as well as [translation] "all required licences in accordance with the laws in effect, including licences in good standing with the Régie du bâtiment du Québec."

The Inspector General is of the opinion that by awarding the contract to Enseignes Dominion, despite its failure to provide a copy of the required licences as specified in the documents in call for tenders 15-031, the Saint-Laurent Borough failed to fulfill its obligation to accept only eligible and compliant bids.

The breaches noted are objectively "serious." The breach noted concerns the very integrity of the contracting process: by ignoring the failure to comply with the requirements set out in the specifications, the Saint-Laurent Borough broke the rules it itself had established in the call for tenders. It therefore gave a competitive advantage to the successful bidder to the detriment of other interested suppliers who had obtained the specifications and who might have reasonably expected that only a company with the required licences could bid on the call for tenders and win the contract.



Table of contents

1. Scope and extent of work.....	1
1.1 Warning.....	1
1.2 Applicable standard of proof	1
2. The facts.....	1
2.1. Complaint.....	1
2.2. Notice to an interested party	2
2.3. Call for tenders 15-031.....	2
2.4. Tender requirements.....	3
2.4.1 Licences required by law	4
2.4.2 Requirement to hold a general contractor's licence	6
3. Analysis.....	7
3.1. Non-compliance with the tender requirements	7
3.1.1 Requirement to hold a general contractor's licence	7
3.1.2 Licences required by law	10
3.2. Requirement unduly restricting competition.....	11
3.2.1 Unnecessary requirement.....	12
3.2.2 Lack of sufficient verification by the borough	12
3.3. Compliance with conditions established in the call for tenders	15
4. Conclusion	17



1. Scope and extent of work

1.1 *Warning*

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

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

1.2 *Applicable standard of proof*

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

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

In performing his judicial duties, as in the case at hand, the Inspector General will apply this standard *a fortiori*.

2. The facts

2.1 *Complaint*

The Office of Inspector General received a complaint regarding call for tenders 15-031. This call for tenders pertains to the renovation, replacement and addition of exterior signage on public municipal buildings and in green spaces in the Saint-Laurent Borough.

The complainant alleges that the requirement for the contractor to have a general contractor's licence, as set out in the tender documents, is excessive for the work required.

To that end, he explains that 95% of contractors that manufacture signs do not have a general contractor's licence, but rather a specialized contractor's licence. In that respect, the complainant claims that the requirement limits the number of companies able to bid on the call for tenders and that he was therefore unable to bid.

¹ The preponderance of evidence exists where the evidence renders the existence of a fact more probable than its non-existence (see article 2804 of the *Civil Code of Québec*).



The complainant also states that the contract was awarded to a company that does not have the licence required by the call for tenders because Enseignes Dominion does not have a general contractor's licence.

The Inspector General launched an investigation in order to ascertain the compliance of the contracting process. During the investigation, nine (9) witnesses were interviewed and many documents were submitted to the Office of Inspector General.

2.2. Notice to an interested party

In accordance with his duty of procedural fairness, before releasing the findings of his investigation, the Inspector General sent a Notice to an Interested Party to the the Parties concerned.

On May 26, 2016, this notice was sent to Enseignes Dominion and Saint-Laurent Borough representatives to allow them to familiarize themselves with the relevant facts gathered during the investigation² and to, in turn, have them provide the Office of Inspector General with their comments and submissions in writing in order to give those persons who may be affected by the Inspector General's decision an opportunity to be heard.

On June 6, 2016, the Saint-Laurent Borough sent the Office of Inspector General its comments and clarifications on the facts raised in the Notice to an interested party. Enseignes Dominion did not provide the Office of Inspector General with a response to the Notice to an interested party, but its representatives had met with the Office during the investigation.

2.3. Call for tenders 15-031

In the Saint-Laurent Borough, signs identify public municipal buildings and many parks. The existing signs are, for the most part, in fairly poor condition and need to be restored. In addition, some green spaces and parks in the borough, particularly in the Bois-Franc and Nouveau-Saint-Laurent sectors, have no signage.

In that context, the Saint-Laurent Borough published call for tenders 15-031 on September 10, 2015, through the Québec's electronic tendering system, (Système électronique d'appel d'offres) (hereinafter "S.É.A.O."), and in *La Presse*.

The main purpose of the call for tenders, according to decision summary 1154430016, is to align signage with the City's graphic standards by restoring as many existing signs as possible for sustainable development and economic reasons, and to propose new signage for squares and recent places that have yet to have signage posted.

²The facts contained in the Notice to an interested party are set out in forty-five (45) paragraphs and are accompanied by documentary evidence in the form of three (3) appendices.

The call for tenders was posted for twenty (20) days. Bid opening took place on September 30, 2015. Based on the information in the decision summary, there were three (3) companies who procured the specifications, but only one (1) bidder: Enseignes Dominion.

On October 6, 2015, the Saint-Laurent Borough Council approved the contract award to Enseignes Dominion for three (3) years, from 2015 to 2017, inclusive.³ The contract amount, including contingencies and taxes, is \$271,992.11. This amount is split as follows over the term of the contract:⁴

- 2015: \$114,891.41
- 2016: \$83,483.58
- 2017: \$73,617.12

Inquiries by the Office of Inspector General into the progress of the work revealed that only the work from the 2015 component had been completed and paid, for a sum of \$94,190.39. For the 2016 component, no planned work was carried out and no invoices were submitted to the Saint-Laurent Borough.

2.4. Tender requirements

Call for tenders 15-031 consists of multiple documents, including a special specification dated September 2015.

Clause 1.12 of section B of the special specification, which contains specific tendering clauses, sets out the licence requirements for bidding on this call for tenders. The clause reads as follows:

[Translation]

1.12 Licences

The contractor, the sub-contractor(s) and any labour shall have all required licences in accordance with the laws in effect, including licences in good standing with the Régie du bâtiment du Québec, and shall be members of their respective corporation, where applicable.

The contractor shall have a general contractor's licence and shall attach a copy thereof to the tender form.⁵

³ Resolution CA 15 08 0656 of the Saint-Laurent Borough Council.

⁴ Decision summary 1154430016.

⁵ Call for Tenders 15-031 – Clause 1.12 of section B – Clauses applicable to this tender (Specific administrative clauses).



Clause 1.12 of section B of the special specification sets out two (2) requirements: the contractor, the sub-contractor and any labour shall have all the licences required by law, and the contractor shall have a general contractor's licence.

It is the interpretation of this clause of the tender documents that is at issue in the current decision.

2.4.1 Licences required by law

The documents for call for tenders 15-031 require that the contractor, the sub-contractor and any labour hold the licences required by law.

To have a clear understanding of the licence requirements in the call for tenders, the various existing licences and the applicable regulations need to be explained.

The *Building Act*, R.S.Q. c. B-1.1, which governs the contract being investigated by the Inspector General, provides that any person who wants to act as a building contractor must hold a current licence for that purpose.⁶

The *Regulation respecting the professional qualification of contractors and owner-builders*, c. B-1.1, r. 9, (hereinafter "Regulation") lists four (4) licence classes⁷:

- general contractor licence;
- general owner-builder licence;
- specialized contractor licence; and
- specialized owner-builder licence.

The licences relevant for the analysis of the contract in the case at hand are general contractor and specialized contractor.

The type of licence required depends on the contractor's main activity.

A general contractor licence is required when that the general contractor's activity consists in "coordinating, carrying out or having carried out, in whole or in part, construction work in the licence subclasses in the general contractor class, or in making or submitting tenders personally or through an intermediary for the purpose of carrying out or having such work carried out in whole or in part."⁸

A specialized contractor's licence is required when the contractor's activity consists in "**carrying out or having carried out**, in whole or in part, construction work in the licence subclasses in the specialized contractor class, or in making or submitting tenders,

⁶ *Building Act*, R.S.Q. c. B-1.1, s. 46.

⁷ *Regulation respecting the professional qualification of contractors and owner-builders*, c. B-1.1, r. 9, s. 3.

⁸ *Regulation respecting the professional qualification of contractors and owner-builders*, c. B-1.1, r. 9, s. 4.

personally or through an intermediary, for the purpose of carrying out or having such work carried out in whole or in part.”⁹

It is important to note that a contractor can hold both a general contractor’s licence and a specialized contractor’s licence.

For each of these licences, the contractor is recognized as having a professional qualification in one or more subclasses. The different general contractor’s licence subclasses are set out in Schedule I of the Regulation, whereas the specialized contractor’s licence subclasses are listed in Schedules II and III of the Regulation.

In order to determine whether the successful bidder, Enseignes Dominion, had all the licences required by law to perform the contract arising from call for tenders 15-031, it is important to know the nature of the work described in the call for tenders.

The work to be carried out according to the special specification in the call for tenders can be summarized as follows:

- manufacture signs;
- install signs;
- paint;
- dig and install new concrete bases for certain steles;
- remove electrical components from some signs;
- identify circuits in electrical boxes and disconnect them;
- remove buried electrical wires and replace the soil; and
- remove (destroy) some concrete bases.

The Office of Inspector General inquired with the Régie du bâtiment du Québec (hereinafter “RBQ”). The RBQ is in charge of protecting the public by establishing professional qualification rules. It is also responsible for issuing the required licences with their subclasses to carry out construction work or have such work carried out.¹⁰

The RBQ told the Office that both a general contractor’s licence and a specialized contractor’s licence would enable a company to bid on call for tenders 15-031.

If the bidder is a specialized contractor, it must, according to the RBQ, have all of the following licence subclasses:

⁹ *Regulation respecting the professional qualification of contractors and owner-builders*, c. B-1.1, r. 9, s. 7.

¹⁰ Refer to the RBQ website at: <https://www.rbq.gouv.qc.ca/en/the-rbq/fields-of-intervention/the-rbqs-fields-of-jurisdiction.html>

- 2.5 Contractor – excavation and earthwork¹¹
- 2.7 Contractor – sitework¹²
- 3.2 Contractor – small concrete works¹³
- 9. Contractor – interior finishing¹⁴
- 11.2 Contractor – special equipment and products¹⁵
- 16. Contractor – electrical¹⁶

According to the RBQ, if the bidder has a general contractor's licence, it must have subclass 1.4 Contractor – roads and mains, as set out in Schedule I. The bidder may then carry out the work itself (if that work is covered by its licence) or sub-contract it out to contractors, provided that its sub-contractors have a contractor's licence with subclasses covering the work to be carried out.

2.4.2 Requirement to hold a general contractor's licence

Despite the RBQ's confirmation to the Office of Inspector General that a general contractor's licence is not required to carry out the work because a specialized contractor's licence with the relevant subclasses would suffice, the Saint-Laurent Borough included a requirement in the special specification of the call for tenders that the contractor have a

¹¹ Except for the work in subclasses 2.2 and 2.4 of Schedule II, this subclass authorizes construction work relating to excavating, moving, compacting and levelling of earth or granular materials, including work relating to small works of art, and similar or related construction work. Refer to Schedule III of the *Regulation respecting the professional qualification of contractors and owner-builders*, c. B-1.1, r. 9.

¹² This subclass authorizes construction work relating to the preparation and finishing of sitework, such as alignment, levelling, fencing, demolition, paving and asphaltting, laying interlocking paving stones, and similar or related construction work. Refer to Schedule III of the *Regulation respecting the professional qualification of contractors and owner-builders*, c. B-1.1, r. 9.

¹³ This subclass authorizes construction work relating to concrete formwork for foundation walls of buildings referred to in Part 9 of the National Building Code – Canada 1995 (NRCC 38726E) as adopted by Chapter I of the Building Code (chapter B-1.1, r. 2), without regard to the exemptions in Division II of the Regulation respecting the application of the Building Act (chapter B-1.1, r. 1) and to other concrete works, concreting, reinforcement and concrete finishing, and similar or related construction work. Refer to Schedule III of the *Regulation respecting the professional qualification of contractors and owner-builders*, c. B-1.1, r. 9.

¹⁴ This subclass authorizes construction work relating to interior and exterior painting, interior surfaces such as flooring, wall and ceiling and their finishing, and similar or related construction work. Refer to Schedule III of the *Regulation respecting the professional qualification of contractors and owner-builders*, c. B-1.1, r. 9.

¹⁵ This subclass authorizes construction work that is not reserved exclusively for master pipe-mechanics and electrical contractors relating to all types of equipment and special products that are not already governed by a subclass in Schedule II or this Schedule, and similar or related construction work. Refer to Schedule III of the *Regulation respecting the professional qualification of contractors and owner-builders*, c. B-1.1, r. 9.

¹⁶ Except for demolition work, this subclass authorizes construction work on an electrical installation to which Chapter V of the Construction Code applies, introduced by the *Regulation to amend the Construction Code* (O.C. 961-2002, 2002-08-21), that is reserved exclusively for electrical contractors. Refer to Schedule II of the *Regulation respecting the professional qualification of contractors and owner-builders*, c. B-1.1, r. 9.

general contractor's licence. This condition was intentionally inserted into the specification by the borough. This requirement is therefore in addition to the requirement that the contractor have the licences required by law.

The Saint-Laurent Borough's project manager, who took part in preparing and implementing the plans and specifications, explained to the Office of Inspector General that, based on his expertise and that of consultants from private firms who assisted with the plans and specifications, multiple trades were needed to carry out the work.

The project manager said that the following work would be performed during the contract: renovation, replacement and addition of steles, concrete installation or restoration, painting, electricity, and the loading and/or installation of signs.

According to the same witness, because multiple trades are needed to carry out this work, the decision was made that a general contractor would be required for this contract in order to coordinate the work and its quality.

3. Analysis

The investigation conducted by the Office of Inspector General revealed that the Saint-Laurent Borough awarded the contract to a contractor, Enseignes Dominion, whose bid did not meet the requirements specified in the call for tenders. Indeed, the contractor does not have a general contractor's licence as required by the borough in clause 1.12 of the special specification. In addition, the contractor does not have all the specialized contractor licence subclasses that the RBQ says a contractor with just a specialized contractor's licence must have to be able to bid on the call for tenders.

3.1. *Non-compliance with the tender requirements*

3.1.1 *Requirement to hold a general contractor's licence*

As stated earlier, Enseignes Dominion did not have a general contractor's licence when it submitted its bid. This was confirmed by a company representative during a meeting with the Office of Inspector General and corroborated through inquiries made by the Office.

In assessing the compliance of the bid submitted by Enseignes Dominion, the Saint-Laurent Borough found that the bid was compliant because the proposed sub-contractor had a general contractor's licence.

During their meeting with the Office of Inspector General, the Saint-Laurent Borough employees involved in this call for tenders explained that their interpretation of the term "contractor," as used in clause 1.12 of section B of the special specification, is either the bidder or any other person on the team carrying out the work.

The Saint-Laurent Borough's procurement officer mentioned noting in his bid analysis that Enseignes Dominion had a specialized contractor's licence. However, after checking the

licences of the sub-contractor proposed in the bid, he found that the latter had a general contractor's licence and determined that this made the bid submitted by Enseignes Dominion compliant.

The Saint-Laurent Borough's project manager is also of the opinion that the requirement to hold a general contractor's licence may be met by the bidder or the sub-contractor. This interpretation is shared by the division head of the Borough's Public Works Department.

On June 6, 2016, in his response to the Notice to an interested party sent by the Inspector General, the director of the Saint-Laurent Borough argued that the contract had legitimately been awarded to Enseignes Dominion and that its bid was compliant. He explained that the Saint-Laurent Borough's procurement officer who analyzed the bid submitted by Enseignes Dominion was perfectly aware that the company did not have a general contractor's licence, but that [translation] "the borough knowingly deemed that the general contractor's licence held by the sub-contractor met the tender requirements."¹⁷

The Saint-Laurent Borough's director said that he had checked with procurement officers from other City units how they would have analyzed the bid's compliance. The officers apparently told him that they would have reached the same conclusion. However, it is worth noting that one procurement advisor from the City's Procurement Department does not share the interpretation of the Saint-Laurent Borough and its employees. He told the Office of Inspector General that the requirement is not ambiguous and that the term "contractor" as specified in clause 1.12 of the special specification refers to the bidder, not the sub-contractor.

The sub-contractor proposed by Enseignes Dominion in its bid does indeed have a general contractor's licence. However, in the opinion of the Inspector General, the interpretation provided by the borough's employees regarding the term "contractor" is not consistent with his understanding of the requirement set out in the tender documents.

Clause 1.12 provides as follows:

[Translation]

1.12 Licences

The contractor, the sub-contractor(s) and any labour shall have all required licences in accordance with the laws in effect, including licences in good standing with the Régie du bâtiment du Québec, and shall be members of their respective corporation, where applicable.

The contractor shall have a general contractor's licence and shall attach a copy thereof to the tender form.¹⁸

¹⁷ Response letter from the Saint-Laurent Borough dated June 6, 2016, to the Notice to an interested party given by the Office of Inspector General on May 26, 2016.

¹⁸ Call for Tenders 15-031 – Clause 1.12 of section B – Clauses applicable to this tender (Specific administrative clauses).



[Our emphasis]

In the opinion of the Inspector General, a quick read of clause 1.12 shows that the borough is not referring to the sub-contractor in its references to “contractor” because, in the first paragraph of that clause, the borough makes a distinction between contractor and sub-contractor in the way it uses those terms.

The Inspector General therefore concludes that the interpretation of the term “contractor” in the second paragraph of clause 1.12 of section B of the special specification must not only be consistent with the rest of the clause, but also with the entire specification. The “contractor” is the principal contractor on a construction site, in accordance with the *Workers’ Compensation Act* (clause 3.1 of section B of the specification), and it is also the “contractor” who is responsible for bidding (clauses 5.1 and 5.2 of section B of the specification) and for coordinating the work (clause 1.6 of section B of the specification).

It is certainly not the desire of the client to assign such responsibility to anyone other than the contractor itself. It would make no sense, for example, to claim that it is up to the sub-contractor to set prices in the tender schedule.

The term “contractor” as used in the specification can therefore only be the bidder, that is, in this case, Enseignes Dominion.

For the bid submitted by Enseignes Dominion to be deemed compliant, it therefore does not suffice for the sub-contractor proposed by the company to have a general contractor’s licence.

During his investigation, the Inspector General was also informed that at least one (1) other company who procured the specifications in call for tenders 15-031 interpreted the term “contractor” the same way and did not submit a bid since it did not hold a general contractor’s licence itself.

Lastly, it is important to reiterate the role of a general contractor, which is to coordinate or carry out construction work, or have such work carried out.¹⁹ However, by the own admission of the Enseignes Dominion representative, the company’s sub-contractor has no supervision, coordination or quality control tasks in respect of the work to be carried out. The Enseignes Dominion representative states that, instead, the sub-contractor is responsible for manufacturing and installing the concrete bases, and potentially tearing down some of the old concrete bases. On June 6, 2016, in his response to the Notice to an interested party sent by the Inspector General, the director of the Saint-Laurent Borough states the opposite, however, and explains that the sub-contractor supervised and coordinated the work. Aside from this general statement from the director, the Inspector General must adhere to the version of the facts submitted by the main party concerned, that is, the Enseignes Dominion representative, who only assumes the responsibilities set out in the specification, as illustrated above.

¹⁹ *Regulation respecting the professional qualification of contractors and owner-builders*, c. B-1.1, r. 9, s. 4.

The Inspector General finds that the bid submitted by Enseignes Dominion does not meet the requirements of call for tenders 15-031 and that the borough should not have awarded the contract to that company because it does not hold a general contractor's licence, as required by clause 1.12 of section B of the special specification.

The Inspector General would like to mention that he obtained copies of the bid documents from Enseignes Dominion. The Saint-Laurent Borough's project manager and procurement officer both provided a copy of these documents. An Enseignes Dominion representative confirmed that this was indeed the company's bid, as his initials appeared on each page of the documents in question. The copies obtained are identical in all respects and show that, contrary to what the Saint-Laurent Borough's director had said in his response dated June 6, 2016, to the Notice to an interested party,²⁰ no general contractor's licence was included with the bid documents submitted by Enseignes Dominion. Based on the documents alone, the borough would not have been able to deduce that a sub-contractor held a general contractor's licence, unless an inquiry is made with the RBQ.

3.1.2 Licences required by law

The Inspector General is of the opinion that failure to comply with the tender requirement that the contractor hold a general contractor's licence is sufficient in itself to rescind the contract, but there is more. Enseignes Dominion does not have all the licence subclasses required for carrying out the work described in the contract.

Enseignes Dominion is a company that manufactures and installs signs for the public and private sectors. This company has a "specialized contractor" licence class. An inquiry by the Office of Inspector General regarding the licence held by the contractor reveals that the latter is entitled to bid, organize, coordinate, carry out and have carried out work in connection with the following subclasses:²¹

- 2.5: Excavation and earthwork
- 3.2: Small concrete works
- 11.2: Special equipment and products

The successful bidder, Enseignes Dominion, does not have two (2) of the subclasses required, according to the RBQ (listed earlier in section 2.3.1), to carry out the work described in the contract, that is, painting (9) and demolition (2.7) work.²²

²⁰ The borough's director states as follows: [translation] "the successful bidder submitted a general contractor's licence, that of its sub-contractor."

²¹ Specialized contractor's licence held by Enseignes Dominion.

²² With respect to subclass 16, according to the RBQ, since disconnection of electrical wiring was specified for just one (1) of the fourteen (14) steles, this work could be treated as demolition-related work. However,

3.2. Requirement unduly restricting competition

The Inspector General's investigation reveals that, by requiring the bidder to hold a general contractor's licence, the Saint-Laurent Borough unduly restricted competition for call for tenders 15-031 because this requirement was not necessary to carry out the work.

The objectives of a call for tenders have been reaffirmed by the courts on many occasions. The rules governing public contracting guarantee that the following core principles are observed:

1. obtaining the best product at the best price, to the benefit of the client;
2. free competition;
3. equal opportunity to access public contracts, such that everyone has an opportunity to submit a bid and to be awarded the contract.²³

As the client, the Saint-Laurent Borough was entirely at liberty to determine the requirements it felt were necessary for its call for tenders,²⁴ but had to observe the three (3) core principles set out above.

In the decision in *Entreprise P.S. Roy Inc. v. Magog (Ville de)*,²⁵ the Court of Appeal of Quebec states that the borough's discretion is not unlimited. Quoting author Patrice Garant from his work titled *Droit administratif*, the Court states that the Administration must exercise caution in imposing conditions that exclude potential bidders:

[Translation]

All parties have an equal right to contract with the Administration in accordance with the core principle of procedural fairness in public procurement. This principle restricts municipalities' freedom to impose conditions that exclude potential bidders.²⁶

this disconnection work would have to be assigned to a holder of subclass 16 nonetheless, according to the RBQ. The demolition contractor could then remove the wiring.

²³ *R.P.M. Tech inc. v. Gaspé (Ville)*, April 14, 2004, Court of Appeal, REJB 2004-60675 (par. 25); *Drummondville (Ville de) v. Construction Yvan Boisvert inc.*, 2004 CanLII 73066 (QC CA) (par. 1); *Groupe Morin Roy, s.e.n.c. v. Blainville (Ville)*, June 19, 2003, Superior Court, REJB 2003-43965 (par. 24); *Archevêque & Rivest Itée v. Beaucage*, August 22, 1983, Court of Appeal, EYB 1983-118139 (par. 52). See also the case law cited by Me Pierre Giroux and Me Denis Lemieux, *Contrats des organismes publics québécois*, ed. Wolters Kluwer (pages 814–5).

²⁴ *Martel Building Ltd. v. Canada*, 2000 SCC 60, par. 89.

²⁵ 2013 QCCA 617.

²⁶ *Entreprise P.S. Roy inc. v. Magog (Ville de)*, 2013 QCCA 617, par. 48.



3.2.1 Unnecessary requirement

The investigation conducted by the Office of Inspector General and inquiries with the organization responsible for issuing contractor licences (the RBQ) reveal that the requirement to hold a general contractor's licence was not necessary to carry out the work described in call for tenders 15-031. According to an RBQ representative, a contractor who has a specialized contractor's licence with all the relevant subclasses for the work could carry out the work described in call for tenders 15-031 or have that work carried out by a sub-contractor, in whole or in part, provided that the sub-contractor has the required licence subclasses.

A representative of the company to which the contract was awarded explained that this was a typical contract for his company. The witness stated that there was no need to require the bidder to hold a general contractor's licence. The witness called such a requirement "overkill."

During a meeting with the Office of Inspector General, a division head from the Public Works Department and the project manager's superior agreed that the requirement to hold a general contractor's licence was "inappropriate."

3.2.2 Lack of sufficient verification by the borough

The investigation conducted by the Office of Inspector General shows that the Saint-Laurent Borough did not check whether it was necessary to require the bidder to hold a general contractor's licence. In addition, no inquiries were made to determine the impact of such a requirement on the pool of potential bidders.

An email exchange to which the Office of Inspector General had access confirms the absence of any verification of the impact that requiring bidders to hold a general contractor's licence might have.

As a matter of fact, on October 1, 2015, before the contract was even awarded to Enseignes Dominion, a contractor who had obtained the tender documents for call for tenders 15-031, and who ultimately reported the matter to the Inspector General, wrote to the director of the Saint-Laurent Borough. He informed the director that his company could not bid because the call for tenders required the successful bidder to hold a general contractor's licence and that, to his knowledge, only two (2) sign manufacturers in Quebec had such a licence. The contractor therefore suggested that this requirement be revised to avoid limiting the tender to two (2) suppliers.

On October 1 and 2, 2015, emails were exchanged between a division head and the director of the Public Works Department of the Saint-Laurent Borough. The latter asked the division head to look into the merits of the contractor's allegations. On October 2, 2015, the division head of the Public Works Department confirmed, by email, that the borough had not checked how many sign companies had a general contractor's licence and that he did not see how that could have been checked.

During the investigation, the Office of Inspector General gave consideration to the role of a procurement officer in a tendering process, particularly with respect to the requirements set out in the specification. What became clear during the investigation was that the procurement officer's role is well established, but the way in which this role is executed in the field is not unanimous. According to the witnesses interviewed by the Office of Inspector General, a department requiring a call for tenders is responsible for all the technical aspects and must provide all the documents necessary for its preparation. Both the employees from the City's Procurement Department and the employees from the Saint-Laurent Borough agree that an administrative framework for calls for tenders must be established, but opinions differ on the content of such a framework.

In his response dated June 6, 2016, to the Notice to an interested party, the director of the Saint-Laurent Borough states that the borough's procurement officer must check the bid's compliance with the requirements set out in the tender documents, but that it is not the officer's responsibility to challenge the project manager's decision to require a general contractor's licence.

The Inspector General's investigation shows that the requirement for a particular licence is an administrative aspect that should fall under the procurement officer's responsibility. The employees from the City's Procurement Department interviewed by the Office of Inspector General stated that the requirement to hold a licence necessary to carry out the work is part of the administrative conditions of the call for tenders.

The Saint-Laurent Borough's procurement officer assigned to call for tenders 15-031 told the Office of Inspector General that his role is to check the administrative clauses of the call for tenders and that the licence requirements are those of the requesting department. However, this officer interprets his role as that of checking the form of the call for tenders, not the content. He is of the opinion that procurement officers do not have the qualifications necessary to question the technical aspects of a call for tenders. He therefore stated that it is not part of his role to question whether a general contractor's licence is mandatory to carry out the requested work, because the requesting department can request anything it wants.

However, a procurement advisor from the City's Procurement Department stated that the procurement officer from the Saint-Laurent Borough responsible for call for tenders 15-031 should have inquired to determine what licences were required to carry out the requested work. In the case at hand, the officer assigned to call for tenders 15-031 did not make any such inquiries.

In this entire discussion, one thing is certain: someone needs to check whether this requirement is needed. Who should be in charge of checking this? The municipality's central structure is of the opinion that procurement officers should be in charge of doing this, but the Saint-Laurent Borough believes the contrary.

Given the position of the borough's director, who says that it is not his procurement officers' responsibility to challenge the project manager's decision to require a general contractor's licence, someone within the borough should do it because it puts the borough in a risk situation, as in the case at hand.



A division head from the City's Procurement Department confirmed to the Office of Inspector General that the procurement officer is responsible for checking the administrative clauses and the requirements in the tender documents. He stated that the procurement officer must act on a seemingly inconsistent request or requirement, or where such a request or requirement would close off the market.

The Inspector General is of the opinion that the role of the procurement officer assigned to a call for tenders is to provide support to the department requesting the work. This officer must ensure that the form of the call for tenders is correct, that the requirements in the specification are valid by checking with the appropriate authorities, and that the requirements requested do not close off the market.

The requirement to hold a general contractor's licence as specified in clause 1.12 of section B of the special specification is part of the administrative conditions of call for tenders 15-031, and the borough's Procurement Department had a duty to ensure that this requirement was valid and did not unduly close off the market. The procurement officer relied on the requesting department (Saint-Laurent Borough) and did not make any further inquiries with the appropriate authorities, that is, the RBQ, before publishing the call for tenders.

The Inspector General is of the opinion that procurement officers should play a bigger advisory role in the preparation of calls for tenders, including the administrative aspects of the content. The officers from this department should question the administrative aspects of the requests by the requesting department and make the necessary inquiries with the relevant bodies. In the case at hand, no inquiries were made, particularly with the RBQ, before the call for tenders was published to ensure that it was necessary to require the bidder to have a general contractor's licence.

In the opinion of the Inspector General, the borough's verification obligations do not stop when the publication period for a call for tenders ends. Where information comes to light that may cast doubt on a condition or requirement of a call for tenders, the borough has the duty to act.

When the borough was notified that a company who procured the specifications had concerns about the restrictive requirements of the call for tenders, the public works director from the Saint-Laurent Borough sent an email on October 1, 2015, to the public works division head in the Saint-Laurent Borough asking him to check the "claims." In his response dated October 2, 2015, the division head explained that the number of sign companies with a general contractor's licence was not checked and that he does not see how that could have been done. He added that nothing was preventing the company who had procured the specifications from sharing these concerns during the tender process so that the borough could respond and make adjustments. According to the Inspector General, such a response should never have been deemed sufficient, and the borough should have taken further action. The control mechanisms in place are inadequate. There needs to be a control mechanism, regardless of who is responsible for this within the borough's management.

What comes as a surprise to the Inspector General is that no steps were taken with the appropriate authorities to ensure that this requirement was needed or to check the borough's interpretation as to who should hold the general contractor's licence. The borough's employees assigned to the project merely asked the question among themselves.

During his meeting with the Office of Inspector General, the project manager involved in the matter explained that he was made aware of the company who procured the specifications concerns as of October 1, 2015. The project manager told the Office that he felt no verification was necessary because the latter had only to team up with a general contractor. He added that if this interested supplier had expressed these concerns before the call for tenders ended, the borough would have told the supplier that it merely had to team up with a general contractor. Just like the division head, the project manager told the Office of Inspector General that if the questions had been asked during the "permitted" period, he would have been able to change the licence requirement to the following: [translation] "the contractor or sub-contractor shall hold a general contractor's licence."

It is important to note that at the time that the company who procured the specifications shared its concerns with the borough, the Borough Council had yet to confirm the decision to award the contract to Enseignes Dominion. The Inspector General is of the opinion that, under the circumstances, the Saint-Laurent Borough should have cancelled the tendering process and started anew. The borough was made aware that few sign manufacturers had a general contractor's licence. It therefore cannot claim that it did not know that the requirement to hold a general contractor's licence could limit the pool of potential bidders or that there was some confusion about the interpretation as to who should hold such a licence.

3.3. Compliance with conditions established in the call for tenders

As the client, the Saint-Laurent Borough was entirely at liberty to determine the requirements of its call for tenders. However, once the choice was made, it had to adhere to the wording of the tender documents. This was confirmed by the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*:

The owner—in this case the government—is in control of the tendering process and may define the parameters for a compliant bid and a compliant bidder. The corollary to this, of course, is that once the owner—here the government—sets the rules, it must itself play by those rules in assessing the bids and awarding the main contract.²⁷

²⁷ Justice Cromwell, on behalf of the majority of the Supreme Court of Canada, agreeing with the statements of the Supreme Court of Newfoundland and Labrador: *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, par. 68.

The Saint-Laurent Borough should therefore have made sure that the successful bidder met the criteria that it itself had established in its call for tenders.

According to doctrine, if a public client [translation] “specifies that the bid must contain specific information or include certain documents, it will not have much discretion to waive such a requirement.”²⁸

The Court of Appeal of Quebec points out that compliance with requirements set out in tender documents is meant to protect against arbitrary action:

[Translation]

It is by establishing requirements of form and substance, and by assessing against them the bids of those responding to calls for tenders that arbitrary action is avoided and greater consistency is guaranteed in the treatment and opportunities afforded to all participants. And, although subjectivity can never be eliminated from an assessment process, it is minimized when the rules of the game, so to speak, are set in advance and are followed.²⁹

Therefore, once the borough decides to require a specific licence from the bidder in its tender documents, such as a general contractor’s licence as in the case at hand, it must then comply with its own requirements and cannot award the contract to a contractor that does not hold such a licence.

Although some might think that failure to hold a licence not even required in this case is just a want of form, the impact that each tender criterion has on the pool of potential bidders is important. Author and lawyer Marc Lalonde writes as follows on the topic in relation to the eligibility criterion:

[Translation]

Finally, it needs to be remembered that every eligibility requirement imposed by a municipal body has the effect of reducing the pool of potential bidders. When the body imposes requirements in its tender documents, but then waives the strict application of these requirements once it is performing the bid analysis, it becomes impossible to know how many additional bidders would have been able to submit a bid under these more relaxed conditions but did not because of the eligibility requirements, which they were unable to meet after reading the call for tenders documents.³⁰

²⁸ Pierre GIROUX et al., *Contrats des organismes publics québécois*, loose-leaf, CCH publication, par. 7-750, p. 1,189.

²⁹ *Demix Construction, division de Holcim (Canada) inc. v. Québec (Attorney General)*, 2010 QCCA 1871.

³⁰ Marc LALONDE, “Honni soit qui mal y pense : réflexions sur l’attribution des contrats des organismes municipaux à l’ère de la vertu” in S.F.C.B.Q., vol. 412, *Développements récents en droit municipal (2016)*, Cowansville, Éditions Yvon Blais, p. 209, at page 269.

By requiring bidders to hold a general contractor's licence, the Saint-Laurent Borough reduced the pool of potential bidders. The fact that there were only three (3) companies who procured the specifications does not change this conclusion. The Inspector General is able to confirm that the requirement for bidders to hold a general contractor's licence excluded at least one (1) bidder from this call for tenders, since one (1) of the companies who procured the specifications told the Office of Inspector General that it had not bid because it did not have a general contractor's licence.

The Saint-Laurent Borough then erroneously interpreted the term "contractor" in clause 1.12 of section B of the special specification. It allowed a bidder without a general contractor's licence to win the contract by indicating that the condition was met by a sub-contractor of the bidder. In doing so, it makes it impossible to determine how many other bidders would have submitted a bid had they known that they did not have to hold a general contractor's licence.

The erroneous interpretation of the requirement—even though its clear wording suggested that the bidder had to hold a general contractor's licence—prevented the borough from obtaining the best service offering at the best price, which is the very purpose of the tendering process. As mentioned earlier, the aim of the call for tenders is to foster healthy competition between all the companies able to provide the product or service requested in order to obtain the best possible price.

4. Conclusion

The Inspector General's power to intervene is set out in section 57.1.10 of Montréal's City Charter, which reads as follows:

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

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

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

(...)

The conditions allowing the Inspector General to intervene are cumulative. First, there must be a failure to comply with one of the requirements set out in the tender documents or in a contract, or there must be a finding that the information provided, in this case by



the bidder, is false. It is only when one of these scenarios is established that the Inspector General will have to make a decision on the seriousness of the breaches.

In the opinion of the Inspector General, there is no doubt that the first criterion under section 57.1.10 of Montréal's City Charter is met. The specification requirements are very clear in the case at hand: the bidding contractor must hold a general contractor's licence.

In addition, that contractor must have licences in all the subclasses required by law and necessary for carrying out the work described in the call for tenders.

As mentioned earlier, the person who must hold this licence is the bidder and not the bidder's sub-contractors. The evidence gathered during the investigation shows that the successful bidder—the sole bidder in this call for tenders—does not have a general contractor's licence and, therefore, does not meet one of the requirements set out in the tender documents.

In his response to the Inspector General's Notice to an interested party, the director of the Saint-Laurent Borough justifies his decision to award the contract to Enseignes Dominion, despite the company not having a general contractor's licence, by pointing out that most of the work planned has to do with supplying panels. The borough's director explained that it is therefore not surprising to have the contract awarded to a manufacturer rather than a general contractor, and that it is sufficient for a sub-contractor to have a general contractor's licence. The Inspector General is of the opinion that this justification does not change his conclusion. Indeed, the requirement, as worded in the call for tenders' documents, is clear. The problem in this case is that the way the requirement is worded led all the companies who procured the specifications (and potential bidders) to believe that they themselves had to hold a general contractor's licence to be able to bid. The Saint-Laurent Borough therefore gave a competitive advantage to the successful bidder to the detriment of other interested suppliers who had obtained the specifications and who might have reasonably expected that only a company with the required licences could bid on the call for tenders and win the contract.

The Inspector General is of the opinion that failure to comply with the requirement to hold a general contractor's licence is in itself sufficient to meet the first criterion under section 57.1.10 of Montréal's City Charter. However, in addition, the successful bidder also does not have [translation] "all required licences in accordance with the laws in effect, including licences in good standing with the Régie du Bâtiment du Québec," as required by the call for tenders. The two missing subclasses are licences for painting (9) and demolition (2.7) work.

Once the first criterion under section 57.1.10 of Montréal's City Charter is met, the Inspector General must then assess the seriousness of the breaches.

In a decision upheld in appeal, the Superior Court explained that laws impose upon those who practice in this field obligations aimed at protecting the public and to ensuring technical competence, contractor solvency and fairness between bidders.³¹

The successful bidder, Enseignes Dominion, did not meet the requirements set out in clause 1.12 of section B of the special specification.

In the decision in *Office municipal d'habitation de Maria v. Construction L.F.G Inc.*,³² the Court of Appeal of Quebec stated that the absence of professional qualification was not a minor anomaly and created an unsurmountable barrier to winning a construction contract.

[Translation]

The respondent's failure to have the professional qualification required by both the relevant legislative provisions and the call for tenders is not a correctable minor anomaly, but rather creates an unsurmountable barrier to winning a construction contract.³³

In this decision, the municipality had added a peremptory clause in the tender documents stating that bids which did not meet the tender conditions would be excluded. In its decision, the Court found that this peremptory clause was an additional factor in favour of rejecting the bid.³⁴ Therefore, a peremptory clause was not essential for the Court of Appeal to decide to reject the bid due to failure to meet a licence requirement set out in the call for tenders. As mentioned earlier, the requirement as worded in call for tenders 15-031 led all the companies who procured the specifications (and potential bidders) to believe that they themselves had to hold a general contractor's licence to be able to bid.

The Inspector General cannot consider the failure to hold a general contractor's licence a "minor anomaly" since the scope of the requirement unduly restricts competition.

Therefore, how can the Inspector General ignore the fact that the successful bidder does not have all the licences required by law? He must consider this breach "serious" within the meaning of the aforesaid section 57.1.10.

According to the Inspector General, by awarding the contract to Enseignes Dominion, despite its failure to provide proof of the licences required in the tender documents and by law, the borough failed to fulfill its obligation to accept only eligible and compliant bids.

The breach noted concerns the very integrity of the contracting process: by ignoring the failure to comply with the requirements set out in the specifications, the borough broke the rules it itself had established in the call for tenders.

³¹ *Bernier Lecompte v. Verdun (Ville)*, J.E. 2002-1551, par. 57, upheld by the Court of Appeal of Quebec, 2005 QCCA 127.

³² 2014 QCCA 2034.

³³ *Office municipal d'habitation de Maria v. Construction L.F.G Inc.*, 2014 QCCA 2034, par. 9.

³⁴ *Office municipal d'habitation de Maria v. Construction L.F.G Inc.*, 2014 QCCA 2034, par. 47.



What message would the borough be sending if the interested suppliers were to learn that the licence criteria were optional and that the borough had the discretion not to respect them?

The impact that this could have on the companies who procured the specifications decision to bid must be reiterated here. If the borough were allowed to ignore some of the criteria set out in the call for tenders, this would prevent healthy competition in the marketplace and would lead to uncertainty among bidders and interested suppliers, who would no longer know what rules applied.

Moreover, when were interviewed by the Office of Inspector General, the project manager and a division head of the Saint-Laurent Borough stated that there was a rush to start the work quite quickly because the funds had to be disbursed before the end of 2015. The rush situation claimed by the borough has no effect on the Inspector General's conclusions.

In conclusion, the Inspector General is of the opinion that the conditions set out in section 57.1.10 of Montréal's City Charter have been established. Given the seriousness of the contractor's breaches, the Inspector General has no other choice but to rescind the contract awarded following call for tenders 15-031.

FOR THESE REASONS,

The Inspector General

RESCINDS the contract awarded to **Enseignes Dominion**, following call for tenders 15-031, for a period of three (3) years (2015–2017) in the approximate amount of \$271,992.11 annually, taxes included, the award of which contract was approved by the Saint-Laurent Borough Council on October 6, 2015, pursuant to Resolution CA 15 08 0656;

SENDS, in accordance with section 57.1.10 of Montréal's City Charter, a copy of this decision to **the mayor** of the City as well as to the **clerk**, who shall in turn send it to the city council concerned, i.e., the **Saint-Laurent Borough Council**.

The Inspector General,

Denis Gallant, Ad. E.

ORIGINAL SIGNED