



PUBLIC REPORT

2022

Recommendations to Société de transport de
Montréal regarding contract management of the
Bellechasse Transit Centre construction project

(Section 57.1.23 of the *Charter of Ville de Montréal, metropolis
of Québec*)

SUMMARY

The Office of Inspector General of Ville de Montréal conducted an investigation on the cancellation of a call for tenders and the performance of certain work by Société de transport de Montréal in connection with the construction of the Bellechasse Transit Centre (hereinafter “Bellechasse TC”). Part of the investigation pertained to the contract resulting from Call for tenders 600002988, “Centre de transport Bellechasse – Gérance de construction” (Bellechasse Transit Centre – Construction Management) awarded to Pomerleau Inc. involving the acquisition of a builder-manager to assist STM in the construction of the Bellechasse TC. The second part of the investigation pertained to the cancellation of call for tenders 600005380, “Lot 2.04 Coffrage des fondations – Construction du nouveau centre de transport Bellechasse” (lot 2.04 Foundation formwork – Construction of the new Bellechasse Transit Centre) and the performance of the work covered by the call for tenders before and after the cancellation.

The facts revealed during the investigation show that the request for bids for the construction management call for tenders did not comply with the regulatory framework applicable to public transit authorities since an item in the price schedule did not allow fixed-price or unit-price bids to be submitted. In addition, as part of the cancellation of the foundation formwork call for tenders, STM did not show good faith toward the bidders by having Pomerleau carry out the work set out in the call for tenders before the bid submission deadline. The investigation also revealed that a stairwell formwork contract was not awarded in accordance with the regulatory framework by STM and its builder-manager Pomerleau.

Construction of the Bellechasse TC is not done using the more standard approach, where STM issues a call for tenders for the construction of the entire transit centre. STM instead divided the construction of the centre into several construction lots awarded successively through a call for tenders. STM first issued a call for tenders aimed at obtaining the services of a builder-manager who would assist STM with the design of the construction package plans and specifications. Second, STM successively issued the construction calls for tenders as lots to be awarded to various specialized contractors. The contracts were then assigned by STM to the builder-manager, which was in charge of coordinating them.

The first part of the investigation concerned the awarding of the contract resulting from the construction management call for tenders to Pomerleau Inc. In that call for tenders, STM had a clause that allowed the builder-manager to carry out internally controlled work part of a separate item in the price schedule. The tender documents indicated that said internally controlled work was to be done for temporary installations or work that could not be part of one of the construction packages.

However, the investigation revealed that the item on the price schedule for internally controlled work did not allow bids to be submitted on a fixed-price or unit-price basis, as required by section 95 of the Act Respecting Public Transit Authorities. Instead, STM used an item that qualified as “Maximum allowance for internally controlled work” and that included an amount of \$4M for all the bidders. Bidders could not change it and therefore it was included in their bid price.

In its response to the Notice to Interested Parties, STM explained that the “Maximum allowance for internally controlled work” was required for the performance of the work and was part of a process of sound management of public funds. STM explained that it was impossible to define the internally controlled work at the time of the construction management call for tenders. STM also wanted to avoid having the Bellechasse TC work site delayed by a contract award for work

that could not be included in one of the construction packages. STM added that fairness among bidders was not affected since the \$4M amount on the price schedule applied consistently to all the bidders.

The Inspector General concluded that use of the “Maximum allowance for internally controlled work” does not comply with the regulatory framework applicable to public transit authorities, which stipulates that tenders must be requested on a fixed-price or unit-price basis. However, by adding a predetermined amount of \$4M in the price schedule without allowing any price competition among bidders, STM was violating a key element of the call for tenders.

The second part of the investigation involved the cancellation of the foundation formwork call for tenders and subsequent performance of certain work contained in it by the Pomerleau builder-manager and its subcontractor. The bid submission deadline for said call for tenders was June 23, 2020. STM notified bidders on September 15, 2020 that the call for tenders was cancelled due to the significant difference between the lowest compliant bidder’s price and STM’s estimate. The investigation revealed that, as soon as the bids had been submitted, STM knew that it would likely cancel the call for tenders because of said difference. However, the call for tenders would only be cancelled about three months later, after requesting and obtaining that bidders extend the validity period for their bids on August 4, 2020.

The formwork covered by the call for tenders included work involving stairwell footings and formwork. However, even before the bid submission deadline, STM chose to proceed with the footing work using the internal control clause in the construction management contract, carried out by Pomerleau for the amount of \$1,055,125.32. No addenda were issued following this decision to proceed on an internally controlled basis for the footings, whereas the call for tenders was still posted and bidders could have taken this into account in their tendering strategy.

The foundation formwork call for tenders also included formwork for the stairwells of the future Bellechasse TC. Despite the call for tenders being cancelled, the work was carried out by Pomerleau and a subcontractor specialized in this type of work. The investigation revealed that, after the bid validity period was extended, Pomerleau began meeting with its subcontractor, which had not bid on the foundation formwork call for tenders, in order to jointly assess with the subcontractor the feasibility of the stairwell formwork project.

A meeting was held on August 24, 2020 at the Bellechasse TC work site to assess the feasibility of the formwork project. It was also at this time that Pomerleau sent the drawings and specifications to the subcontractor, which submitted its bid two days later. A new meeting was held on September 8 with representatives from Pomerleau, the subcontractor and STM. The subcontractor then agreed to reduce its price submitted on August 26 for the stairwell formwork to comply with STM’s budget. The next day, on September 9, Pomerleau officially recommended that STM proceed with the stairwell formwork with the internally controlled work clause with said subcontractor. On the same day, the decision to cancel the call for tenders was made internally at STM.

The Inspector General has noted that the work on the stairwell footings and formwork was not awarded in accordance with the regulatory framework and that STM did not show good faith to bidders in its decision to cancel the call for tenders. The extension of the bid validity period allowed STM and its builder-manager to negotiate a price with Santco for the stairwell formwork. It was only after Santco agreed to reduce its price that STM announced the cancellation of the foundation formwork call for tenders. Such a practice constitutes lack of good faith toward bidders since the request for an extension of the bid validity period was used only to enable a contract to be negotiated with a third party for the performance of the work.

In short, the Inspector General believes that the facts and findings in this report should be brought to Ville de Montréal's attention. The Inspector General is recommending that for any future use of an internally controlled work clause, STM shall indicate in its tender documents the information required on the nature and quantity of work to be performed so that bidders may bid on a fixed or unit price basis.

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1. Scope and extent of work

1.1. Clarifications

Under section 57.1.8 of the *Charter of Ville de Montréal, metropolis of Québec* (R.L.R.Q. c. C-11.4, hereinafter the “Charter of Ville de Montréal”), the Inspector General’s mandate consists in overseeing contracting processes and the performance of contracts by Ville de Montréal or a related legal person.

The Inspector General does not conduct criminal investigations, but rather 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 evidence

The Inspector General has the duty to deliver quality reports that are timely, objective, accurate and presented in a manner that will ensure that the individuals and organizations under her authority are able to act in accordance with the information provided.

In support of her opinions, reports and recommendations, the Inspector General imposes upon herself the burden of proof of the civil standard of the balance of probabilities.¹

1.3. Notice to Interested Parties

Before making the results of her investigation public and, where applicable, using the powers conferred to her under section 57.1.23 of the *Charter of Ville de Montréal* in accordance with her duty of procedural fairness, the Inspector General sends a Notice to interested parties (hereinafter, the “Notice”) to the persons involved indicating the relevant facts gathered during the investigation. Upon receiving the Notice, the persons concerned may submit in writing any comments, representations or observations they believe to be relevant.

Such a Notice was sent on November 18, 2021 to the attention of Société de transport de Montréal (hereinafter “STM”), Pomerleau Inc. (hereinafter “Pomerleau”), 9148-4006 QUÉBEC INC. (hereinafter “Santco”), Coffrage Alliance Ltd. (hereinafter “Alliance”), the senior project manager at STM’s major bus projects division, and the Pomerleau project manager. Among all those who were sent the Notice, only STM, Pomerleau and Santco sent a response to the Office of Inspector General of Ville de Montréal. All others exercised their right to abstain from responding.

The facts and arguments invoked by STM, Pomerleau and Santco were taken into account by the Inspector General and are covered in this report.

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*).

2. Background

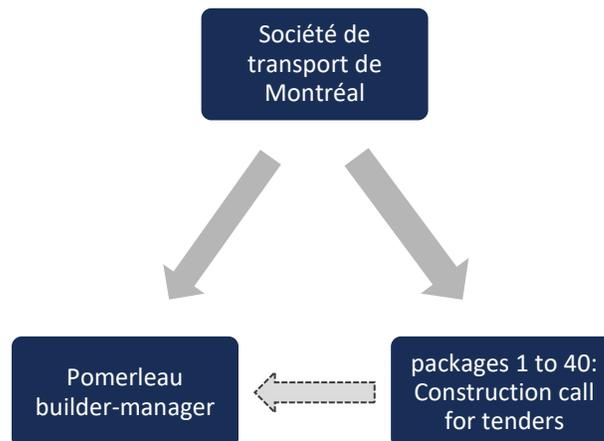
2.1. Scope of the investigation

The Office of Inspector General's investigation involved the cancellation of a call for tenders and the performance of certain work in relation to the construction of the Bellechasse Transit Centre (hereinafter "Bellechasse TC"). The Bellechasse TC is a new entirely underground transit centre that will be used for 300 STM buses with an estimated completion date of fall 2022 as of the publication of this report. The Bellechasse TC construction project was divided into two phases: the first consisted in demolishing the existing building, decontaminating the soil and excavating the bedrock, while the second involved building the new transit centre. The contracts and the call for tenders covered by the investigation are part of the second phase of the work.

Construction of the Bellechasse TC is not being carried as is more commonly done where a call for tenders for the construction of the entire building is issued and awarded to a general contractor who carries out the work with its subcontractors. Instead, STM initially contracted the services of a builder-manager to assist in the planning of the work required to build the Bellechasse TC. The builder-manager contract was awarded following the publication of a call for tenders in which Pomerleau was the successful bidder.



Second, once the contract was entered into with the builder-manager, the latter supported and advised STM in the planning of upcoming calls for tenders for the construction of the Bellechasse TC. The construction was divided into approximately 40 construction lots, each of which was subject to a specific tender call for tenders to be awarded to a contractor. For example, roofing, metal cladding, masonry and plumbing were all divided into individual calls for tenders rather than grouped into a single call for tenders for construction work. The contracts resulting from these calls for tenders were then assigned to the Pomerleau builder-manager, who carried them out in accordance with the plans and specifications.



2.2. Contracts and calls for tenders covered by the investigation

2.2.1. Contract resulting from Call for Tenders 6000002988 – Bellechasse Transit Centre – Construction management

On November 15, 2019, STM published in the Government of Québec's electronic tendering system (SEAO) call for tenders 6000002988, "CENTRE DE TRANSPORT BELLECHASSE – GÉRANCE DE CONSTRUCTION" (hereinafter the "Construction Management Contract") aimed at obtaining the services of a builder-manager for the construction of the Bellechasse TC. The contract was awarded to Pomerleau for the amount of \$27,474,426 following a two-envelope call for tenders, where the successful bidder received the best score according to the evaluation system used for this call for tenders. STM had awarded the contract despite a 45% difference between Pomerleau's tendered price and STM's estimate of \$18,897,291 for the contract. As mentioned above, the builder-manager had to advise STM with the design of the plans and specifications for the various packages that would then be assigned to it in view of being completed.

2.2.2. Cancellation of Call for Tenders 600005380 – Package 2.04 Foundation formwork – Construction of the new Bellechasse Transit Centre

On April 21, 2020, call for tenders 600005380, "Lot 2.04 Foundation formwork – Construction of the new Bellechasse Transit Centre" (hereinafter "the foundation formwork call for tenders") was posted by STM on the SEAO website in view of performing the various formwork for the Bellechasse TC. The bid submission deadline was June 23, 2020 and two companies submitted bids, "9090-5092 Québec inc." (hereinafter "Synergy") and Alliance. Synergy was the lowest compliant bidder with a bid of \$17,813,198.62. However, STM cancelled the call for tenders on October 2, 2020 due to a significant difference between the lowest bidder's price and the estimate.

2.3. Denunciations received

In November 2020, the Office of Inspector General of Ville de Montréal received a denunciation concerning the foundation formwork call for tenders. The whistleblower alleged that the work involved in the foundation formwork call for tenders had been completed while the call for tenders had still not been awarded or cancelled at that time.

3. Construction management contract

Société de transport de Montréal (STM) is a public transit authority that is subject to the *Act Respecting Public Transit Authorities* when awarding public contracts. Section 95(8) of the Act stipulates that public transit authority's contracts must be entered into on a fixed price or unit price basis:

*"[...] Tenders may not be called for nor may the contracts resulting therefrom be awarded except on a fixed price or unit price basis."²
[Underlining by the Inspector General]*

The Office of Inspector General's investigation revealed that one item in the construction management contract call for tenders did not comply with the regulatory framework applicable to STM. The call for tenders contained an item in the price schedule for which bidders could not tender a bid on a fixed price or unit price basis.

3.1. Purpose of the contract

The construction management contract is a mixed-purpose construction and services contract aimed at building the Bellechasse TC. The role of the builder-manager is to provide construction consulting expertise to STM in the delivery of the project. Among the services required of the builder-manager, the tender documents specify that the builder-manager shall advise STM in the design of the plans and specifications, which shall be included in a package to be awarded by public tender. The builder-manager will also be responsible for providing the construction consulting services required for the Bellechasse TC project. The required construction work results from the transfer of the various packages to the builder-manager, which acts as the project's principal contractor and coordinates the performance of the work. The call for tenders also contained a clause that enabled the successful bidder to carry out certain work on an "internally controlled" basis with its own employees or by using a subcontractor. This construction management contract is the first of its kind to be used by STM.

3.2. Tender documents

3.2.1. Price schedule

A fixed-price contract is a contract [TRANSLATION] "through which the builder (or co-contractor in another type of contract) undertakes to deliver the work performed in accordance with the plans and specifications for a predetermined total fixed price."³ This is a well-known and widely used type of contract by all Québec public bodies.

Conversely, a unit-price contract is a contract entered into for [TRANSLATION] "a total price for a particular item that may vary in the end according to the quantity required for said item, regardless of whether it is less or more, without the parties being bound by the approximate

² *Act Respecting Public Transit Authorities*, CQLR, c. S-30.01, sect. 95(8).

³ André Langlois, *Les contrats municipaux par demandes de soumissions*, Éditions Yvon Blais, 4th Edition, page 90.

quantities in the estimates used as the basis for awarding the contract.”⁴ In this type of contract, bidders tender a unit price for goods or services (e.g. \$30/tonne, \$80/hour) and the public body pays for the quantity of goods or services requested from the successful bidder.

The price schedule in the construction management call for tenders was divided into four items:

1. Fees for construction management services;
2. Preparation of calls for tenders and performance of contracts transferred by STM to the successful bidder;
3. Work site organization;
4. Maximum allowance for internally controlled work.

As illustrated in Figure 1 below, the first three items consist of work and services at a fixed price, while item 4 is a “Maximum allowance under internal control”:

[TRANSLATION] APPENDIX A-1: PRICE SCHEDULE

ITEMS	DESCRIPTION	TYPE	PRICE (BEFORE TAXES)
1	Fees for construction management services	Fixed price	\$ _____
2	Preparation of calls for tenders and performance of contracts transferred by STM to the successful bidder	Fixed price	\$ _____
3	Work site organization	Fixed price	\$ _____
4	Maximum allowance for internally controlled work	Maximum allowance under internal control	\$4,000,000.00
TOTAL TENDERED PRICE (Before taxes)			\$ _____

Figure 1: Price schedule excerpt

As shown in Figure 1, item 4 in the price schedule in the tender documents indicates that the maximum allowance for internally controlled work is \$4,000,000. As this amount is predetermined in the price schedule, bidders cannot change it in their bid. In fact, it is added to the previous three items for each potential bidder in the calculation of their total tendered price. The tender documents do not contain any description of the work to be performed in that respect for which the bidders could submit a fixed price or unit price. This “Maximum allowance under internal control” is therefore a \$4M expenditure by STM for undefined work for which bidders cannot tender a price in their bid.

3.2.2. Internally controlled work clause

Section 22.12 of the *Instructions to Bidders* sets out the terms for the performance of internally controlled work by the builder-manager:

[TRANSLATION] “The price set out in item 4 “Maximum allowance for internally controlled work” to cover the reimbursement of materials, labour,

⁴ André Langlois, *Les contrats municipaux par demandes de soumissions*, Éditions Yvon Blais, 4th Edition, page 95-96.

administration, profits, Work Site overhead, costs and expenses related to the performance of services and work under internal control such as protection or other temporary Work Site installations and any work that could not be included in any of the construction packages assigned to the Successful Bidder. Internally controlled work must be authorized in advance by the designated Representative by signing the form provided for this purpose. STM is not obligated to spend said provisional amount in whole or in part. In such case, the Successful Bidder shall not be entitled to any compensation.” [Underlining by the Inspector General]

As shown in the above clause, work that can be carried out on an internally controlled basis must meet one of the two following criteria: it must involve temporary installations or it could not be included in one of the packages to be assigned to the builder-manager.

The tender documents did not contain any other description of internally controlled work other than the text of article 22.12. In other words, there was no description of the work that enabled bidders to assess its scope in order to tender a price based on the work to be performed. In addition, the tender documents did not indicate a maximum amount for the work to be performed in this manner, except for the total amount of the envelope itself, which was \$4M. This therefore meant that STM could have construction work performed by its builder-manager, the value of which would be above the public tender threshold as long as the value of the contract did not exceed \$4M.

The tender documents also included provisions for the performance of the internally controlled work by the builder-manager. In the event that the internally controlled work was performed by the employees of the successful bidder, the latter could mark up the cost of the work by 15% to cover overhead and management costs and profits, for instance. Conversely, in the event the successful bidder had the work performed on an internally controlled basis by a subcontractor, the tender documents stipulated that it was the subcontractor who could mark up its invoice by 15% to cover its own management costs and profits for the work involved. In this case, the builder-manager could mark up its invoice by 10% to cover its management fees and profits in addition to the 15% charged by the subcontractor.

3.3. Use of the allowance for internally controlled work

The investigation revealed that the allowance for internally controlled work is separate from contingencies in the builder-manager’s contract. Contingencies are amendments to a public contract⁵ that occur during the work due to unforeseen events during the performance of the work or services. These amendments are permitted under the *Act Respecting Public Transit Authorities* provided that the amendment is ancillary to the main contract and does not change its nature.

In the builder-manager contract, these two notions are covered by separate clauses, which shows that STM considers them as two different concepts. This was also confirmed by the various witnesses interviewed during the investigation, who explained that internally controlled work is different from contingencies. The various meetings with witnesses revealed that the purpose of the allowance for internally controlled work is to quickly carry out different work by the builder-manager that was not planned at the start of the project. In that respect, three STM

⁵ *Op. cit.*, note 2, sect. 102.1.

employees involved in the Bellechasse TC project, including the senior project manager in the major bus projects division, explained that internal control allows the builder-manager to carry out urgent work that comes up during the performance of the construction packages. STM's project manager also explained that internal control is used to carry out work that could not be anticipated at the start of the project and for which it would be difficult to issue a call for tenders in order to avoid slowing down the work site. Witnesses also explained that internal control is used to carry out work quickly in order to keep the work site running smoothly. Interviews with witnesses revealed that the objective of internal control is to provide STM with some flexibility and agility in awarding construction work contracts.

3.4. Response to the Notice to Interested Parties

3.4.1. Société de transport de Montréal

In its response to the Notice to interested parties, STM maintained that use of internally controlled work was necessary to carry out the work and was part of a process of sound management of construction activities.

3.4.1.1. Work that cannot be defined in advance

STM explained that the scope of the work (labour, equipment and materials) to be carried out by the builder-manager could not be determined since the scope of the various packages was not yet known at the time of the construction management call for tenders. This is why an allowance for internally controlled work was included in the call for tenders to compel the successful bidder to perform the necessary work that would come up during the performance of the contract. According to STM, the transit authority could have even chosen not to indicate any amount for this item, but opted to enter \$4M in order to provide bidders with an overview of the scope of the work potentially required by the builder-manager.

3.4.1.2. Sound project management

STM explained that the decision to include an allowance for internally controlled work was made from the standpoint of sound management of the construction activities of the Bellechasse TC. One of the objectives was to avoid having a portion of the work to be carried out that could not be assigned to a specific package unduly delay the completion of the work. STM added that this type of allowance is a practice found in construction management contracts, including with other public bodies such as Société québécoise des infrastructures, Centre hospitalier universitaire Sainte-Justine and Société de développement et mise en valeur du Parc olympique.

3.4.1.3. Fairness among bidders

STM also maintained that use of the maximum allowance for internally controlled work did not affect fairness among bidders for the construction management call for tenders. The contract was awarded on the basis of two envelopes, namely, a combination of quality and price to determine the bidder with the highest score, and the \$4M amount was the same for all the bidders.

3.4.1.4. Nature of the contract

The Notice to interested parties allows recipients to express their views and indicate their disagreement with certain preliminary facts or findings contained in the Notice. At this stage, they can still present arguments that will lead the Inspector General to alter one or more of her preliminary findings. In the Notice sent on November 18, 2021, the Inspector General concluded that the contract awarded to Pomerleau was a service contract and not a mixed-purpose contract. This conclusion was based among other things on the price schedule, which did not include any permanent construction work and the specifications, which indicated the services that the builder-manager had to deliver throughout the contract.

In its response, STM disagreed with this position and instead described the builder-manager contract as a mixed-purpose contract (services and construction work). Among the reasons mentioned, STM stated that the contracts resulting from the construction lot call for tenders are assigned to the builder-manager as stipulated in the construction management call for tenders. The arguments used by STM in its response are sufficiently compelling for the Inspector General to modify her preliminary conclusion and qualify the contract as a mixed-purpose contract (services and construction work). The analysis of the facts and the resulting conclusions in this report were therefore made with this qualification of the contract.

3.5. Analysis

STM is subject to the *Act Respecting Public Transit Authorities* when awarding public contracts. STM may not deviate from the Act unless authorized to do so by the Minister of Municipal Affairs and Housing.

The Inspector General believes that the allowance clause for internally controlled work as used in the construction management call for tenders is contrary to the regulatory framework applicable to STM. First, this item in the price schedule is contrary to the *Act Respecting Public Transit Authorities*, which stipulates that contracts must be entered into on a fixed-price or unit-price basis. Second, the item does not allow for any competition between bidders regarding price, which is counter to the very purpose of public calls for tenders.

3.5.1. Act Respecting Public Transit Authorities

As mentioned in section 3, the *Act Respecting Public Transit Authorities* requires that bids be requested and any resulting contracts be entered into on a fixed-price or unit-price basis. However, the Inspector General believes that item 4 in the price schedule clearly does not comply with either of the two possible options in the Act. The inclusion of a predetermined price of \$4M by STM for the maximum allowance for internally controlled work does not allow bidders to enter a price since it has already been added to all the bids. Furthermore, unlike the first three items in the price schedule that indicate that the type is fixed, item 4 is described as a "Maximum allowance for internally controlled work." However, the Act requires that contracts be entered into only on a fixed-price or unit-price basis. The fact that it is only one item out of four in the price schedule does not alter that conclusion. The entire bid must be requested on a fixed-price or unit-price basis. Otherwise, accepting such a practice would be tantamount to allowing STM to do indirectly what it cannot do directly, which is to award mutual agreement contracts to its builder-manager without having to comply with public contracting rules.

The fact that STM was unable to determine ahead of time the work that needed to be done is not a reason to circumvent this requirement of the Act. First, it was STM that chose to proceed with the construction of the Bellechasse TC by lots to be awarded successively by tender rather than through a construction call for tenders for the entire Bellechasse TC. It cannot then invoke its own choice to justify circumventing a public policy obligation of the law. Second, the fact that STM indicated in its response that it could have chosen not to indicate any amount for the item shows a profound lack of understanding of the regulatory framework applicable to it. All contracts entered into by STM must be on a fixed-price or unit-rate basis. If STM had chosen not to indicate any amount for the aforementioned item, then any expenditure for internally controlled work would be in violation of the Act since it would not have been stipulated in a call for tenders.

Nor can the Inspector General accept STM's argument that it had chosen to "provide an indication of the maximum scope of the work" to bidders as it was STM itself that entered the amount of \$4M in the price schedule. Given that there was no description of the internally controlled work, what was the purpose of providing the information to the bidders since they had no details on the nature, complexity and scale of the internally controlled work? The answer is that the indication was not useful since the terms related to the expenditures would be determined when the work was approved. The Inspector General instead believes that STM included the amount in the call for tenders so that it could spend it during the performance of the work.

Lastly, the fact that other public bodies use a similar clause in their calls for tenders is irrelevant since none of the organizations mentioned in the response is subject to the *Act Respecting Public Transit Authorities*. As a public transit authority, this is the legislation with which STM must comply when awarding contracts. Although it is true that certain obligations are common to all public bodies, there may be some differences and the Office of Inspector General is required to apply the regulatory framework specific to the municipal bodies within its jurisdiction.

3.5.2. Competition between bidders

The Inspector General is also of the opinion that item 4 of the construction management call for tenders vitiates an essential element of any public call for tenders: competition between bidders on that item. By determining an amount of \$4M on its own for undefined work, STM was preventing bidders from competing for internally controlled work. In fact, a public call for tenders is intended to replace negotiations through competition between potential bidders.⁶ The objective is to obtain the best services at the lowest price by giving all qualified bidders an equal opportunity to participate.

⁶ *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 SCR 619, par. 41.

In a call for tenders, a bidder must adhere to the terms and only indicate the price it intends to require as consideration.⁷ Here is how the Supreme Court explained this fundamental principle of a call for tenders:

“A tender, in addition to responding to an invitation for tenders, is also an offer to perform the work outlined in the plans and specifications for a particular price. The invitation for tenders is therefore an invitation for offers to enter into Contract B on the terms specified by the owner and for a price specified by the contractor. The goal for contractors is to make their bid as competitive as possible while still complying with the plans and specifications outlined in the tender documents.”⁸

However, as written for internally controlled work and its item 4, the construction management call for tenders does not allow for plans and specifications to be accepted or a price to be tendered. No description of the work is indicated and no price can be tendered by bidders. This is a fundamental element that is omitted for item 4 in the call for tenders.

The fact that it only applies to one item in the price schedule does not make this practice compliant with the regulatory framework. Internal control remains a budget envelope that allows several contracts totalling \$4M to be awarded, some of which may involve an expenditure that exceeds the public tender threshold.

⁷ Sébastien Laprise and Jean-Benoit Pouliot et al., *Contrats des organismes publics québécois*, Wolters Kluwer Québec Ltée, Brossard, 2022, par. 6-890 c).

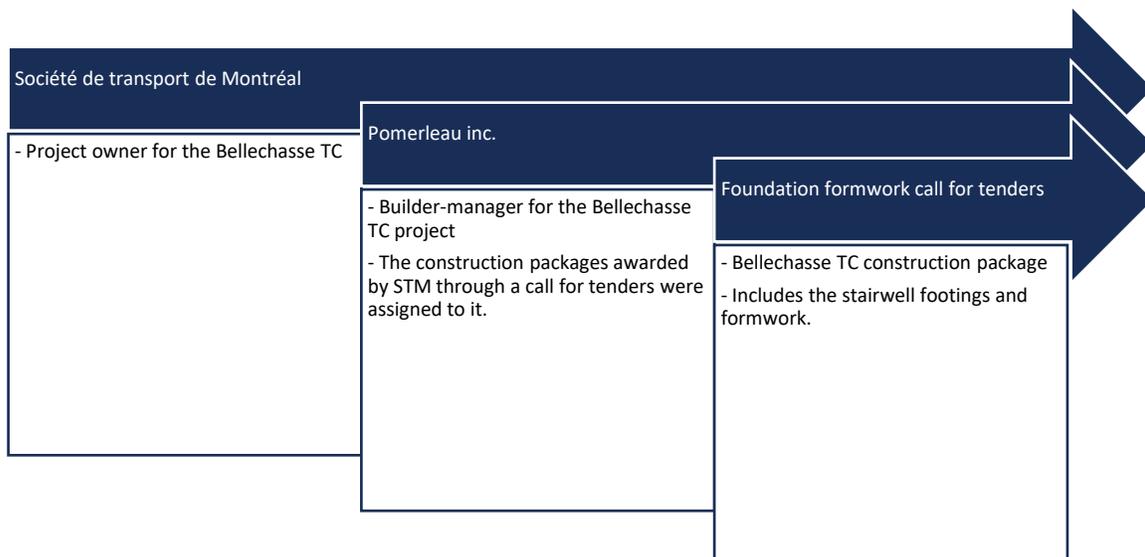
⁸ *Op. cit.*, note 6, para. 37.

4. Foundation formwork call for tenders – Package 2.04

The investigation revealed that when the foundation formwork call for tenders was cancelled, STM did not act in good faith toward bidders by negotiating at the same time with its builder-manager Pomerleau during the call for tenders to perform the work involved. The investigation also revealed that STM negotiated with a company to have other work performed on an internally controlled basis after the bid submission deadline but before announcing the cancellation of the call for tenders.

4.1. Purpose of the contract

The foundation formwork call for tenders contained different types of work to be carried out by the successful bidder. Some of the work consisted in the successful bidder carrying out the stairwell footings and formwork at the Bellechasse TC.



4.2. Cancellation of call for tenders

STM notified bidders on September 15, 2020 that the foundation formwork call for tenders was cancelled, nearly three months after the bid submission deadline. However, the investigation revealed that, upon receiving the bids, STM was considering cancelling the call for tenders due to the considerable difference between the lowest compliant bidder's price and the estimate. As mentioned in section 2.2.2, Synergy was the lowest compliant bidder for the call for tenders with a bid of \$17,813,198.62, whereas the estimate produced by STM and Pomerleau for the contract was \$10,816,735, a difference of 43%.

Two STM employees who were interviewed during the investigation explained that STM knew, upon receiving the bids, that the tendered prices presented a problem and that it would be difficult to justify awarding the contract. This was corroborated by documents obtained during the investigation that revealed that as of July 6, 2020, an STM employee was asking his colleagues if a decision had been made regarding the call for tenders and whether he should

prepare cancellation letters for the call for tenders. On July 10, 2020, an architectural firm involved in the project recommended going back to tender to get prices closer to market standards if the schedule allowed for it.

In a document produced by Pomerleau dated July 16, 2020, the builder-manager proposed two courses of action following the call for tenders: meeting with the bidders to request reduced-cost proposals or cancelling the call for tenders. The document also stated that in the event the call for tenders was cancelled, the internally controlled work could continue so as not to delay the project schedule and future packages (the facts related to the internally controlled work will be covered in sections 4.3 and 4.4). The decision to cancel the call for tenders was finally made internally at STM on September 9, 2020. A document obtained during the investigation from the STM project manager indicated that the above decision was made subsequent to the recommendations of the STM professionals and builder-manager Pomerleau.

4.3. Footing work

Footings are the foundations of a building's structure and prevent the walls from sinking in over time. The foundation formwork call for tenders stipulated footing work for this lot that would be carried out by the eventual successful bidder. However, the footing work was done by Pomerleau using its own employees after obtaining STM's approval, while the call for tenders was still posted.

The investigation revealed that while the call for tenders for the foundation formwork was still posted on the SEAO site, STM gave Pomerleau the go-ahead to carry out the footing work that was part of said call for tenders. The work was carried out by Pomerleau on an internally controlled basis using its own employees and began in late June 2020. The total value of the work was \$1,055,125.32.

Note that when the foundation formwork call for tenders was issued, the footing work had initially been part of a grouped item in the price schedule. However, on May 22, 2020, STM issued addendum #3 that amended the price schedule so that the footing work would be separate in the price schedule. The Pomerleau project manager explained to the Office of Inspector General's investigating officers that the change to the price schedule made it possible to easily remove the footing work after the contract award. Five days later, on May 27, 2020, discussions were held between Pomerleau and STM employees to plan the drilling of the footings, and STM authorized the technique to be used for the drilling. On June 16 and 17, 2020, while the call for tenders was still posted and potential bidders were preparing their bids, STM sent a written authorization to Pomerleau allowing it to carry out the footing work on an internally controlled basis. The reason for authorizing the footing work at the time by the builder-manager was to respect the project schedule.

Note that no addenda were issued to remove the footing work from the call for tenders after the decision was made to have Pomerleau perform the work. The Pomerleau and STM project managers explained to investigating officers that such an amendment would have required an extension of the call for tenders and therefore of the contract award and the start of the work. Witnesses explained that the tight project schedule and the planned start of another lot to come, namely the steel structure work, were the main reasons for Pomerleau performing the footing work. The STM senior project manager at the major bus projects division explained that his decisions were made to save project costs and taxpayers' money.

A photo taken on July 13, 2020 at the Bellechasse TC site, while the decision to cancel the call for tenders had still not been announced by STM, shows that the footings had already been completed at that time.



The Pomerleau project manager also explained to investigating officers that the footing work carried out by his company as internally controlled work was started in June 2020 and completed in fall 2020. Thus, before the end of the posting of the call for tenders and well before the cancellation of the call for tenders was announced, STM had intended to have the footing work included in the call for tenders carried out by its builder-manager on an internally controlled basis.

4.4. Stairwell formwork

The stairwell formwork consisted in pouring the concrete around the stairs of the future Bellechasse TC. This work was also part of the foundation formwork call for tenders that was cancelled on September 15, 2020. The work was also carried out on an internally controlled basis, but this time by a Pomerleau subcontractor, 9148-4006 Québec inc. (hereinafter “Santco”), for the amount of \$1,725,000, plus applicable taxes.

The investigation revealed that a little over a month before the cancellation of the call for tenders was announced to bidders, Pomerleau began discussions and took steps with Santco to carry out the stairwell formwork, which was also included in the foundation formwork call for tenders.

4.4.1. Contract award to Santco

4.4.1.1. Modification of initial plan

As mentioned in section 4.2, STM already knew, in early July 2020, that the foundation formwork call for tenders would likely be cancelled because of the difference between the lowest compliant bidder's tendered price and the estimate. However, it appears that STM was looking for a way to have the stairwell formwork done despite the likely cancellation of the call for tenders. Pomerleau's general superintendent explained that the company's initial plan was to carry out the work with its own employees, in the same way as with the footings. To this end, the Santco project manager explained having come to the work site in late July or early August 2020, at Pomerleau's request, to explain the issues related to the stairwell formwork. As Santco had expertise in this type of work, it would appear, according to the project manager, that Pomerleau wanted his opinion on whether it was feasible to have the work done by its own employees. Santco's project manager also explained that at the time of his visit, he understood that Pomerleau wanted to perform the formwork using its own employees.

On August 4, 2020, STM requested and obtained from bidders Synergy and Alliance an extension of the validity period of their bids until September 18, 2020 as well as an extension of the bonds for the call for tenders. A meeting was also held with them on August 18 to obtain more information on their bids, in particular on the significant difference between their prices and the control estimate. At the meeting, the bidders explained that one of the issues was the schedule of the construction lots planned by STM. In fact, the stairwell formwork was originally planned after the steel structure work that was part of another lot. Synergy and Alliance explained that this approach was more costly than doing the stairwell work before the steel structure work.

At a meeting with the Office of Inspector General's investigating officers, STM's project manager agreed that STM and Pomerleau concluded that the construction of the stairwells before the steel structure would save money in addition to being a permanent and safer alternative to installing temporary stairs. An STM project technician explained that STM needed to complete the stairwell formwork to not risk delaying the project schedule.

4.4.1.2. Negotiations with Santco

On August 24, 2020, another meeting was held between Pomerleau and Santco at the Bellechasse TC project office. The purpose of the meeting was to assess whether it was feasible to have Santco perform the stairwell formwork. To this end, Pomerleau sent Santco an email the same day with the plans for the work. However, the Santco project manager told investigating officers that August 24 was not the first time he was seeing the stairwell formwork plans. Neither Synergy nor Alliance was invited to the meeting, whereas their bids for all the foundation formwork were still valid and the call for tenders had not yet been cancelled. On August 26, 2020, Santco sent its bid to Pomerleau for the formwork for nine stairwells for the amount of \$1,801,000 plus taxes.

On September 8, 2020, a meeting was held between STM, Pomerleau and Santco representatives to discuss the stairwell formwork. Santco agreed at the meeting to reduce its price to \$1,725,000 (excluding taxes). During a meeting with the Office of Inspector General's investigating officers, the Santco project manager explained that he had reduced his price so that STM could stay on budget and that he had teams to carry out the work at the time requested by STM. The investigating officers were able to consult documents showing that the following day, September 9, Pomerleau proposed to STM to use internal control to carry out

the stairwell work and to give the fixed-price contract to Santco for the revised amount of \$1,725,000:

[TRANSLATION] “Further to our discussion and meeting yesterday, please find attached the comparative table and Santco’s proposal for the stairwell formwork.

Here is what we are proposing: Use of internal control for the completion and formwork and laying of concrete for the 9 stairwells to be awarded on a fixed-price basis to Santco. [...]

Subsequent to your approval, we will proceed with drawing up and initiating the proposed internal controls for your official signature. [...]

We would appreciate your getting back to us quickly to implement this strategic plan so that the maximum number of stairwells can be completed before the arrival of the [steel structure engineer] (package 2.01) at the work site.”

The internal announcement on September 9, 2020 by the STM project manager announcing the cancellation of the call for tenders (section 4.2.) took place the day after Santco agreed to reduce its price for the stairwell formwork.

4.4.1.3. Contract award to Santco

On October 5, 2020, Pomerleau contacted the STM project manager by email to once again offer to carry out the stairway formwork on an internally controlled basis and to award the contract to Santco. The email stated that it would be more economical to build the concrete structures before the steel frame. On October 26, 2020, the STM project manager sent an email to the Pomerleau project manager to notify him that STM had allowed the stairwell formwork to be carried out on an internally controlled basis by the Santco subcontractor. On October 29, 2020, Pomerleau submitted an authorization request to STM to have the stairwell formwork carried out under internal control and award the contract to Santco. The request was authorized the same day by STM and on November 2, 2020, Santco began work at the Bellechasse TC work site. The contract was signed on November 25 by Pomerleau and Santco.

4.4.2. Pomerleau’s request for bids

Following the start of negotiations with Santco, Pomerleau invited Alliance and Synergy to bid on the stairwell formwork project. No companies other than Santco, Alliance and Synergy were invited to tender a price for the work. However, the investigation revealed that this process was not fair to the two companies since the choice of Santco had been made well before their bids were submitted.

4.4.2.1. Alliance’s bid

Pomerleau contacted Alliance in late August 2020 to ask them to propose a price for the stairwell formwork. About a month later, on September 23, 2020, Alliance submitted its bid to Pomerleau for the formwork for six stairwells in the amount of \$1,877,786 (excluding taxes). Its bid was incomplete since the price was only for six stairwells and not nine as had been requested from Santco in August 2020. Alliance representatives explained that Pomerleau’s

request was in fact for six stairwells. Upon realizing that Alliance's bid was for six stairwells, the builder-manager modified the bid price itself to arrive at a price for nine stairwells.

4.4.2.2. Synergy's bid

Around September 13, 2020, Pomerleau contacted Synergy to ask it to submit a price for the stairwell formwork. At a meeting with the Office of Inspector General's investigating officers, Synergy's construction vice-president stated that Pomerleau did not give him any details on the scope of the work to be carried out other than it was for the stairwells. Synergy submitted its bid on October 1 for the formwork of nine stairwells for an amount of \$2,030,000 (excluding taxes). Thus, Pomerleau requested a price from Synergy after recommending on September 9 that the same contract be awarded to Santco.

4.4.3. Rationale for awarding the stairwell formwork contract

Section 105 of the *Act Respecting Public Transit Authorities* states that the chair of a public transit authority may, in a case of force majeure likely to endanger public health or life, to seriously disrupt public transit service or seriously damage STM equipment or interfere with its operation, to order such expenditures as the chair deems necessary and to award any contract required to remedy the situation. The chair must then submit a substantiated report of the expenditure and the contract at the next board meeting. This provision allows a transit authority like STM to bypass the public tendering process in order to award a contract, regardless of the contract's expenditure amount.

STM justified Pomerleau's use of internal control to complete the stairwell formwork through the urgency of securing the Bellechasse TC work site and ensuring the safety of its workers. However, STM did not produce a substantiated report of the expenditure and the contract that had to be submitted at the next board of directors meeting following the contract award. The investigation instead revealed that the emergency invoked at the time was more schedule-related and not one that jeopardized the safety of workers at the work site. In fact, the notion of work site securement was not brought up at the beginning of the stairwell contract approval process; instead, STM was assessing the possibility of a change directive.

4.4.3.1. Change directive option

The investigation revealed that STM first assessed the option of a change directive to complete the stairwell formwork. In an email dated October 5, 2020, the STM project manager wrote to the senior project manager of the major bus projects division and to the STM procurement section chief that he wanted to issue a binding change directive to complete the stairwell formwork. The reason mentioned at the time was the very tight lead times to get the work done in order to meet the project schedules.

At a meeting with the Office of Inspector General's investigating officers, the senior project manager of the major bus projects division explained that STM had first reviewed the possibility of awarding the contract through a change directive in the steel structure contractor's contract. A meeting was held on October 21, 2020 to discuss the four conditions of the STM's by-law on contract management⁹ that would allow a contract to be amended. In his opinion, this option was ruled out as it would have been illogical and unlikely that a steel structure contractor would have agreed to complete the stairwell formwork, which is not its specialty. The decision to

⁹ Société de transport de Montréal, *Règlement concernant la gestion contractuelle*, R-175, sect. 9.1.

proceed on an internally controlled basis was made after eliminating the option of a change directive.

4.4.3.2. Work site securement

The investigation revealed that after considering the option of a change directive for the stairwell formwork and selecting internal control, work site safety risks were raised by STM employees to justify the work.

In November 2020, when STM approved the construction of the stairwells by Pomerleau and its subcontractor Santco, the STM project manager issued a first memo in which he said the work was required due to an unforeseen event at the work site. In his opinion, internal control would be a very cost-effective way to deal with the situation and a call for tenders would delay the Bellechasse TC project schedule. At one place, the STM project manager stated that ensuring the quality of the works and safety of the work site in general was one of the reasons for internal control. Although the issue of work site safety was mentioned in this first memo, it does not appear from reading it that the Bellechasse TC work site posed a threat to worker safety.

In an amended version of the first memo, the STM project manager justified the stairwell formwork project by the fact that there was a hazard at the Bellechasse TC work site. In this amended version, the STM project manager wrote twice that the presence of fragmented rock required protection that had to be implemented quickly to ensure the safety of the workers, work site, and works. The stairwell formwork was the first step in securing the fragmented rock. Note that the first memo never addressed the risks associated with the fragmented rock at the work site, even though it was mentioned as a risk to the safety of Bellechasse TC workers.

During an interview, the STM project manager explained that internal meetings were held to explain the urgency of proceeding with the work. He also explained that the contract was approved as the work was included in article 22.12 of the construction management contract. In addition, it would have taken too long to issue a public call for tenders given the construction lead times.

4.5. Response to the Notice to Interested Parties

4.5.1. Société de transport de Montréal (STM)

4.5.1.1. Stairwell formwork and footing work

In its response to the Notice to Interested Parties, STM argued that the stairwell formwork and footing work were additions to Pomerleau's contract that complied with section 102.1 of the *Act Respecting Public Transit Authorities* and section 9.1 of its by-law on contract management, namely, the provisions involving amendments to a contract resulting from a public call for tenders (commonly referred to as contingencies). Section 102.1 stipulates that a public contract may be amended if the amendment does not change the nature of the contract and is ancillary to it:

“102.1. “A transit authority may not amend a contract awarded following a call for tenders unless the amendment is accessory and does not change the nature of the contract.”

However, this statement by STM is blatantly false given that documents obtained during the investigation from STM and Pomerleau show that the contracts were awarded on an internally controlled basis and not following an amendment to the contract. The statement is also

contrary to all the testimonies made during the investigation that the work was carried out on an internally controlled basis and not through an amendment to Pomerleau's contract.

First, the invoice issued by Pomerleau dated August 31, 2021 contained the list of work carried out by the company on an internally controlled basis and indicated that the stairwell formwork and footing work was performed as internally controlled work:

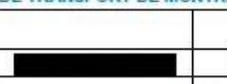
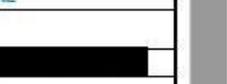
POMERLEAU		DEMANDE DE PAIEMENT		Demande no. : 19		Facture no. : [REDACTED]	
Projet [REDACTED]		CT BELLECHASSE		Revision no. : 3		Date de la facture : 2021-08-31	
RBO No. : [REDACTED]				Travaux finissant le : 2021-08-31			
Référence et description	Contrat original	%	Total complété à date	Demande Précédente	Demande Courante	Retenue	
00 CT BELLECHASSE							
50 Contrat de base / Base Contract							
1. Honoraires pour services de gérance de construction	6,969,000.00	60.98	4,250,000.00	3,800,000.00	450,000.00	425,000.01	
2. Préparation des appels d'offres exécution des contrats cédés	7,980,000.00	58.16	4,641,000.00	4,116,000.00	525,000.00	464,100.00	
3. Organisation de Chantier	4,947,000.00	87.70	4,338,448.00	4,186,312.00	152,136.00	433,844.86	
4. Provision maximale pour travaux en régie contrôlée							
L0144R.01 Analyse / Tests des eaux usées	0.00	0.00	0.00	0.00	0.00	0.00	
L0150R.01 Drainage et Pompage des excavations	0.00	0.00	0.00	0.00	0.00	0.00	
L0150R.02 Escaliers d'accès temporaires	0.00	0.00	0.00	0.00	0.00	0.00	
L0150R.03 Protection temporaire Escaliers PE5093 et PE5098	0.00	0.00	0.00	0.00	0.00	0.00	
L0152R.01 Chauffage Temporaire pour travaux de coffrages	0.00	0.00	0.00	0.00	0.00	0.00	
L0157R.01 Clôtures de chantier Omega / Bois sur Jersey	0.00	0.00	0.00	0.00	0.00	0.00	
L0160R.01 Mesures de sécurité diverses - non prévisible	0.00	0.00	0.00	0.00	0.00	0.00	
L0160R.02 Garde-corps structure d'acier	0.00	0.00	0.00	0.00	0.00	0.00	
L0162R.01 Dégel, déglacage accès travailleurs & dvr chantier	0.00	0.00	0.00	0.00	0.00	0.00	
L0166R.01 Signalisation / Contrôle de la circulation	0.00	0.00	0.00	0.00	0.00	0.00	
L0169R.01 Aménagement des bureaux de chantier - Bixi	0.00	0.00	0.00	0.00	0.00	0.00	
L0201R.01 Ajustem. plaque de fermeture Steel Deck détail AGF	0.00	0.00	703.97	0.00	703.97	70.40	
L0204R.01 Coffrages des empiètements des Zones A @ E	1,055,125.32	100.00	1,055,125.32	1,055,125.32	0.00	105,612.52	
L0204R.02 Coffrages des édicules des escaliers	1,826,250.00	97.80	1,883,962.73	1,848,095.30	35,867.43	188,396.26	
L0206R.01 F-11 Manchons & Tuyauteries de plomberie diverses	40,476.00	100.00	40,476.00	40,476.00	0.00	4,047.60	
L0228R.01 Manutention des équipements Lot 2.28	0.00	0.00	4,285.18	0.00	4,285.18	428.51	
L0232R.01 Remblai MG20DB SS3	565,000.00	99.16	560,258.89	558,924.34	1,334.55	56,025.89	
L0232R.02 Nettoyage des Bases pour Bétonnage	60,983.71	100.00	60,983.71	60,983.71	0.00	6,098.37	
L0232R.03 Nettoyage et entretien des rues domaine public	0.00	0.00	0.00	0.00	0.00	0.00	
L0255R.01 Arpentage pour Mandat Consolidation de Roc	46,748.01	100.00	46,748.01	46,748.01	0.00	4,674.82	
L0255R.02 Consolidation Roc axe 8, Coffrages & trav.connexes	0.00	0.00	0.00	0.00	0.00	0.00	
L0300R.02 Déplacement Jersey / Clôture pour travaux CMS	13,520.48	100.00	13,520.48	13,520.48	0.00	1,352.04	
L0300R.03 Retrait & réinstal. bollards-Tour de ile nuit 2021	0.00	0.00	1,432.96	0.00	1,432.96	143.30	
L8000B Provision non utilisée pour travaux en régie	306,083.90	0.00	0.00	0.00	0.00	30,608.39	
4. Provision maximale pour travaux en régie contrôlée	4,000,000.00	91.33	3,653,309.84	3,609,685.75	43,624.09	365,330.95	

The Office of Inspector General also obtained a document from an STM employee dated June 17, 2020 authorizing Pomerleau to proceed with the footing work on an internally controlled basis:

[TRANSLATION] "Based on your recommendation aimed at meeting the project schedule, STM hereby authorizes you to proceed with the internally controlled work under the supervision and through the signature of our work site representative's time/equipment sheets.

*Please note that these costs must be part of the \$4M envelope stipulated in your contract for item **4. Maximum allowance for internally controlled work.**"*

STM authorized Pomerleau to proceed with the stairwell formwork as internally controlled work, as evidenced by this signed authorization request dated October 19, 2020:

POMERLEAU		PROJET : 19.0486 - CENTRE DE TRANSPORT BELLECHASSE		
		AUTORISATION DE TRAVAUX EN RÉGIE		
		Révision <input type="checkbox"/>		
		REV: 01	Date: 10/29/2020	
PCI :	BT-1015	TITRE :	Coffrage des édicules d'escaliers	
# JOB :	19.0486	# PHASE :	L0204R.02	
DESCRIPTION ET COÛTS DES TRAVAUX				
Fourniture de toute la main-d'œuvre, matériaux, outillages et équipements nécessaires à l'exécution complète des travaux de coffrage, mise en place du béton et décoffrage des édicules d'escaliers.				
Dans le cadre de cette demande d'autorisation de travaux en régie vous nous avez demandé d'obtenir trois propositions d'entrepreneurs spécialisés en coffrage. Vous trouverez ci-dessous et ci-joint le résultat des soumissions (courriel du 5 octobre 2020).				
Santco				
Travaux de coffrage		\$	1,725,000.00	
Budget escaliers d'accès en hauteur		\$	25,000.00	
Voir proposition datée du 28 août 2020, révisée verbalement par Santco le 8 septembre 2020				
Résumé des propositions reçues :				
Santco \$ 1,802,800.00 (complet)				
Alliance -\$ 1,804,438.00- (incomplet) 3,090,112.89 \$ (Ajusté en analyse, afin d'être complet pour comparaison)				
Synergy -\$ 2,030,000.00- (légèrement incomplet) 2,100,080.00\$ (Ajusté en analyse, afin d'être complet pour comparaison)				
Sous-total 1,750,000.00 \$				
Administration et profit 10% sur travaux de coffrage de Santco 172,500.00 \$				
Administration et profit 15% sur escaliers d'accès en hauteur 3,750.00 \$				
Budget autorisé 1,926,250.00 \$				
Note: Ceci est une autorisation budgétaire et non forfaitaire. Une fois les coûts réels de cette régie seront comptabilisés, un ajustement en crédit ou en supplément sera émis pour la réviser ou la fermer et ajuster les projections budgétaires.				
SIGNATURE - AUTORISATION				
POMERLEAU INC.		SOCIÉTÉ DE TRANSPORT DE MONTRÉAL		
				
Date: 2020.10.29	Date: 2020.10.29	Date: 2020/10/29	Date:	Date:
FORM - ES - RG - REV. 2020-04-22				

Lastly, a senior STM official himself confirmed to the Assistant Inspector General, Analysis and Preliminary Investigations by e-mail on November 26, 2020 that the stairwell formwork had been carried out on an internally controlled basis by Pomerleau in its capacity as builder-manager.

STM's response alleging that the work had been done as an addition to Pomerleau's contract was false and contrary to all the contemporary statements and documents relating to the facts obtained during the investigation. The work was carried out on an internally controlled basis under item 4 of the price schedule contained in the tender documents.

4.5.1.2. Special circumstances related to the performance of the project

STM also made clarifications regarding other elements contained in the Notice to Interested Parties. STM explained that the decision to add 300 new buses was made following the fulfilment of an election promise made by the Montréal mayor. The purchase required that transit centres be quickly added or expanded. STM explained that the choice to proceed with a builder-manager for the first time allowed the work to be started quickly for the first construction packages before the design was completed.

STM added that the Inspector General should take into account the special circumstances involved in building the Bellechasse TC, namely the first wave of the COVID-19 pandemic in spring 2020. STM believed that the pandemic, combined with the already overheated construction market at the time, largely accounted for the 43% difference between the estimate and the lowest compliant bidder's bid price for the foundation formwork call for tenders. STM also confirmed that it could not accept that price as it was disproportionate to the control estimate. In its response, STM added that the purpose of the action taken in the summer of 2020 in relation to the bidders was to grasp the magnitude of the situation with respect to the tendered prices.

The decision to have Pomerleau carry out some of the concreting work was therefore necessary because of the high bid prices, which, according to STM, was an unforeseen situation beyond its control. Having Pomerleau perform the work had three objectives: ensure the safety of the work site, meet the project schedule, and ensure sound management of public funds. As a result of the above work, STM restructured the concreting package to go back to tender for the remainder of the work to be performed.

4.5.1.3. Contract award to Santco

STM is maintaining that the process of requesting quotes from Santco, Alliance and Synergy for the stairwell formwork was conducted by Pomerleau with potential subcontractors. STM's first concern was to obtain the best possible price within the required timeframe, and there was no indication that STM wanted to favour one of the companies over the others. STM therefore considered that it would be unwarranted to claim that it was directing the bid request process toward Santco.

Lastly, STM explained that the stairwell formwork represented only a fraction of the work in the foundation formwork call for tenders. In addition, the work was critical and necessary for the safety of the work site. STM also confirmed that section 105 of the *Act Respecting Public Transit Authorities* was not considered when Pomerleau was awarded the work.

4.5.2. Pomerleau

4.5.2.1. Footings

In its response to the Notice to Interested Parties, Pomerleau clarified certain facts regarding the process of authorizing the stairwell formwork and footing work on an internally controlled basis. For instance, decisions to proceed with work were made by STM, which could choose whether or not to follow Pomerleau's recommendations. Pomerleau also confirmed that STM authorized the footing work on June 17, 2020, which was prior to the publication of the foundation formwork call for tenders.

4.5.2.2. Stairwells formwork

With regard to the stairwell formwork, Pomerleau explained that the meetings with Santco in July 2020 were the beginning of an analysis process to assess all possible options for carrying out the work. This meeting with Santco was consultative in nature in order to discuss possible methods of carrying out this work before the steel structure work, and there was no established plan to proceed with internally controlled work. Pomerleau also confirmed that it was following the meeting on August 18, 2020 with Synergy and Alliance that the internal control option was seriously considered because of the cost savings the option could provide. Pomerleau added that it was STM that had asked it not to invite Synergy and Alliance to the meeting on August 24 attended by Santco, since the foundation formwork call for tenders had still not been cancelled at the time.

4.5.2.3. Process for requesting bids from Synergy and Alliance

Pomerleau contradicted the assertion made by Alliance's representatives that the request for bids for the stairwells involved six and not nine stairwells. The company stated that its request was the same for the other bidders and maintained that the confusion was possibly due to the fact that the request was divided into two phases for the stairwells: an initial phase for six stairwells and a second phase for three stairwells. Lastly, Pomerleau said that the change to Alliance's bid was made after speaking with one of the company's executives over the phone. Pomerleau concluded by stating that the three companies received the same information for the work to be done, that the company was chosen based on the lowest compliant bidder, and that the request was not directed to Santco.

4.5.3. Santco

In its response to the Notice to interested persons regarding the stairwell contracting process, Santco explained that it was never notified of a particular process for the bid it had been asked to submit. The company added never having been aware that the process was intended to favour it in any way.

4.6. Analysis

4.6.1. Contract award in breach of the regulatory framework

The Inspector General has determined that none of the reasons mentioned by STM for the award of the stairwell footing and formwork contracts complied with the regulatory framework applicable to them. First, the stairwell formwork did not comply with the wording of article 22.12 of the *Instructions to Bidders* on the notion of internally controlled work, namely that the work in question was to consist of temporary installations or could not be included in any of the construction packages. Neither of the two conditions was met for the formwork and footing work since the work involved building permanent facilities and was part of a call for tenders that was cancelled on September 15, 2020.

In fact, it appears that it was the constraints related to the Bellechasse TC project schedules that forced STM to use internal control to award the two contracts totalling over \$105,700 without a call for tenders, despite the fact that the conditions of section 22.12 were not met. The issue of project schedules was mentioned on several occasions at the time of the events as well as in the STM's response to the Notice to interested parties. While the Inspector

General is aware that project schedules are important, they are not a reason to circumvent a contractual clause or a requirement under the Act.

Second, the stairwell formwork did not constitute an emergency or a force majeure that would endanger human life or the safety of the Bellechasse TC work site or its workers. Section 105 of the *Act Respecting Public Transit Authorities* stipulates the means whereby transit authorities can bypass the public tendering process and award contracts quickly to ensure worker and work site safety. It requires that a report be submitted to the board of directors to demonstrate the need for the work and to ensure transparency in the decision-making process. However, this method was not used for the stairwell formwork.

STM confirmed in its response to the Notice that section 105 of the *Act Respecting Public Transit Authorities* was not considered at the time of the contract award. This response is surprising given that the notion of ensuring worker and work site safety was mentioned repeatedly at the time of the contract award and in the STM's response to the Notice to Interested Parties. For instance, the STM project manager took the time to amend his November 2020 note to add the risks related to the consolidation of the bedrock and work site safety. In this respect, it should be noted that STM also assessed the option to have the work done through an amendment to the steel structure contractor's contract and that the references to work site safety came later in the fall of 2020.

The Inspector General has noted that the need to proceed with the stairwell formwork was based more on a change to the project schedule rather than an emergency that put workers' safety at risk. STM wanted to complete the formwork prior to the steel structure work in order to save costs on the rest of the project.

Third, the stairwell formwork and footing work were done on an internally controlled basis and certainly did not constitute an amendment to the construction management contract, as claimed by STM in its response to the Notice to Interested Persons. As shown in section 4.5.1.1, this statement is contradicted by invoices from Pomerleau, documents from STM employees, and by STM itself in an exchange with the Office of Inspector General in November 2020. It is therefore not relevant to analyze the criteria set out in the Act and the STM's by-law on contract management that authorize an amendment to a public contract.

It is surprising that STM would try to change the facts in this way in its response to the Notice when it is clear that this was not an amendment to the contract. Even Pomerleau in its response to the Notice did not mention that the work resulted from an amendment to its contract, which it would have certainly mentioned in its response if that had been the case. In addition, the Inspector General noted that before performing the work on an internally controlled basis, STM had even considered the option of a change directive to the steel structure contractor's contract and not to the Pomerleau contract. The possibility of amending Pomerleau's contract was not an option in the fall of 2020.

4.6.2. Lack of good faith on STM's part

The Inspector General believes that STM did not show good faith toward the bidders of the foundation formwork call for tenders by cancelling the call for tenders after receiving the bid from Santco on September 9, 2020 and by having the footing work carried out by Pomerleau before the bid submission deadline. STM could have still issued an addendum for the footing work when it authorized Pomerleau to begin the work. This would have enabled bidders to alter their bidding strategy following the withdrawal of this item in the call for tenders.

With respect to the stairwell formwork, it was clear as soon as the bids were submitted in June 2020 that STM could not award the contract due to the 43% difference between the estimate and the price tendered by the lowest compliant bidder. In its response to the Notice, STM described this discrepancy as disproportionate and stated that it could not accept the prices tendered for the call for tenders.

In response to this situation, STM, through its builder-manager, took steps to assess the feasibility of completing the stairwell formwork outside of the foundation formwork call for tenders. The request on August 4 to extend the bid validity period enabled STM and Pomerleau to conduct parallel negotiations with Santco for the construction of the stairwell formwork despite the upcoming cancellation of the foundation formwork call for tenders. It was after this date that a meeting was held with the bidders at which they recommended that the stairwells be built before the steel structure, and it was only after obtaining the reduction in Santco's bid price for the work that STM made the decision to cancel the call for tenders on September 9, 2020.

The Inspector General is not questioning STM's right to use the privilege clause in its call for tenders. However, the right of a public body to use a privilege clause must include good faith¹⁰ toward bidders and does permit bid shopping¹¹. As stated by the Supreme Court, fair treatment of competitors is necessary to promote and protect the integrity of a public call for tenders:

*"While the Lease Tender Document affords the Department wide discretion, this discretion must nevertheless be qualified to the extent that all bidders must be treated equally and fairly. Neither the privilege clause nor the other terms of Contract A nullify this duty. As explained above, such an implied contractual duty is necessary to promote and protect the integrity of the tender system."*¹²

However, in requesting an extension of the bid validity period, STM did not act fairly toward these bidders since this additional time was only used for negotiations with Santco to complete the stairwell work. From the start of negotiations with Santco in July 2020, STM should have cancelled the call for tenders and by carrying out parallel negotiations was unfair to bidders.¹³

4.6.3. Request for bids process

Lastly, the Inspector General has found that the request for bids process for the stairwells formwork was unfair and directed toward Santco. First of all, Santco, Synergy and Alliance did not all obtain the plans and specifications for the stairwell work at the same time or the same information, since Santco was able to come to the site at least twice to assess the scope of the work. Second, Pomerleau sent its recommendation to proceed with Santco on an internally controlled basis on September 9, 2020, before Alliance and Synergy were able to submit their bids. Worse still, Pomerleau contacted Synergy to ask it to tender after recommending to STM on September 9 to proceed with the work using Santco. This recommendation followed a meeting held the day before that was attended by representatives from Santco, STM and Pomerleau and which led Santco to reduce its tendered price on August 26, 2020. A process

¹⁰ MYG Informatique inc. c. Commission scolaire René-Lévesque inc., 2006 QCCA 1248, par 35.; *Martel Building Ltd. v. Canada*, 2000 CSC 60.

¹¹ *Op. cit.*, note 6, para. 50.

¹² *Martel Building Ltd. v. Canada*, 2000 SCC 60, par. 92.

¹³ 9150-2732 Québec inc. c. Ville de Montréal., 2021 QCCS 2899, par. 64. Statement of appeal filed on August 16, 2021.

that is fair to all bidders cannot allow a bidder to meet with the project owner and reduce its price at the latter's request.

Lastly, the Inspector General cannot accept Pomerleau's assertion in its response to the Notice that its choice was made based on the lowest compliant bidder. It was not Santco's bid submitted on August 26 that was selected by Pomerleau and STM, but rather Santco's bid at the negotiated price. Neither Alliance nor Synergy had the opportunity to reduce their prices after submitted their bids, which gave another advantage to Santco.

The investigation found no evidence of attempts on Santco's part to gain an advantage in the above process. In fact, as the company indicated in its response to the Notice, it did not even know that there was a specific process for the contract in question. The Inspector General cannot blame a company for submitting a bid when invited to do so without any other indication related to the contract.

The fact that STM is alleging that said request for bids process was conducted by Pomerleau with its subcontractors cannot be accepted by the Inspector General and does not stand up to the facts. The work was paid by STM and not by Pomerleau, so STM cannot be relieved of its responsibility to comply with the regulatory framework applicable to it. In addition, STM employees attended the September 8, 2020 meeting at which Santco agreed to reduce its price for the stairwell work. The Inspector General also accepted Pomerleau's response to the Notice to interested parties that it was at the request of STM itself that Pomerleau did not invite Alliance and Synergy to attend the August 24 meeting, which was also attended by a Pomerleau employee.

5. Conclusions and recommendations

The Inspector General believes that the breaches noted in this report are serious and would justify terminating the footing and stairwell contract as well as the maximum allowance for internally controlled work. However, this is no longer possible since the work was performed, the project has been completed, and the \$4M envelope was used up by STM as of the date of publication of this report.

Nonetheless, under section 57.1.23 of the *Charter of Ville de Montréal metropolis of Québec*, the Inspector General may, at any time, send a report presenting findings or recommendations which, in her opinion, warrant being brought to the attention of City Council. These recommendations are intended to prevent similar occurrences in future construction management contracts at STM.

5.1. Construction management contract

The Inspector General has concluded that the internal control clause in the construction management contract is contrary to the regulatory framework applicable to STM since the contract was not entered into on a fixed-price or unit-price basis for the given item. Moreover, by adding a predetermined amount of \$4M, STM is going against the very objectives and principles of a public call for tenders, which is to allow bidders to compete and tender prices based on the work described in the tender documents. The fact that STM has asserted that it could not anticipate all the work to be carried out at the time of the builder-manager call for tenders and that the purpose of the clause was sound project management are not reasons for not complying with a regulatory provision.

As applied, the clause constitutes a discretionary envelope that allows STM to award contracts by mutual agreement to Pomerleau without regard to the rules for awarding public contracts. The Inspector General cannot accept such a clause in a public contract. If, as STM asserts, it would like to have the option of having work carried out quickly by the builder-manager, it must include items at a unit price that make up a group of services and materials on which bidders can tender a price. Lastly, the Inspector General is recommending that STM no longer add funds to the item “Maximum allowance for internally controlled work” and no longer use it for the remaining duration of the work at the Bellechasse TC in order to comply with the regulatory framework.

5.2. Stairwell footings and formwork

Lastly, the Inspector General has concluded that the contracts awarded to Pomerleau for the footing work did not comply with the regulatory framework applicable at STM. First of all, as explained above, the actual allowance for internally controlled work did not comply with the regulatory framework. Second, the work consisted of permanent facilities that were part of a call for tenders that STM chose to cancel. Contrary to STM’s response to the Notice, the work did not constitute additions or amendments to the construction management contract. The documents and testimonies obtained during the investigation revealed that the work was carried out on an internally controlled basis by builder-manager Pomerleau or its subcontractor Santco.

STM also failed in its duty to act in good faith toward the bidders of the foundation formwork call for tenders by cancelling the call for tenders as it did. Regarding the footing work, STM still had ample time to issue an addendum to remove this work from the price schedule when it authorized Pomerleau to start the footing work. For the stairwell formwork, the Inspector General cannot accept that STM conducted parallel negotiations for a price for this work with Santco after getting the bidders to agree to extend the validity of their bids. As explained by the Superior Court, such behaviour *[TRANSLATION]* “*may discourage companies from submitting bids because such a submission requires an investment in time and money (in particular to pay for a bond) and prevents them from pursuing other possibilities (by submitting bids in response to other calls for tenders, for instance)*”¹⁴.

The Inspector General has also concluded that the tendering process for the stairwell formwork contract was directed toward Santco. The actions taken by Pomerleau as early as July 2020, the meetings at the Bellechasse TC work site, the plans and specifications sent to Santco before the other bidders, the meeting on September 8, 2020 that led to Santco reducing the price of its bid, and Pomerleau’s recommendation to proceed with Santco before even obtaining the bid prices from Alliance and Synergy are all elements that show that the process was directed toward Santco. The fact that it was Pomerleau that led the process, as explained by STM in its response to the Notice, does not absolve STM from making sure that its builder-manager complies with the regulatory framework applicable to public contracts. This is why the Inspector General is recommending that for any future construction management contracts STM should exercise greater control over its builder-manager when required to award contracts for STM.

¹⁴ Op. cit., Note 13, par. 47.

FOR THESE REASONS,

The Inspector General

RECOMMENDS that Société de transport de Montréal, in any future use of the internally controlled work clause, specifies in the tender documents the information required on the nature and quantity of the work to be carried out so that potential bidders may bid on a fixed-price or unit-price basis.

RECOMMENDS that Société de transport de Montréal take the necessary measures to ensure the fair and ethical treatment of bidders in good faith until a final decision is made on the awarding of any public call for tenders.

RECOMMENDS that Société de transport de Montréal exercise better control and oversight over the contracts entered into by its builder-managers and make sure they comply with the regulatory framework applicable to public transit authorities for its projects.

RECOMMENDS that Société de transport de Montréal not add any more money to the maximum allowance for internally controlled work and that it no longer use it until the work at the Bellechasse TC has been completed.

SENDS, pursuant to section 57.1.23 of the *Charter of Ville de Montréal, metropolis of Québec*, this report to the Mayor and the City Clerk so that it may be submitted to City Council after it is received.

The Inspector General,

Brigitte Bishop

SIGNED ORIGINAL

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