



# PUBLIC REPORT 2022

Report on the awarding and execution of professional services contracts by the Société de transport de Montréal

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

## Summary

*In October 2021, the Bureau de l'inspecteur général received a denunciation regarding a call for tenders issued by the STM for consulting services on compensation and benefits. It was alleged that the call for tenders unduly restricted competition for two reasons.*

*While the denunciation involved only one call for tenders' process, the investigation required analyzing two other contracts that predated this one. In all, the investigation dealt with the awarding and execution of three contracts for consulting services on compensation and benefits, all awarded to the same company between 2016 and 2021. These consulting services are intended to support the STM in managing the various group insurance contracts that it holds as the employer.*

*At the end of the investigation and after analysis of the response to the Notice by the winning bidder of the three contracts under investigation, all violations are attributable to the STM. The Inspector General wishes to clarify that the investigation was unable to conclude that the winning bidder, its management, or its employees, committed a breach of the normative framework regulating said contracts. For this reason, the winning bidder will not be named in this report and will be referred to only as the "Winning Bidder."*

*The starting point of the investigation is a project developed in 2019 by an STM project manager entrusted with managing the first contract under investigation and a representative of the Winning Bidder to merge, into a single comprehensive call for tenders, the seven group insurance contracts held and managed by the STM for its various employees.*

*Since this project was expected to generate substantial savings for the STM, especially at the level of its group insurance contracts, the STM authorized its implementation. Although this major project was not part of the STM's initial needs at the time the contract was awarded in 2016, the STM did not require an estimate of anticipated fees from the Winning Bidder prior to beginning its execution within the 2016 contract.*

*By July 2020, more than a year before the end of the initial term of the contract, its financial envelope had been depleted. The STM's project manager then estimated the additional fees required by the Winning Bidder at \$263,000, before taxes, to finalize the implementation of the merger of the group insurance contracts and deliver the other services included in the initial contract. This represents a 50% increase in the initial amount of the contract (\$574,875).*

*The investigation shows that the lack of funds remaining in the initial contract's financial envelope and the continuation of the work, nevertheless, because of the coming into effect of the merged insurance contracts on January 1, resulted in several violations by the STM of the normative framework regulating the contract, including:*

- An amendment to the initial contract in December 2020 that did not comply with the normative framework;*
- Contract splitting in the awarding of a private second contract to the Winning Bidder in February 2021, since the amendment was for an amount lower than the fees required and already agreed to by the latter, with the same objective and on the same terms as the first contract;*
- Insertion by the STM of conditions unduly restricting the market in the call for tenders issued in 2021 to replace the initial contract;*

- *Inadequate management by the STM of a conflict-of-interest disclosure included in the Winning Bidder's submission to this new call for tenders to the effect that one of its employees was the STM's project manager's spouse;*
- *Absence of a formal conflict-of-interest disclosure by the project manager to his superiors at the STM, and absence of measures taken by the latter to monitor the project manager after learning about the Winning Bidder's conflict-of-interest disclosure;*
- *Agreement, on several occasions, by the STM to the Winning Bidder's fees over and above the financial envelopes duly approved by the internal authorities at the STM; and*
- *Insufficient transmission of information to the STM's board of directors prior to its approval of the amendment to the initial contract and awarding of the third contract, and omission of vital information, including the agreement to fees over and above the financial envelopes.*

*Ultimately, on March 9, 2022, the STM's board of directors adopted a resolution cancelling the third contract as of July 1, 2022. This decision stems from audits carried out by the STM's Auditor General and the investigation conducted by the Bureau de l'inspecteur général.*

*The Inspector General wishes to clarify that, had the STM's board of directors failed to make that decision, she would have recommended that the STM do so given the various violations identified by this investigation.*

*In its response to the Notice, the STM declares to duly acknowledge it and recognizes the poor understanding and application, while unintentional, of some aspects of the normative framework. To prevent this type of situation from recurring, the STM proposes various measures that it commits to taking, including presenting an action plan and a timeline for its implementation.*

*The Inspector General welcomes these commitments announced by the STM and recommends various measures that should be included in the redress plan to come from the STM. The Inspector General will continue to monitor its implementation.*

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# 1. Scope and Extent of the Investigation

## 1.1 Clarification

Under Section 57.1.8 of the *Charter of Ville de Montréal, metropolis of Québec* (CQLR c. C - 11.4) (hereinafter “Charter of Ville de Montréal”), the mandate of the Inspector General is to oversee the processes of awarding contracts and their execution by the City or by a related corporation.

The Inspector General does not conduct any criminal investigations. She carries out investigations of an administrative nature. Each time the term “investigation” is used in this report, it shall mean an investigation of an administrative nature and shall in no case be interpreted as a criminal investigation.

## 1.2 Applicable Standard of Evidence

The Inspector General assumes the obligation to deliver quality reports that are timely, objective, accurate and presented in such a way as to ensure that the individuals and agencies under its jurisdiction can act based on the information conveyed.

To support her notices, reports and recommendations, the Inspector General assumes the burden of the civil standard of a preponderance of evidence.<sup>1</sup>

## 1.3 Notice to Interested Parties

Prior to making the results of her investigation public and, if necessary, using the powers conferred upon her by 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 (hereinafter “Notice”) to interested parties indicating the relevant facts gathered during the investigation.

Following receipt of the Notice, interested parties have the possibility of presenting, in writing, any comment, representation or observation that they deem relevant.

Such Notice was sent on April 22, 2021, to the attention of the senior management of the Société de transport de Montréal (hereinafter “STM”), to Human Resources management, which is responsible for the contracts investigated and for the employee in charge of them, as well as to the latter. Notice was also sent to the Winning Bidder of the contracts investigated.

While the initial timeline of two weeks would have expired on May 6, 2022, it was extended to May 11, 2022, at the STM’s request.

The facts and arguments presented by the STM and the Winning Bidder of the contracts under investigation were considered by the Inspector General and will be addressed in this report.

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<sup>1</sup> If the evidence is sufficient to render the existence of a fact more probable than its non-existence, there is a preponderance of evidence (see section 2804 of the *Civil Code of Québec*).

## 2. Context of the Bureau de l'inspecteur général's Investigation

### 2.1 Denunciation received

In October 2021, the Bureau de l'inspecteur général received a denunciation regarding an STM call for tenders for the purposes of retaining consulting services on compensation and benefits. It was alleged, for two reasons, that the call for tenders unduly restricted competition.

First, by pairing the compensation and benefits mandates, the call for tenders' documents failed to take into consideration the realities of the market. According to the denunciation, most firms operating in this market specialize in one or the other of these areas.

Second, the call for tenders' documents prohibited the subcontracting of either of these mandates, thereby limiting tenders to one or two potential bidders.

### 2.2 Clarification

While the denunciation involved only one call for tenders' process, the investigation required analyzing two other contracts that predated this one. As detailed in the next section, these two other contracts were intended to obtain the same consulting services and were awarded by the STM to the same company.

At the end of the investigation and following the analysis of the response to the Notice by the Winning Bidder of the three contracts investigated, all violations are shown to be attributable to the STM. The Inspector General wishes to clarify that the investigation was unable to conclude that the Winning Bidder, its management, or its employees, committed a breach of the normative framework regulating said contracts.

For this reason, the Winning Bidder will not be named in this report and will be referred to only as the "Winning Bidder." The identifying numbers of the contracts investigated have also been removed from this report.

### 2.3 Contracts Investigated

As mentioned above, the investigation dealt with the awarding and execution of three consulting services' contracts, all awarded to the Winning Bidder between 2016 and 2021.

#### 2.3.1 Initial Contract

On October 5, 2016, the STM awarded a first contract to the Winning Bidder following a call for tenders for the purposes of retaining "consulting services on compensation and benefits" for the period from October 5, 2016, to October 4, 2021, for an amount totalling \$574,875.00, including taxes.

This contract is referred to hereinafter as the "Initial Contract."

#### 2.3.2 Amendment to the Initial Contract

On December 2, 2020, the STM's board of directors ratified an amendment to the Initial Contract, increasing the financial envelope by \$172,462.50, including taxes, bringing the total value of the Initial Contract to \$747,337.50, including taxes. This increase was meant to cover the period from December 2, 2020, to October 4, 2021.

### 2.3.3 The Second Contract

On February 15, 2021, the STM's Managing Director of Human Resources awarded a private contract to the Winning Bidder in the amount of \$103,477.50, including taxes, for professional consulting services on compensation and benefits.

This contract is referred to hereinafter as the "Second Contract."

### 2.3.4 The Third Contract

On April 13, 2021, the STM issued a new call for tenders for the purposes of retaining "consulting services on compensation and benefits." The deadline for receipt of bids was set at May 18. The contract resulting from this call for tenders, in the amount of \$862,312.50, including all taxes, was awarded to the Winning Bidder and was intended to cover the period from July 7, 2021, to July 7, 2026.

This contract is referred to hereinafter as the "Third Contract."

## 3. Findings of the Investigation

As mentioned above, the investigation found several violations by the STM of the normative framework regulating the contract, in particular:

- The amendment made to the Initial Contract was not legally compliant;
- Contract splitting occurred with the awarding of the Second Contract;
- The STM agreed to the Winning Bidder's fees over and above the financial envelopes approved by the internal authorities at the STM;
- Insufficient information was transmitted to the STM's board of directors prior to its approval of the amendment to the Initial Contract and awarding of the Third Contract, including omission of the status of the agreement to fees over and above the financial envelopes;
- There was a failure to manage the appearance of a conflict of interest pertaining to the STM's employee (hereinafter the "Project Manager") responsible for managing the Initial Contract, the Second Contract, and the Third Contract on the grounds that his spouse worked for the Winning Bidder.

These violations will be addressed in the order in which the facts were uncovered by the investigation into the awarding and execution of the Initial Contract, amendment to the Initial Contract, awarding of the Second Contract, and awarding and execution of the Third Contract.

## 3.1 Initial Contract and Merger of Group Insurance Contracts

### 3.1.1 Facts uncovered by the investigation

In 2018, the Project Manager is hired by the STM because of his expertise in employee benefits. He is entrusted with several tasks, including managing the execution of the Initial Contract, under which the Winning Bidder provides the STM with consulting services on compensation and benefits. These services are intended to support the STM in managing the various group insurance contracts that it holds as the employer (e.g., comparative market analyses, analysis of protections provided in the group benefits package, and guidance on preparing calls for tenders for group insurance contracts).

In 2019, the STM's Project Manager and a representative of the Winning Bidder develop a project to merge, into one comprehensive contract, the seven group insurance contracts awarded and managed by the STM for its various employees.

According to several witnesses we met, this merger of group insurance contracts was meant to generate substantial savings for the STM at the level of the group insurance contracts themselves, as well as the consulting services contracts required to support the execution of these various group insurance contracts. The Project Manager presented this project to his supervisors who endorsed it.

It should be noted that this project had not been contemplated by the STM at the time the Initial Contract was awarded. The investigation also reveals that the STM did not request an estimate of anticipated fees from the Winning Bidder prior to undertaking the execution of such a project within the Initial Contract.

All the invoices received from the firm during the investigation are addressed to the STM's Project Manager as the person responsible for the Initial Contract. According to him, it was only at the end of summer 2020 that he became aware that the Initial Contract's remaining financial envelope was insufficient to complete the merger of the group insurance contracts. That is therefore when he asked the Winning Bidder to provide him with an estimate of the fees that would be required to do so.

The Initial Contract's financial envelope had, in fact, been totally depleted by July 2020. Moreover, as will be detailed further on, despite the depletion of the envelope, the STM continued to agree to pay the Winning Bidder's fees throughout summer and fall 2020.

In short, as is apparent in an email dated September 16, 2020, the Winning Bidder estimated that the amount required to complete the additional work needed to merge the group insurance contracts could be between \$175,000 and \$241,000, an increase of 30% to 42% over the original envelope of \$574,875 for the Initial Contract.

### **3.1.2 Analysis and conclusion regarding the Initial Contract and the merger of the group insurance contracts**

At the outset, it should be noted that the investigation was never intended to determine the merits of proceeding with the merger of the group insurance contracts. Instead, its objective was to examine how this decision was made, which, in light of the overall file, proves to be the source of several problems.

Despite this major project not having been initially planned in 2016, the foreseeable probability that it would involve substantial fees by the Winning Bidder, and the lack of a prior estimate of these fees requested by the STM, the STM decided to go ahead with it within the Initial Contract's financial envelope. In other words, the project began without the STM knowing whether it could be completed within the Initial Contract's financial envelope.

This way of proceeding is symptomatic of the STM's approach to amending contracts in effect at that time, a practice that had been previously denounced by the Bureau de l'inspecteur général.<sup>2</sup> Based on this approach, if of a contract's financial envelope was depleted or nearing depletion, it could be increased to reach the end of the contract as long as the rapid spending of the envelope and need to continue with the contract were justified.

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<sup>2</sup> See the investigation report titled *Enquête sur la gestion contractuelle de la Société de transport de Montréal concernant les modifications apportées à divers contrats*, published on page 30 and subsequent pages of the 2021 mid-year report of the Bureau de l'inspecteur général, available at <https://www.biqmtl.ca/wp-content/uploads/2021/09/rapport-mi-annuel-2021-vf-2.pdf>.

The extent of the required increase compared with the initial budget was not seen as a significant legal issue.

In other words, since the STM estimated that it could generate major savings by merging the group insurance contracts, it was less important to know whether the Initial Contract's financial envelope was sufficient to cover all the required fees. In the event of a problem, the envelope could simply be replenished.

As will be further analyzed in the following section, this view does not comply with the applicable normative framework at the STM. In addition, the absence of an estimate prior to the launch of the project and the late monitoring of the spending status of the Initial Contract's financial envelope contributed to putting the STM in a difficult and "urgent" situation in fall 2020, at a critical time in the progress of the project as the new merged contracts were to come into effect in January 2021.

The preliminary estimate would have enabled the STM to determine, as of 2019, whether the project could be completed within the financial parameters of the Initial Contract or whether it would instead be necessary to proceed with a new call for tenders. At the very least, closer monitoring of the invoices after the beginning of the project would have raised awareness of the problem and given the STM the needed time to go back to tender.

## **3.2 Amendment to the Initial Contract**

### **3.2.1 Facts uncovered by the investigation**

Between late September and early October 2020, the Project Manager prepares a note justifying an amendment to the Initial Contract.

His new estimate, now set at \$263,000, before taxes, is higher than the amount stated by the Winning Bidder. This can be explained by the fact that this additional amount is needed to cover all the Winning Bidder's fees to the end of the Initial Contract in October 2021. The amount includes estimated fees to finalize the implementation of the merger of the group insurance contracts, as well as the other services to be rendered under the Initial Contract.

In October 2020, the justification for the request to amend the Initial Contract makes its way through the project manager's various superiors, receiving the approval of the STM's then Director General on October 21, 2020.

Along the way, some managers questioned the absolute need to increase the Initial Contract's financial envelope instead of returning to tender.

While recognizing that returning to tender was an option, lower-level managers nonetheless wholeheartedly supported increasing the Initial Contract, noting that bringing in a new Winning Bidder on the file who was less familiar with STM contracts would result in costs and delays, that the resulting savings justified the increase and that the merger had not been initially planned in 2016, constituting an unforeseen event.

On November 10, 2020, the manager of the STM's Purchasing Department intervenes in the file, claiming that the anticipated increase, which represents about a 50% increase in the value of the Initial Contract, is too great. Adding that the Bureau de l'inspecteur général was

looking into other contract increases, she concluded that the STM needed to return to tender.<sup>3</sup>

On November 10, 2020, several other emails are exchanged, the STM's Project Manager maintaining to his supervisors that returning to tender was not an option, given the advanced state of the project to merge the group insurance contracts and its coming into effect on January 1, 2021.

Ultimately, the manager of the STM's Purchasing Department sends an email stating that no increases to envelopes would be done until further notice, that only mentions of contract amendments would be allowed and that such amendments needed to meet the four criteria of the STM's *Règlement concernant la gestion contractuelle* (R-175, hereinafter the "RGC"). She asks them to assess whether it is possible to limit the increase to 30% of the original value of the Initial Contract and, at the same time, to return to tender.

The following day, a representative of the Purchasing Department advises the Project Manager that the maximum allowable increase to the Initial Contract is \$150,000 (before taxes), that it is now necessary to talk about amending the contract and that additional notes need to be amended.

The file requesting an increase to the Initial Contract's financial envelope is amended in accordance with these new parameters. It then makes its way through all the STM's decision-making levels and is approved by the board of directors on December 2, 2020.

### 3.2.2 Analysis and conclusions regarding the amendment to the Initial Contract

The facts presented above reveal three distinct problems:

- The STM did not comply with the normative framework regulating amendments to the Initial Contract;
- The STM continued to incur costs from the Winning Bidder in summer and fall 2020, despite depletion of the Initial Contract's financial envelope;
- The information provided to the board of directors for decision-making was insufficient and omitted certain important elements.

#### 3.2.2.1 *The amendment to the Initial Contract did not comply with the normative framework*

##### *(i) Applicable normative framework*

The normative framework for amending a contract for municipal bodies was defined in the 1978 Superior Court judgment in the case of *Adricon*.<sup>4</sup> According to this decision, municipal bodies need not return to tender if they wish to amend a contract currently being executed where the monetary value of the planned amendment exceeds the threshold of the call for tenders.

However, this amendment must first meet certain requirements to avoid serving as a way for municipal bodies to circumvent their obligation to go to tender. Thus, to be valid, any amendment must be accessory to the contract and not change its nature.

<sup>3</sup> This refers to the investigation by the Bureau de l'inspecteur général, cited previously in footnote 2, that was under way and at the end of which the Inspector General concluded that the STM was non-compliant with the normative framework in the case of increases to financial envelopes allocated to other contracts.

<sup>4</sup> *Adricon Ltée v. East Angus (Town of)*, [1978] 1 SCR 1107.

Some remarks are needed here. First, the law does not define what constitutes an accessory or a change to the nature of a contract. It is necessary, therefore, to analyze each amendment to a municipal contract being contemplated on a case-by-case basis.

Second, this interpretation should be applied narrowly.<sup>5</sup> It is important to note that this is an exception to the general rule of inviting competition from the market through a call for tenders. In other words, not amending a contract is the rule, and approving an amendment is the exception.

In 2010, this case law rule was integrated into various acts regulating municipal bodies, including section 102.1 of the *Act respecting public transit authorities* (hereinafter “APTA”), which governs the activities of the STM:

*“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.”*

In addition, the RGC, which the STM adopted, also includes a section with which the public transit authority must comply when wishing to amend a contract:

[Translation]

**9.1 ADMISSIBILITY OF AN AMENDMENT**

*“A contract that has been awarded may not be amended, except where this amendment is accessory and does not change its nature. An amendment to the contract may only be made when the following conditions are met:*

- *1 to 4 below in the case of an amendment entailing an expense;*
- *1 to 3 below in the case of an amendment entailing no expense or resulting in a credit.*

*Conditions to be met:*

*Condition 1: The amendment does not change the nature of the contract.*

*Condition 2: The objective of the amendment is to correct a situation that has arisen during the execution of the contract and was not foreseen or determined at the time the contract was awarded.*

*Condition 3: The amendment is accessory to the contract; accessory being that which is closely tied to the objective of the contract and necessary for its completion.*

*Condition 4: The execution of the amendment by another supplier would interfere with the effective completion and sound management of the existing contract.”<sup>6</sup>*

To be valid, therefore, any amendment planned by the STM to a contract awarded following a public call for tenders, including increasing its financial envelope, must meet sections 102.1 of the APTA and 9.1 of the RGC. Failure to comply with all these rules could result in serious consequences.

Increasing the financial envelope could then be considered a new private contract awarded to the Winning Bidder. If the value of this new contract exceeds the threshold of the call for tenders, failure to follow the applicable conditions would render it invalid, i.e., the contract would be deemed never to have existed.<sup>7</sup>

*(ii) Application of the normative framework to the facts*

<sup>5</sup> See also *Sotramex Inc. v. Québec (Attorney General)*, JE 96-2258 (SC.), paras. 87–88.

<sup>6</sup> It should be noted that the version of section 9.1 of the STM's RGC reproduced here is the one that was in force at the time of the facts. This section was amended in 2021, the first sentence of the first paragraph now reading as follows: [Translation] *“A contract awarded following a call for tenders may not be amended, except where this amendment is accessory and does not change the nature of the contract.”*

<sup>7</sup> See *Montréal (City) v. Octane Stratégie inc.*, 2019 SCC 57, para. 39 and sections 1416 and 1417 of the Civil Code of Québec.

In this case, by increasing the Initial Contract's financial envelope, the amendment made to the contract by the STM fails to meet conditions 2 and 3 of section 9.1 of the RGC, i.e., there is no actual unforeseen situation, and the amendment is not accessory to the Initial Contract.

First, the decision-making file submitted to the STM's board of directors maintains that the objective of the amendment is to correct a situation that arises during execution of the contract because "the STM's decision to merge all its group insurance contracts had not been finalized when the [Initial Contract] was awarded."

Based on case law, it is not sufficient for a situation to arise during the execution of a contract to qualify as "unforeseen." Instead, it must be "a condition that was unforeseen during the preparation of the bid." For example, this would apply to a requirement by an engineer that a different excavation material be substituted for the material planned in the call for tenders,<sup>8</sup> but not to the execution of work outside of the scope described in the call for tenders.<sup>9</sup>

In this case, the merger of group insurance contracts corresponds more closely to this second specific case. This is actually a new need for the STM and not an actual unforeseen situation.

Admittedly, the STM could draw funds from the Initial Contract's financial envelope to complete the merger of the group insurance contracts. However, from the moment this project's implementation, added to the other pre-established needs in 2016, caused the financial envelope to be depleted, the STM could not legally justify amending the value of the Initial Contract. Instead, the STM should have issued a new call for tenders.

Regarding the third condition of the RGC, the STM indicated in its decision-making file that the amendment is accessory to the Initial Contract because it is "necessary for the completion of the contract and [that] proceeding without it could hinder the efficient deployment of the group insurance contracts."

It should be noted that the third condition of section 9.1 of the RGC uses the criterion of section 102.1 of the APTA regarding the accessory character of the amendment and goes on to define this term, clarifying that it must [Translation] "be closely tied to the objective of the contract and be necessary for its completion." While the concept of "closely tied to the objective of the contract" is relevant, great caution is needed in assessing the criterion of necessity.

In an example taken from case law, the construction of two sections of a bicycle path was entrusted to two different contractors. One of the contractors carried out work that was outside his purview but that was needed to link the two sections and make the bicycle path usable. While recognizing the need for such work, the judge stated that [Translation] "this is not the criterion that must be considered in response to this question" of the accessory character of a contract amendment.<sup>10</sup>

As underscored in another decision, rather [Translation] "the work must be the normal, logical and necessary continuation" of the work that the winning bidder agreed to and not conceptually distinct.<sup>11</sup>

In this case, the merger of the group insurance contracts is conceptually distinct since it had not been planned when the Initial Contract was awarded. Otherwise, this would allow a public

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<sup>8</sup> *Lac Saint-Charles (Ville de) v. Construction Choinière inc.*, JE 2000-1319, paras. 36–38.

<sup>9</sup> *Roxboro Excavation Inc. v. Montréal (Ville de)*, 2015 QCCQ 1228, para. 85.

<sup>10</sup> *Roxboro Excavation Inc. v. Montréal (Ville de)*, *supra*, note 9, para. 87

<sup>11</sup> *Stantec Experts-conseils ltée v. Brossard (Ville de)*, 2016 QCCS 4941, para. 39.

body to integrate new needs into a contract while it was being executed and then use these new needs to justify exceeding the original financial envelope. Recall that a contract amendment must be narrowly interpreted.

Furthermore, the percentage of the Initial Contract that the increase represents is an important element in determining the accessory character, or not, of the amendment. Contrary to the email from the manager of the STM's Purchasing Department, who seems to take for granted that an increase of 30% is automatically more acceptable than the original planned increase of 50%, there is no set threshold establishing absolutely what would constitute a reasonable increase.

While some decisions mention a range between 15% and 20%, others refused lesser amendments<sup>12</sup> or accepted ones that were much higher.<sup>13</sup> It should not be taken as a given, therefore, that an increase to a financial envelope will be compliant by the mere fact that it represents a small percentage of the original amount awarded. In this case, the extent of the increase to the Initial Contract's financial envelope could not be deemed acceptable especially since, as detailed in the next section, the STM did not limit itself to an increase of 30% but instead awarded the other 20% of the originally planned increase in a private contract reached two months later with the Winning Bidder.

Finally, analyzing the compliance of the increase to the Initial Contract's financial envelope provides an opportunity for the Inspector General to make some new comments regarding the fourth and last condition of section 9.1 of the RGC, which requires weighing whether [Translation] "the execution of the amendment by another supplier would interfere with the effective completion and sound management of the existing contract." Since this is not included in section 102.1 of the APTA, it results entirely from its inclusion by the STM in its RGC.

While this fourth condition could reasonably be met in this case, it should not take precedence, i.e., overshadow the analysis of the RGC's other conditions. Yet this is what several witnesses we met believed, based on their statements during the investigation. If the STM is unable to correct this perception among its staff, it should consider removing this fourth condition from its RGC.

### 3.2.2.2 *Budget overrun*

As mentioned earlier, despite the depletion of the Initial Contract's financial envelope by July 2020, the STM continued to incur fees from the Winning Bidder throughout summer and fall 2020.

According to the documents collected during the investigation, more than 96% of the \$150,000 increase granted on December 2, 2020, was used to pay several invoices for services rendered before the financial envelope was increased, i.e., a total of \$145,441.25 broken down, as follows:

- Part of invoice 68417 (dated July 1, 2020), in the amount of \$29,605.75;

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<sup>12</sup> *Roxboro Excavation Inc. v. Montréal (Ville de)*, *supra*, note 9, para. 91. The work represented 13.7% of the original amount.

<sup>13</sup> For example, *Pavage LP inc. v. Municipalité de Sainte-Béatrix*, 2015 QCCQ 14897. An increase of 42% was deemed accessory, but the court strongly emphasized the distinctive considerations of the file.

- Invoices 68645 (dated July 31, 2020), 69035 (dated September 1, 2020) and 69769 (dated October 1, 2020), for a total of \$96,900;
- Part of invoice 70949 (dated December 1, 2020), in the amount of \$18,935.50.

Thus, no sooner had the increase been approved by the STM's board of directors than not only had the entire increased financial envelope been depleted, but as shown by the partial payment of the December 1, 2020, invoice, it was insufficient, as soon as it was awarded, to pay all the fees already incurred from the Winning Bidder. As will be detailed in the next section, it was this situation that led to the awarding of a Second Contract in February 2021.

Finally, it should be underscored that, from all the witness statements collected during the investigation, it appears that after the increase to the financial envelope on December 2, 2020, and despite the budget overrun, no additional measure was implemented at the STM to monitor expenses, and no instruction was issued to comply with the Initial Contract's new financial envelope.

### 3.2.2.3 *Insufficient information submitted to the board of directors*

The analysis of the decision-making file submitted to the STM's board of directors in support of approving the increase to the Initial Contract's financial envelope shows that the information conveyed was insufficient and omitted vital details, especially regarding the prior commitment of almost all the amounts targeted by the increase.

In fact, there is no explicit mention of this in the documents provided to board members prior to their approval of the increase to the Initial Contract's financial envelope. Only an indication that "the contract is over cost" appears in the Supplementary Notes. Nothing indicates the true nature of this overrun, i.e., that almost the entire amount would be used to pay invoices already due and that even the invoice of December 1, 2020, could not be fully paid despite the increase in the envelope.

What is more, the "cost breakdown" section of the documents submitted to the board indicates that \$12,500 of the increased envelope would be allocated to the remainder of 2020, and \$137,500 would be allocated to 2021. This helps create the impression that most of the increased envelope would be used to pay for future work, and not past work, done by the Successful Bidder.

In the view of the Inspector General, it is completely unacceptable that the budget overrun of the Initial Contract was not fully disclosed to the STM's board of directors prior to its approval of the increase to the envelope. Decision-making documents must contain all relevant information to enable the board to make informed decisions with full knowledge of the facts and fully assume its role.

## 3.3 Awarding of the Second Contract

### 3.3.1 Facts uncovered by the investigation

On January 5, 2021, the STM's Project Manager speaks to a representative of the Purchasing Department, claiming that the amount of \$150,000 allocated as part of the amendment to the Initial Contract would be insufficient to cover the Winning Bidder's fees up to the awarding of a contract following the new call for tenders that has yet to be prepared.

According to the Project Manager, it was agreed that a private contract would be awarded to cover the remaining fees, and preparations would begin on the new call for tenders.

That same day, this Purchasing Department representative replies that the Project Manager is not permitted “to do indirectly what [the Purchasing Director] had refused that he do directly,” that the increase is limited to \$150,000 and that he should, therefore, “hurry up and issue a new call for tenders.”

On January 11, 2021, the Project Manager fills out a form requesting that a private contract be awarded in the amount of \$105,000. It especially mentions that “the STM could take advantage of the hourly rates indicated in the current contract without adjusting for cost of living.” The following day, the STM’s Managing Director of Human Resources approves the request.

Several emails are exchanged on February 2, 2021. Employees of the Purchasing Department raise several questions about the legality of the process, pointing out that the amount requested in the document that was submitted to them, i.e., \$105 000 plus taxes, exceeds the thresholds, thereby requiring a call for tenders, and that the board of directors had already agreed to an increase of \$150,000 in December 2020 for the same contract with the same supplier.

Ultimately, on February 11, 2021, a private purchase order for \$90,000, before taxes, is approved by the STM’s Managing Director of Human Resources with, according to the witnesses we met, the approval of the heads of purchasing and legal affairs.

The following day, a representative from purchasing notifies the Winning Bidder of the awarding of a Second Contract. He specifies at that time that “this is a purchase order in addition to the [Initial Contract], which means that the same hourly rate will continue to apply with this purchase order.”

### 3.3.2 Analysis and conclusions regarding the awarding of the Second Contract

#### 3.3.2.1 *The awarding of the Second Contract constitutes contract splitting*

In 2001, the law incorporated into all the acts governing municipal bodies the lessons of the courts to the effect that the division of contracts is valid only if [Translation] “it meets considerations regarding the sound administration of the department involved and is not done solely to circumvent the strict rules governing public bids.”<sup>14</sup> In the case of the STM, reference should be made to section 102 of the APTA:

*“102. A transit authority may not divide into several contracts having similar subject-matter an insurance contract, a contract for the performance of work, a supply contract or a contract for the supply of services other than professional services necessary for the purposes of a proceeding before a tribunal, a body or a person exercising judicial or adjudicative functions, unless the division is warranted on grounds of sound administration.”*

This section of the Act is echoed by section 3.4 of the STM’s RGC:

[Translation]

#### **“3.4 Contract Division**

<sup>14</sup> Langlois, André, with the collaboration of Pier-Olivier Fradette, *Les contrats municipaux par demandes de soumissions*, 4th edition. Éditions Yvon Blais, Montréal, 2018, pp. 78–79.

*The Society may not divide a contract into several contracts for similar goods or services, except when this division is justified for reasons of sound administration.”*

In light of the facts uncovered by the investigation, it is clear that the awarding of a Second Contract constitutes contract splitting, in contravention of sections 102 of the APTA and 3.4 of the RGC.

In fact, as of September 2020, the STM knew the amount required by the Project Manager to replenish the Initial Contract's financial envelope and successfully complete the merger project, i.e., \$263,000 before taxes. Realizing that this amount could not be allocated entirely by amending the Initial Contract, it was divided into two, the balance being the maximum amount that could be awarded privately.

It should be noted that both the amendment to the Initial Contract and the awarding of the Second Contract are intended for the provision of the same services by the same firm on the same terms as the Initial Contract. Moreover, the analysis of the invoices and supporting documents submitted by the Winning Bidder shows that the hourly rates it billed and the tasks performed by its employees between the amendment to the Initial Contract and the Second Contract are identical.

Finally, as the courts indicate, it is not sufficient that the result of dividing contracts is [Translation] “adequate and in the interest of the municipality and its taxpayers: the end does not justify the means. The division itself must arise out of sound administration.”<sup>15</sup> It goes without saying that the fact that the STM decided to award a Second Contract to pay, as we will see later, amounts incurred prior to its awarding would not constitute grounds of sound administration within the meaning of the law.

### 3.3.2.2 *Budget overrun*

As with the situation revealed above regarding the amendment to the Initial Contract, the STM continued incurring fees from the Winning Bidder in December 2020 and January and February 2021, despite the Initial Contract's increased financial envelope being depleted as soon as it was awarded on December 2, 2020.

According to the documents gathered during the investigation, more than 92% of the \$90,000 allocated to the Second Contract was used to pay invoices for services rendered before the private contract was even awarded, i.e., a total of \$83,477 broken down as follows:

- Part of invoice 70949 (dated December 1, 2020), totalling \$54,344.50.
- Invoices 71406 (dated January 1, 2021) and 71876 (dated February 1, 2021), totalling \$29,132.50.

Hence, as of the awarding of the Second Contract by the STM's Managing Director of Human Resources, almost its entire financial envelope was already depleted.

Finally, it seems from all the witness statements collected during the investigation that, after the Second Contract was awarded, no additional measure was put in place to monitor expenses, and no instruction was issued to comply with the Second Contract's financial envelope. As will be detailed in the next section, this would lead to additional problems when the Third Contract was awarded in July 2021.

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<sup>15</sup> *Boyd v. Tremblay*, 2005 CanLII 14536 (QC SC) 116. Appeal rejected: *Tremblay v. Desnommés*, 2007 QCCA 378.

### 3.3.2.3 *Insufficient information in the request for approval of the Second Contract*

As with the amendment to the Initial Contract, analysis of the supporting document attached to the request for approval of the private awarding of the Second Contract indicates that the information provided was insufficient and omitted vital details. In fact, there was no mention of the prior commitment of almost the entire amount awarded in the Second Contract.

As in the previously mentioned case of documents submitted to the STM's board of directors, this constitutes a major violation since it prevents the board from making an informed decision about approving the awarding of the contract.

## 3.4 Awarding and Execution of the Third Contract

At the same time as the Second Contract was being awarded, the Project Manager and a representative from the STM's Purchasing Department began steps to prepare the new call for tenders for the awarding of a contract after the Initial Contract expired.

From the documents and witness statements collected, it seems that the preparation of the call for tenders began around mid-January 2021 and continued until it was issued in April 2021.

This section will deal with the findings in this case and the violations stemming from them:

- Pairing the compensation and benefits mandates in the same call for tenders, and prohibiting the potential Winning Bidder from subcontracting one of these, unduly restricted the market (section 3.4.1);
- The conflict-of-interest disclosure included in the Winning Bidder's submission was not dealt with properly by the STM (section 3.4.2);
- Despite the depletion of the Second Contract's financial envelope, the STM continued to incur fees from the Winning Bidder during spring and summer 2021, and these fees were paid out of the Third Contract's financial envelope (section 3.4.3); and
- The Project Manager did not make a formal conflict-of-interest disclosure to his superiors at the STM. Furthermore, after becoming aware of the Winning Bidder's conflict of interest, the Project Manager's superiors failed to put in place measures to oversee the situation (section 3.4.4).

### 3.4.1 Pairing compensation and benefits mandates

#### 3.4.1.1 *Preparation of the call for tenders*

It appears from the investigation that the main issue at the time the call for tenders for a Third Contract was being prepared was the type of mandates to include.

Initially, Human Resources management planned to pair three different mandates in a single call for tenders: compensation, benefits, and retirement plans.

However, the Project Manager argued that no firm provided these three mandates. The third mandate, retirement plans, was thus eliminated.

According to the witness statements collected, while the Purchasing Department had suggested separating the two remaining mandates — compensation and benefits —, the Project Manager and his chain of command insisted on including them in the same call for tenders.

They wanted them kept together, surmising that four firms (i.e., the Winning Bidder and three competitors) could submit bids even if the two mandates were paired, and that the results of the last 10 years showed that it was to the STM's benefit to have a single Winning Bidder with an overall vision of the project.

The Purchasing Department also suggested allowing the eventual Winning Bidder to subcontract one of the two mandates but, according to the Project Manager and his chain of command, this amounted to the same thing as separating the two mandates. The documents collected show that the Project Manager asked a representative of the Purchasing Department to confirm that subcontracting was specifically prohibited in the call for tenders' documents.

Thus, the call for tenders for awarding the Third Contract that was issued combined the compensation and benefits mandates and prohibited subcontracting.

#### *3.4.1.2 Impact of this decision observed during the posting period*

During the posting period, the person responsible for the call for tenders at the STM received several emails from bidders, most of whom raised concerns with the pairing of the two mandates in one call for tenders.

On April 21, 2021, he received an email from a first potential bidder claiming that pairing the two services limited competition. Without removing the email sender's identifying information, the person responsible for the call for tenders forwarded it to the Project Manager, who responded by saying that they would discuss this again on the phone. The following day, the person responsible for the call for tenders informed the first potential bidder that the call for tenders' documents would not be amended.

The investigation shows that the Project Manager did not consult his superiors before making the decision to maintain the prohibition on subcontracting.

Following this, on April 28, 2021, a representative of the Winning Bidder wrote to the person responsible for the call for tenders at the STM to confirm that the firm would submit a bid.

On April 29, 2021, a second potential bidder advised the person responsible for the call for tenders that it would not be participating in the process given the pairing of the two mandates.

On May 11, 2021, a third potential bidder also indicated to the person responsible for the call for tenders that it would not be participating because of the required experience criterion of the senior expert in the call for tenders documents.

Finally, on May 14, 2021, a fourth potential bidder informed the person responsible for the call for tenders that it would not be participating because of the criteria contained in the weighting grid used by the STM.

The non-participation forms and emails we analyzed show that the pairing of the two mandates and the prohibition against subcontracting had an impact on the reason behind the withdrawal of these potential bidders.

#### *3.4.1.3 Analysis and conclusion regarding the pairing of mandates*

While the decision to pair the two mandates in a single call for tenders is the result of the STM's discretionary definition of needs, the investigation reveals that the process leading to this decision has several shortcomings. Given the responses received from potential bidders, it would have been wise for the STM to review its strategy during the call for tenders.

First, witnesses indicate that the services targeted by the two mandates are assigned to two separate teams at the STM — benefits to the Labour Relations and Benefits Division, and compensation to the Organization-Compensation Division. While not a determining factor, this nevertheless underscores the contradiction in the alleged need to pair the two mandates from the standpoint of the eventual Winning Bidder.

Second, the investigation reveals that no formal documented market study was conducted beforehand. Some felt that such a step was not required since the players in the market were well-known to them and that two bids had been submitted by three different companies for each of the three calls for tenders issued in the previous 10 years. The events that followed will show, in a telling way, the importance of conducting a market study beforehand for any public body.

Third, the analysis of the non-participation forms and emails shows that, on May 14, 2021, i.e., four days before the closing of the call for tenders for the purposes of awarding a Third Contract, the STM was aware that only one firm would submit a bid.

In fact, of the four firms previously identified as able to submit a bid, only the Winning Bidder had notified the STM that it would be participating in the call for tenders.

Two of the three other firms were among those who wrote to the person responsible for the call for tenders at the STM to indicate that they would not be submitting bids. It also appears from the supplementary notes to the decision-making file for awarding the Third Contract that one of these firms “is not in the habit of replying to our call for tenders.”

As for the fourth firm, it sent its non-participation form to the STM only on June 4, 2021, i.e., after the deadline for receipt of bids. However, it appears that this firm had never submitted a bid in the previous three STM calls for tenders held in the previous 10 years.

Fourth, it should be noted that call for tenders 6000011045, issued at the same time by the Finance Department to retain actuarial services for two accounting mandates, i.e., pension plan and benefits, initially prohibited subcontracting. However, following a question by a potential bidder, an addendum was issued on May 26, 2021, removing this condition.

While this amendment was made after the deadline for submitting bids in the call for tenders for the Third Contract, it should be noted that there is only eight days between the two events. Therefore, it becomes even more difficult to understand why the STM refused to accept subcontracting within the framework of the Third Contract even though one potential bidder had explicitly asked for this during the call for tenders' posting period.

Ultimately, some witnesses met by the Bureau de l'inspecteur général's investigators acknowledge that the pairing of the two mandates restricted the pool of potential bidders. The Project Manager himself recognized that subcontracting could have helped open up the market.

In short, the Inspector General concludes that the STM has inserted clauses in the call for tenders' documents, i.e., the pairing of the two mandates and the prohibition against subcontracting, that unduly restricted the pool of bidders. Given the non-participation notices received before the deadline for submitting bids, the STM knew that maintaining the pairing of the two mandates and the prohibition against subcontracting would lead to only one bid submission — that of the Winning Bidder — whereas opening them up would have allowed two other firms to bid.

This is obviously contrary to the primary objective of the call for tenders' process, which is to stimulate competition to obtain the best service at the best price and, thus, soundly manage the public funds.

Furthermore, it should be noted that the person responsible for the STM's call for tenders sent a question from a potential bidder to the Project Manager without first removing the correspondent's identifying information. While not a violation of the normative framework per se, it is recommended that the STM change this practice in the future. Excluding identifying information from questions received during the call for tenders' period fosters the fairer treatment of bidders by removing, at the outset, all potential favourable or unfavourable bias on the part of an employee other than the person responsible for the call for tenders.

### **3.4.2 Receipt of bids and management of a conflict-of-interest disclosure during analysis of the bids**

As mentioned previously, the call for tenders was published on April 13, 2021, and the deadline for receipt of the bids was set for May 18, 2021. Of the eight specifications holders, only one company submitted a bid, the Winning Bidder.

As will be explained, this bid included a conflict-of-interest disclosure regarding the STM's Project Manager.

#### *3.4.2.1 Analysis of the Winning Bidder's tender*

On May 25, 2021, a selection committee made up of STM employees met to evaluate the bid, assigning it a satisfactory passing grade.

The same day, the person responsible for the call for tenders wrote the Winning Bidder to advise it of the selection committee's decision. While it was the only compliant bidder, the person responsible for the call for tenders nevertheless asked the company to lower its prices, which were 9% higher than the STM's preliminary estimate.

Faced with the Winning Bidder's refusal to change its prices, the STM reduced the number of hours planned on the call for tenders' price schedule, so that the total value of the Third Contract corresponded to its preliminary estimate.

It appears from the decision-making file submitted to the board of directors for awarding the Third Contract that the STM estimated "that this [reduced] amount would be sufficient to complete the contract."

#### *3.4.2.2 Analysis of the conflict-of-interest disclosure in the Winning Bidder's tender*

On May 28, 2021, the person responsible for the call for tenders at the STM is advised by the STM's legal counsel that the legal analysis of the Winning Bidder's tender revealed a conflict-of-interest disclosure by the firm stating that one of its employees is the spouse of the STM's Project Manager. It is suggested that this disclosure be submitted to the appropriate internal committee.

On June 9, 2021, the person responsible for the call for tenders writes the STM's Project Manager to advise him that the ad hoc ethics committee (internally called the "vacuum committee") would be meeting to analyze the conflict-of-interest disclosure contained in the Winning Bidder's tender. He indicates that a representative of the ad hoc ethics committee is also asking him to justify the pairing of the two mandates during the drafting of the call for tenders' documents.

Rather, it is a Project Manager's superior who responds, stating that, while the mandates are assigned to two different teams within the STM, he is convinced that, in terms of knowledge of the STM and the rates that could be offered, it is advantageous to have only one bidder. If there were two suppliers, the STM would have to coordinate the information between them.

This superior confirms that the Project Manager had stated that his spouse has worked for more than seven years for the Winning Bidder, but that she has never been involved in any of his projects.

On June 11, 2021, the chair of the ad hoc ethics committee writes the person responsible for the call for tenders to inform him of its decision.

The ad hoc ethics committee, made up of members of the STM's Purchasing Department and Legal Affairs Department, determined that there was no real conflict of interest, but there could be the appearance of one.

In its opinion, this would not have influenced the fact that only one firm submitted a bid or that this firm obtained the contract.

According to the committee, however, "the STM must take note" and indicates that an "ethical follow-up letter will be sent [to the Project Manager] to clarify expectations for dealing with this situation for the duration of the contract."

#### *3.4.2.3 Analysis and conclusion drawn from the analysis of the Winning Bidder's tender and handling of the conflict-of-interest disclosure*

From the outset, it should be noted that the investigation does not show that the Project Manager's spouse was involved in the preparation of the Winning Bidder's tender. The investigation does not show that the spouse of the STM's Project Manager or any other representative of the Winning Bidder was involved in drafting the call for tenders' documents. In its response to the Notice sent by the Bureau de l'inspecteur général, the Winning Bidder confirms these two findings.

In addition, it is important to note that the Winning Bidder had satisfied its obligations under the terms of the STM's RGC by including the conflict-of-interest disclosure in its tender.

Nevertheless, the investigation uncovers several major shortcomings on the part of the STM, especially regarding the work of the ad hoc ethics committee and the follow-up, or rather lack thereof, stemming from it, as well as with the failure to disclose this situation to the board of directors prior to its awarding of the Third Contract.

Regarding the work of the ad hoc ethics committee, two issues need to be highlighted. First, neither the Project Manager nor his superior met personally with the ad hoc ethics committee. Second, the Winning Bidder's coordinator for the Initial Contract and Second Contract claims not to have received any questions from the STM regarding the conflict-of-interest disclosure contained in the bid.

One has to wonder how the ad hoc ethics committee was able to properly fulfill its mandate without:

- Seeking further details from the Project Manager and his manager about the nature of his duties and pre-existing oversight measures or ones to be implemented;
- Asking the Winning Bidder about oversight measures in place within the company regarding the Project Manager's spouse;
- Informing the Project Manager and his superiors of the conclusions and recommendations stemming from its work;
- Following up the oversight measures determined and their implementation by the STM after completion of the committee's work, especially given the absence of a follow-up letter being issued.

Regarding these last two items, despite the email of June 11, 2021, mentioning that a follow-up letter would be sent to the Project Manager to clarify expectations about him, the investigation reveals that neither he nor his superiors were informed in writing of the ad hoc ethics committee's recommendations prior to the awarding of the Third Contract. What is more, it appears from an email dated September 29, 2021, that an STM employee indicates that the follow-up letter could not be found in the file.

Finally, the decision-making file provided to the STM's board of directors on July 7, 2021, for the awarding of the Third Contract also shows that the information conveyed was insufficient and that vital details had been omitted. It should be underscored that the document makes no mention of the Winning Bidder's conflict-of-interest disclosure, the conclusions of the ad hoc ethics committee or the implementation and follow-up of specific oversight measures.

In light of the above, the Inspector General is of the opinion that the STM's processes for handling and following up conflict-of-interest disclosures should be reviewed.

### **3.4.3 Awarding of the Third Contract and payment of previous invoices**

As mentioned above, the Third Contract was submitted for approval and awarding by the STM's board of directors on July 7, 2021. The following day, the person responsible for the call for tenders at the STM advised the Winning Bidder that it had been awarded the Third Contract.

#### *3.4.3.1 Analysis and conclusions regarding the awarding of the Third Contract*

##### *(i) The information submitted to the board of directors was insufficient*

As with the amendment to the Initial Contract and the awarding of the Second Contract, the analysis of the decision-making file submitted to the STM's board of directors for the awarding of the Third Contract shows that the information provided was insufficient and that important details were omitted.

First, as mentioned in the previous sub-section, the decision-making file failed to include any mention of the conflict-of-interest disclosure by the Winning Bidder or how it was handled by the STM.

Second, despite the depletion of the Second Contract's financial envelope, the STM continued to incur fees from the Winning Bidder during spring 2021.

According to the documents and witness statements collected during the investigation, the Third Contract was used to pay several invoices for services rendered prior to its awarding on July 7, 2021, totalling \$18,629.50 broken down as follows:

- Part of invoice 72633 (dated March 1, 2021), in the amount of \$7,059.50;
- Invoices 73154 (dated April 1, 2021), 73873 (dated May 1, 2021) and 74286 (dated June 1, 2021), for a total of \$11,408.75;
- Half of invoice 75564 (dated July 31, 2021), in the amount of \$161.25.

These invoices were for services rendered by the Winning Bidder within the framework of the Second Contract, and the fees were charged at the hourly rates set out in the Initial Contract.

It should be noted that there is no mention of these facts in the documents given to the members of the board of directors prior to their approval of the awarding of the Third Contract.

Third, the “contracting history” section of the Executive Summary, which identifies contracts awarded previously by the STM to the same supplier, does not include any mention of the privately awarded Second Contract. The board of directors was therefore not informed that, two months after its decision to increase the Initial Contract’s financial envelope, the STM had also awarded another contract to the same supplier.

In short, the Inspector General’s previous comments regarding approval of the amendment to the Initial Contract and the awarding of the Second Contract fully apply to the awarding of the Third Contract.

*(ii) Budget overrun*

As mentioned above, the STM continued to incur fees from the Winning Bidder during spring 2021, despite the depletion of the Second Contract’s financial envelope.

According to the Project Manager, the payment of prior invoices out of the Third Contract’s financial envelope was not discussed with his superiors. He stated to the Bureau de l’inspecteur général that, knowing that the financial envelope was depleted, he held back the invoices he received from the Winning Bidder during completion of the Initial Contract and the Second Contract. Once funds became available, he sent the invoices to the Finance Department for processing and payment.

Thus, the seven invoices produced by the Winning Bidder for work done in December 2020 and the first six months of 2021 were processed and entered into the SAP system after the awarding of the Third Contract and paid at the hourly rate set out in the Initial Contract.

Even more astonishing, the STM’s Project Manager states that he was never called on to explain the delays and deferred payments of the invoices to the approving authority or Finance Department. This situation is clearly a red flag that should have drawn the attention of the STM to a problem that needed solving.

According to several witnesses we met during the investigation, these unpaid invoices had no impact on the call for tenders’ process and the evaluation of the Winning Bidder. In their opinion, if the latter had not been awarded the contract, the STM would have found another way to settle the unpaid bills.

Without necessarily finding a lack of integrity in the process for awarding the Third Contract, these unpaid invoices nevertheless create persistent doubt in the mind of the external observer. It is patently obvious that paying these invoices out of the new contract constitutes a practice which, according to the Inspector General, diverges significantly from the STM’s applicable normative framework. Such a situation should never be allowed to recur, and it behoves the STM to take the necessary measures to ensure that it is not repeated.

Finally, let us not forget that, as indicated in sub-section 3.4.3.1, the STM reduced the number of hours by about 9% on the price schedule of the call for tenders because the prices submitted by the Winning Bidder exceeded its preliminary estimate by this same amount. Nevertheless, the STM estimated “that this [reduced] amount would be sufficient to complete the contract.”

Faced with findings of multiple budget overruns in this file, including the payment of prior invoices totalling \$18,000 from the Third Contract, one wonders about the accuracy of such a claim, at least without an eventual increase of the Third Contract’s financial envelope prior to its expiry in July 2026.

### **3.4.4 Absence of a formal conflict-of-interest disclosure by the Project Manager and lack of oversight by the STM during the execution of the contracts under investigation**

This section will address the absence of a formal conflict-of-interest disclosure by the STM's Project Manager, which is the internal equivalent of the conflict-of-interest disclosure made by the Winning Bidder, and the lack of oversight by the STM following the opening of the Winning Bidder's tender.

#### *3.4.4.1 Absence of a formal conflict-of-interest disclosure by the Project Manager*

As mentioned previously, since being hired in 2018, the Project Manager had managed the Initial Contract, Second Contract and Third Contract, and the investigation shows that he had never officially informed his superiors of the fact that his spouse worked for the Winning Bidder.

Several witnesses state that they were unaware of this fact until the Winning Bidder's tender for the Third Contract was received, with the conflict-of-interest disclosure it contained.

The Project Manager acknowledges that he had never filled out an official document disclosing his spouse's job with the Winning Bidder. According to him, however, the situation was known by everyone at the STM when he was hired.

It should be noted that, in anticipation of this selection committee being formed, the Project Manager had advised the person responsible for the call for tenders at the STM of his spouse's job. He was thus removed from the selection committee's work.

Again, according to the Project Manager, his spouse does not work on the STM files targeted by the Initial Contract, Second Contract or Third Contract. This situation regarding the Initial Contract existed even before his arrival at the STM. The Winning Bidder confirmed this information during and at the close of the investigation in its response to the Notice sent by the Bureau de l'inspecteur général.

#### *3.4.4.2 Lack of oversight measures by the STM regarding the Project Manager*

Some of the Project Manager's superiors confirm that no specific oversight measures had been put in place at the time that the Project Manager assumed his post in 2018, or after the conflict-of-interest disclosure contained in the Winning Bidder's tender.

According to one of the Project Manager's superiors, a representative from the STM's Legal Affairs Department determined that he was not obliged to declare that his spouse worked for the Winning Bidder. According to another superior, the relationship between the Project Manager and his spouse at the Winning Bidder's was never an issue.

Some witnesses mentioned to the Bureau de l'inspecteur général's investigators that the Winning Bidder's invoices would have been approved by the Project Manager's superior, while another superior would have monitored monthly expenses related to the Initial Contract, Second Contract and Third Contract.

Regarding the preparation of the call for tenders for the awarding of the Third Contract, the investigation is not able to show that any of the Project Manager's superiors had reviewed the specifications before its publication.

### 3.4.4.3 *Oversight steps taken by the STM after the beginning of the Bureau de l'inspecteur général's investigation and audits by the STM's Auditor General*

As mentioned in section 2.1, at the beginning of October 2021, the Bureau de l'inspecteur général received a denunciation that triggered this investigation. This denunciation was also communicated to the STM's Auditor General, who conducted his own audits in tandem.

On October 27, 2021, the STM's Assistant Corporate Secretary contacted the Project Manager about the conflict-of-interest disclosure in the Winning Bidder's tender. The next day, a letter was sent to him containing the following information:

- The Project Manager had apparently reiterated to the STM's Assistant Corporate Secretary that his managers were aware that his spouse worked for the Winning Bidder. He also apparently reiterated that she was not involved in the STM's contracts and that they do not work on the same projects.
- Given that the Project Manager had indicated that he was the one who issued the purchase orders for the Winning Bidder, it is required that he:
  - i. Obtain pre-authorization from his manager for such purchase orders "or inform him as soon as possible after the fact";
  - ii. Involve his manager in any negotiations, evaluation or administration of the contract that might create the impression that the Project Manager had given the firm preferential treatment;
  - iii. Advise the Corporate Secretary if the Project Manager was involved in future in a contract awarding process in which the Winning Bidder might submit a tender so that the Corporate Secretary's Office staff could notify him of preventive measures to put in place;
  - iv. Preserve the confidentiality of the information to which the Project Manager might have access, act with caution during exchanges with his spouse, and ensure that no third party could conclude that the firm benefited from undue preferential treatment following such exchanges;
  - v. Notify any new manager to whom the Project Manager reports of this situation, as necessary.

The investigation shows that, in the wake of this letter, no change was made to how the execution of the Third Contract was managed. Furthermore, the Project Manager indicates that it was only in December 2021 that he completed an official document declaring the situation regarding his spouse.

Otherwise, the Bureau de l'inspecteur général's investigators met with the STM's Managing Director of Human Resources, the person to whom the Project Manager ultimately reports at the end of January 2022. At that time, the Managing Director declared that he had still not received the report of the STM's ethics committee regarding the conflict-of-interest disclosure made by the Winning Bidder in May 2021.

Eight days after this meeting, a mid-level manager gave the STM's Managing Director of Human Resources a variety of "monitoring methods" that would be put in place to ensure the sound management of various facets of the Winning Bidder's Third Contract:

- Yearly planning of work related to managing the Group Insurance;
- Prior approval of work to be done by the Winning Bidder;
- Approval of the invoices submitted by the Winning Bidder;

- Budget follow-up of the sector.

It should be noted that the persons responsible for each of these facets are shown as being the Project Manager and his immediate manager.

Finally, it should be noted that a representative of the Winning Bidder confirmed that no change had been made to how the Initial Contract, Second Contract and Third Contract were managed. It is still the Project Manager who coordinated their mandates.

#### *3.4.4.4 Analysis and conclusion regarding the STM's management of the appearance of a conflict of interest by the Project Manager*

As part of their duties, STM employees have a variety of ethical obligations that must be met, including those set out in the STM's RGC and Code of Ethics.

First, under section 3.1 of the STM's RGC, which applies to all members of the STM's staff, [Translation], "anyone who takes part in a contract process at the Société must help maintain the sound management of the process by acting impartially and complying with the STM's Code of Ethics." To this end, an employee must [Translation] "disclose any conflict of interest, appearance of a conflict of interest or any situation that could result in undue advantage."

Second, section 4.2 of the STM's Code of Ethics states that all employees [Translation] "must not only avoid real conflicts of interest but also any situation that could create such a conflict or create the appearance of one. This is especially true for those who work in the contract management field, including when taking part in a contract awarding process, negotiations or work assessment."

The same section specifies that conflicts of interest are not limited to financial questions or economic advantages but can also refer to [Translation] "personal or family relationships." STM employees are thus [Translation] "required to inform their superior or the Corporate Secretary when they or someone with whom they have a special relationship have a vested interest in a company that is providing services or goods to the Société, and their functions are such that they are likely to play a role in making decisions regarding this company or influencing decision-making."

Again, in the same section, the manager or Corporate Secretary must support the employee in question.

Finally, this section states that the manager or Corporate Secretary can [Translation] "recommend implementing the necessary measures in such situations."

In this case, the facts uncovered by the investigation show that the Project Manager was in an appearance of a conflict of interest because of his spouse's job with the Winning Bidder. By not formally disclosing this conflict of interest, the Project Manager contravened sections 3.1 of the RGC and 4.2 of the STM's Code of Ethics.

Conversely, it appears that his managers also failed to comply with section 4.2 of the STM's Code of Ethics. In fact, the investigation shows that, following the conflict-of-interest disclosure included in the Winning Bidder's tender, neither the Project Manager's superiors nor the Corporate Secretary put in place the necessary measures to properly oversee the situation and ensure the sound management of the awarding and execution of the STM's various contracts with the firm in question.

In this matter, the following elements are noteworthy:

- The ethical follow-up letter was only issued on October 28, 2021, approximately four months after the analysis of the Winning Bidder's conflict-of-interest disclosure by the

ad hoc ethical committee and several weeks after the beginning of audits by the STM's Auditor General and the Bureau de l'inspecteur général's investigation;

- No follow-up was done regarding the implementation of the measures outlined in this letter;
- In fact, it appears from the investigation that these measures were not implemented;
- Oversight measures were developed only after the Bureau de l'inspecteur général's investigators met with the STM's Managing Director of Human Resources at the end of January 2022;
- In fact, it appears from the investigation that these measures were not implemented.

In short, the Inspector General finds that both the Project Manager and his superiors failed their ethical obligations in this matter. While it was only the appearance of a conflict of interest, the laxity observed remains a source of concern. This must be tightened up as soon as possible.

### **3.4.5 Cancellation of the Third Contract**

Ultimately, on March 9, 2022, the STM's board of directors adopted a resolution cancelling the Third Contract as of July 1, 2022. This decision stems from the audits carried out by the STM's Auditor General and the Bureau de l'inspecteur général's investigation.

On November 24, 2021, the STM's Auditor General forwarded the conclusions of its audits to the STM, which indicate various violations of the normative framework regulating the STM.

As apparent from a letter dated December 7, 2021, several members of the STM's management refute the conclusions of the STM's Auditor General. Reproaching the Auditor General for acting on "conflated reasoning" and "creating the impression of illegitimacy in the call for tenders process and the appearance of a conflict of interest," these members of the STM's management nevertheless announce that they would cancel the Third Contract and issue a new call for tenders that would provide for two separate mandate packages.

The Inspector General wishes to underscore that, had the Third Contract not been cancelled by the STM's board of directors, she would have recommended that the STM do so, in light of the findings of this investigation.

## **4. The STM's Response to the Notice, Conclusion and Recommendations**

This report highlights various violations of the normative framework regulating the STM. In its response to the Notice, the STM states that it has taken official note and acknowledges poor understanding and application, albeit unintentional, of certain aspects of the applicable normative framework.

To avoid this type of situation recurring, the STM proposes various measures that it commits to take, underscoring that the implementation of these measures will be the responsibility of a working group that will be formed shortly and that will bring together all the necessary stakeholders. The working group will produce an action plan and timeline for dealing with each of these commitments.

The Inspector General welcomes these commitments announced by the STM and will follow up with ongoing checks of their implementation. She also takes this opportunity to emphasize to the STM that the remedial plan must contain the following elements:

- i. Take the required measures to prevent the commitment of funds to a supplier over and above the financial envelope duly approved by the authorities concerned;
- ii. Take the required measures to ensure that the documents submitted to the board of directors or to any other internal decision maker contain all the information needed to make an informed decision, in full knowledge of the facts;
- iii. Take the required measures to ensure that the process for managing a conflict-of-interest disclosure by a bidder or the Winning Bidder is reviewed;
- iv. Take the required measures to ensure that the management of conflict-of-interest situations or the appearance of an STM employee's conflict of interest is reviewed, including by removing, if necessary, any employee found to be in such a situation from the call for tenders' process (preparing specifications, issuing and analyzing bids);
- v. Take the required measures to ensure compliance with the normative framework that applies to amending a contract or dividing contracts, including by prohibiting the practice of awarding "bridge contracts";
- vi. Remove identifying information from questions received from bidders during the call for tenders' period prior to the person in charge of the STM's call for tenders forwarding them to other employees;
- vii. In accordance with section 8 of the STM's RGC, provide additional training to staff members involved in the awarding or management of contracts, including pertaining to all the points listed above.

Regarding points v. and vii., some additional remarks are warranted here. As mentioned previously, this is the Bureau de l'inspecteur général's second investigation on the STM's contract amendment practices.

Despite publication of the results of the first investigation in the 2021 mid-year report of the Bureau de l'inspecteur général, meetings with several STM employees assigned to manage the contracts investigated reveal a certain lack of knowledge of the normative contract framework regulating the STM, including in relation to amending contracts.

In fact, several witnesses still refer to the concept of a "bridge contract" between two calls for tenders. According to them, it would be acceptable at the STM to replenish a contract's depleted financial envelope by awarding another private contract to the same company for the same services while waiting for a second call for tenders to conclude, thereby "bridging" the two calls for tenders.

In its response to the Notice, the STM again defends the practice of awarding bridge contracts. While acknowledging that the concept had been wrongly applied in this case, the STM maintains that it is a "tool that can be essential for maintaining operational needs in certain specific situations justifying its use."

The Inspector General cannot endorse such a position, since the very concept of "maintaining" rests on the premise that the same supplier can receive a new contract that, while of short duration and below the threshold of the call for tenders, is intended for the same purpose as the preceding contract. The law foresees provisions that allow the

amendment of a contract and, in a real emergency, the awarding of a private contract. Otherwise, this amounts to doing indirectly what cannot be done directly.

Maintaining operational needs should be done instead by the company, first by better prior planning of these needs and, second, by stricter follow-up of the progressive use of a contract's financial envelope.

In the same vein, while this way of working was denounced by the Inspector General in her 2021 mid-year report, the testimony of some employees reveals that they still consider that the expiry of a contract prevails over the depletion of the financial envelope and that, if necessary, the latter will be replenished in the amount required to reach the contract deadline.

Finally, complying with the normative framework was seen by some as contrary to finalizing the merger of the group insurance contracts. Likewise, some witnesses show evidence of a certain shirking of responsibility by relying exclusively on the Purchasing Department or Legal Affairs Department to ensure that the management of the contract complies with the normative framework.

While these departments clearly remain as expert resources to consult, the onus is on the STM employees assigned to manage public contracts to play their "first-line" role of defending contract integrity. To this end, the Inspector General reiterates that more training must be provided to STM employees.

## **FOR THESE REASONS,**

The Inspector General

**FINDS** and **INFORMS** City Council and the Board of Directors of the Société de transport de Montréal of the various violations observed in the STM's process of awarding and managing contracts.

**RECOMMENDS** that the Société de transport de Montréal quickly develop a remedial plan including the elements cited in this report.

**TRANSMITS**, in accordance with section 57.1.23 of the *Charter of Ville de Montréal*, a copy of this decision to the mayor and city clerk so that the latter may forward it to the City's councils concerned and to the board of directors of the Société de transport de Montréal.

Me Brigitte Bishop,  
Inspector General