

Public contracts: Québec introduces the Autorité des marchés publics

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On June 8, 2016, the Québec government introduced Bill 108 (the Bill) proposing the establishment of the Autorité des marchés publics (AMP) to replace the Autorité des marchés financiers (AMF) as the organization responsible for overseeing all public procurement for public bodies.

Key events leading up to the proposed Bill

- In October 2011, the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry (Charbonneau Commission) was enacted to investigate potential corruption in the management of public contracts in the Québec construction industry.
- In December 2012, the *Integrity in Public Contracts Act* (the Integrity Act) amending the *Act respecting contracting by public bodies* was passed and assented to promote integrity in the public procurement process in the Province of Québec. In accordance with the Integrity Act, enterprises must obtain prior authorization from the AMF if they wish to compete in a call for tenders or an awards process for contracts and subcontracts with Québec government departments and agencies and Québec municipalities involving an expenditure equal to or greater than the thresholds determined by the government.
- In its report released in November 2015, the Charbonneau Commission concluded that the establishment of a provincial public market framework body is key to ensuring the integrity of the tendering, awarding and management processes for public contracts. As such, it recommended the Province of Québec establish the "Autorité des marchés publics." The recommendation was accepted by the Québec government, which introduced the *Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics* (the Act) on June 8, 2016.

Overview of the proposed Bill

Establishment of the Autorité des marchés publics

The Act establishes the AMP, which shall oversee all public contracts, and shall apply the *Act respecting contracting by public bodies* in determining the eligibility for public contracts, granting prior authorization to obtain public contracts or subcontracts, and evaluating

contractors' performance. As such, the AMP assumes all the existing responsibilities that were held by the AMF under the *Act respecting contracting by public bodies*.

In addition, the AMP oversees all other contracting processes determined by the government.

Among other tasks, the AMP must

- examine the compliance of a tendering or awarding process for a public contract of a public body – the review may be done on the AMP's own initiative, or after a complaint is filed by an interested person, or on the request of the Chair of the Conseil du trésor or a bidder;
- maintain the register of enterprises ineligible to enter into a public contract or subcontract and the register of enterprises authorized to do so; and
- ensure that the contract management of the Ministère des Transports and any other public body the government designates is carried out in accordance with the normative framework to which the body is subject.

Various powers are given to the AMP to conduct audits and investigations and to give subsequent orders and recommendations. These may include, but are not limited to, orders to a public body to amend its tender documents or to cancel the public call for tenders, and to suspend the performance of any public contract or cancel such a contract.

The Bill sets out the AMP's organizational structure and operational rules. It specifies that the AMP is to be composed of a president and one or more vice-presidents appointed by the government. The Bill also requires the AMP to establish a strategic plan, which must be approved by the government, as well as rules of ethics applicable to its staff members.

Amendments to the Act respecting contracting by public bodies and the Tax Administration Act

The Act amends the *Act respecting contracting by public bodies*. According to the amendments

- Public bodies are required to publish, prior to entering into certain contracts by mutual agreement, a notice of intention. They must also establish a procedure for receiving and examining the complaints filed with them in the course of the tendering or awarding process for a public contract.
- The government may require an enterprise to obtain authorization to contract while it is in the phase of performing a public contract.
- The government may require an enterprise to obtain authorization to contract in order to enter into a public contract involving an expenditure below the applicable authorization threshold.
- The AMP could cancel an application for authorization to contract or suspend such an authorization if the enterprise in question fails to communicate the required information.
- An enterprise that has had its application for authorization to contract cancelled or has withdrawn its application may not file a new application within the year after such cancellation or withdrawal.

- The Conseil du trésor could give permission, “in exceptional circumstances,” to an enterprise to enter into or to continue performing a contract by mutual agreement or a public call for tenders despite a negative decision of the AMP.
- A penal offence will be introduced for anyone who communicates or attempts to communicate with a member of a selection committee for the purpose of influencing the member.
- The disclosure of information that allows the number of enterprises that asked for a copy of the tender documents or that tendered a bid to be known, or that allows those enterprises to be identified, is limited.

Yet, the process to obtain prior authorization for public contracts and public subcontracts remains untouched, with the exception that an enterprise must submit its application in the form prescribed by the AMP (formerly prescribed by the AMF).

It is noteworthy that the Bill amends the *Tax Administration Act* to allow the Agence du revenu du Québec to communicate to the AMP information obtained under fiscal laws that the AMP needs for the purposes of prior authorizations.