Summary - Construction Bau-Val inc. c. Ville de Montréal, 2019 QCCS 3094

August 28, 2019

Public contracts: The *Cities and Towns Act* henceforth imposes on every municipality the obligation to adopt a by-law on contract management, in order to ensure the integrity and transparency of the tendering process, as well as equality among the tenderers.

A Superior Court decision rendered on July 17, 2019 has confirmed that any communication sent to a party other that designated in the call for tenders may lead to the registration of the tenderer in the register of ineligible persons.

When the Ville de Montréal (the City) issued three calls for tenders on June 4, 2018, Construction Bau-Val inc. (Bauval) learned that the contracts would be awarded to EBC inc. (EBC). In Bauval's view, EBC did not meet the requirements of the Specifications regarding the minimum experience required for the project manager. On September 13, 2018, Bauval filed an originating application for a provisional interlocutory injunction, an interlocutory injunction and a permanent injunction, for the purpose of having itself declared the low conforming bidder for the three projects (docket no. 500-17-104801-181). The Superior Court heard and dismissed the application the following day.

On September 17, 2018, Bauval, through its in-house counsel, sent a letter (the Letter) to the City Council, contending that the imminent awarding of the contracts to EBC would contravene an essential condition of the calls for tenders and therefore that the contracts should not be awarded to EBC.

On September 26, 2018, the City's Executive Committee adopted a resolution taking note of the influencing communication from Bauval and, incidentally, of its automatic registration in the register of ineligible persons for a one-year period. The City was of the opinion that the Letter constituted an influencing communication within the meaning of sections 6 and 9 of the *City Council By-law concerning Contract Management* (the By-law). Under section 23 of that By-law, any tenderer that breaches section 9 (*i.e.* by issuing an influencing communication) is automatically ineligible to be awarded any contract.

On October 1, 2018, Bauval decided to contest that decision and filed an application for judicial review, in which it petitioned the Court to quash the City's decision declaring it

ineligible. Bauval alleged that the Letter was in fact a demand letter (a *mise en demeure*) and not an influencing communication.

The Honourable Justice Hélène Langlois, J.C.S., stressed that under section 573.3.1.2 of the *Cities and Towns Act*, every municipality must, by means of a by-law on contract management, ensure that the process of awarding contracts complies with applicable legislation to counteract bid-rigging, as well as with the *Lobbying Transparency and Ethics Act*. She further held that all municipalities are now obliged to ensure that the tendering process is uncorrupted by influence peddling or any conflict of interest situation likely to compromise its impartiality and objectivity.

The Court has therefore ruled that section 6 of the By-law confers a restrictive power which leaves the City with no leeway: **Any communication during the tendering period following a call for tenders with any person other than the person responsible for the call for tenders is a prohibited communication.** It must be mentioned that under its section 3, the By-law applies to all City contracts and to all procedures related thereto.

Langlois J. held that the Letter did not constitute a demand letter (*mise en demeure*). She recalled that in both jurisprudence and doctrine, a demand letter is an imperative invitation addressed to a debtor to regularize their situation within a stipulated deadline. In this case, the Letter made no mention of any performance expected by the City or of any deadline for rendering such performance. In the opinion of the Court, the Letter had but one purpose, namely, to influence the Mayor and the City Council on the eve of the decision they were preparing to make to award the three contracts to EBC.

The Court pointed out that Bauval could have reported the alleged flaw in the contract awarding process to the Office of the Inspector General. He is an officer mandated to ensure compliance with the tendering process, in accordance with the powers conferred upon him by the *Charter of the Ville de Montréal*. In addition, the Superior Court's decision emphasizes that there was nothing to prevent Bauval from having access to the courts to assert its contentions and notes that that is precisely what it did by filing an application for a provisional interlocutory injunction, which, however, proved unsuccessful.

For the foregoing reasons, the application for judicial review was dismissed. Bauval, however, is appealing the decision and the case will be argued once again before the highest court in the Province. In the meantime, and pursuant to an agreement concluded with the City to avail until judgment is rendered on the merits of the judicial review application, Bauval has not been registered in the registry of ineligible persons.

This recent landmark case reminds us that in public procurement, the rules on the awarding of contracts must be strictly complied with, failing which tenderers are exposed to serious consequences.

By

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