Major public infrastructure projects in Québec: A major reform of the legislative framework

May 14, 2024

On May 9, 2024, Bill 62, *An Act mainly to diversify the acquisition strategies of public bodies and increase their agility in carrying out infrastructure projects* (Bill 62), was introduced before the National Assembly of Québec.[1]

Bill 62 – Background

Québec's major public infrastructure sector has come under pressure in recent years. Specifically, industry stakeholders' waning interest in traditional contract award methods due to associated risks and market disruptions like inflation and supply chain issues have made submitting a competitive bid difficult to impossible.

The government of Québec is introducing Bill 62 in response to the sector's growing interest in a "collaborative approach" as an alternative project delivery method. Without this reform of the legislative and regulatory framework, this delivery method has been broadly unfeasible in Québec.

Bill 62 reflects the Québec government's desire[2] to equip itself with competitive tools for major public infrastructure projects. As a result, Bill 62 aims to make these projects more effective and attractive by proposing changes to the current legislative and regulatory framework. This is reflected by Bill 62's introduction of a new type of contract called the "partnership contract" in the *Act respecting contracting by public bodies* (ARCPB). This article discusses the key changes proposed by Bill 62 and their implications.

Withdrawing the concept of PPPs and introducing the concept of partnership contracts

Partnership contracts

Bill 62 permanently removes the concept of traditional public-private partnerships (PPPs), wherein bodies are called upon to design, build and operate public infrastructure,[3] and replaces it with the concept of partnership contracts. Under Bill 62,

partnership contracts are contracts entered into for the purposes of an infrastructure project for which a public body brings in a contractor to participate in designing and building the infrastructure. They also carry out "other responsibilities" related to the infrastructure. Partnership contracts involve a collaborative approach during or after the tendering process. Mixed construction work and professional services contracts—as well as contracts determined by a regulation of the Conseil du trésor—under which a public body brings in a contractor to participate in designing or building an infrastructure if they involve a collaborative approach as specified in the regulation are considered to be partnership contracts.[4]

Partnership contracts may be entered into by the Minister of Transport, the Société québécoise des infrastructures or any other public body provided that the minister responsible for the public body authorizes it. This said, ministerial authorization does not relieve the public body from the obligation to obtain any other authorization relating to the partnership contract concerned that would otherwise be required under an Act, a regulation or a directive.[5] Given the establishment of Mobilité Infra Québec pursuant to Bill 61, *An Act enacting the Act respecting Mobilité Infra Québec and amending certain provisions relating to shared transportation* (Bill 61), and the role that the government intends to give to this entity, we can only assume that it will be authorized to enter into such partnership contracts, or work with the entities that have entered into them.

What is a collaborative approach?

In accordance with Bill 62, a collaborative approach may, in particular, include holding bilateral workshops, pooling resources and information related to the infrastructure project, consensually sharing risks and, as applicable, savings generated or gains made and losses sustained during the term of the contract.[6] It is important to note that this definition is non-comprehensive and subject to interpretation. As a result, multiple projects may qualify as partnerships within the meaning of Bill 62, regardless of their size.

This definition, or rather this description of the "collaborative approach," provides no guidance about the main provisions that may be contained in the partnership contracts, such as an open-book approach or a full or partial waiver of recourse between the parties. The government's choice to broadly define the concept of partnership suggests that a range of contractual solutions may be considered and subject to change in accordance with market trends.

Practical implications

The current ARCPB includes a chapter dedicated exclusively to PPP contracts: Chapter V.[7] In accordance with the changes proposed by Bill 62, this chapter would now be applicable to partnership contracts. As such, more projects will likely be able to avail themselves of the partnership contract regime as amended under the terms of Bill 62. Their procurement process will therefore be governed by Chapter V of the ARCPB.

As Chapter V stipulates, the nature of the projects entered into under a partnership contract will require discussions between the client and potential private partners to define the project and enter into the contract. The ARCPB also expressly allows practices for selecting the partner and entering into a partnership contract that depart

from the generally applicable rules for awarding contracts following public calls for tenders.

In addition, Bill 62 increases the latitude given to public bodies in connection with a partnership contract. More specifically, Chapter V would expressly authorize:

- a public body to undertake discussions with the selected tenderer or each of the selected tenderers, as applicable, after the first stage of the selection process, to further define the technical, financial or contractual aspects of the project and give each of the selected tenders the opportunity to submit a proposal (currently, the ARCPB only allows such discussions *with each of the selected tenderers*);
- a public body to negotiate, during and at the end of the selection process, with the selected tenderer or tenderers the provisions needed to finalize the contract while preserving the basic elements of the tender documents and the proposal (currently, the ARCPB only allows such negotiations to be held *at the end of the selection process and only with* ***the*** *selected tenderer*).

Accordingly, Bill 62 provides public bodies with greater flexibility to conduct tenders for projects carried out under the partnership contract regime. These changes suggest that public bodies could work more closely with tenderers at all stages of the selection process, including at the end of the same.

Elimination of the requirement to publish a notice of intention for projects that received no compliant bids

Bill 62 proposes relaxing existing measures to speed up tendering processes by allowing a public body, following an unsuccessful call for tenders, to enter into a contract by mutual agreement without it being necessary to publish a notice of intention on the electronic tendering system, under certain conditions.[8]

In particular, Bill 62 requires the conditions of the contract awarded by mutual agreement to be the same as those set out in the documents of the public call for tenders for which no compliant bids were submitted, except as regards the period of time allotted for carrying out the contract. This interval may not be postponed longer than the time elapsed between the tender closing date and the date the contract is entered into.

In our view, some potential pitfalls limit the usefulness of this provision. For example:

- If no compliant bids are received at the end of the call for tenders, it seems unlikely that a third party will be able to meet the requirements of the proposed contract. Instead, the bill could have enabled a public body and the successful bidder to negotiate any such provision as may be required to enter into the contract while preserving the basic elements of the tender documents.
- The postponement period as currently stipulated does not take into account the seasonality of the work or the availability of the potential successor bidder.

It is also not provided that public bodies using this approach would be permitted to enter into agreements for preliminary work, which agreements are regularly used to secure the project schedule by carrying out certain critical path activities in advance.

Auditing powers of the Autorité des marchés publics (AMP)

Bill 62 also expands the AMP's powers to conduct an investigation to include any person who has previously been a director, partner, officer or shareholder of an enterprise subject to the oversight of the Autorité des marchés publics and any other person or entity bound or previously bound, directly or indirectly, by contract to the enterprise.[9]

Furthermore, Bill 62 sets out certain immunities for persons who collaborate with the Autorité des marchés publics in investigations to verify whether a person meets the integrity criteria. Bill 62 also bars asserting any form of duty of confidentiality or loyalty to refuse to disclose any such documents or information as may be required for the purposes of these investigations.[10] Only professional secrecy between a lawyer or a notary and a client is not covered by this exception to professional secrecy.

Bill 62 further provides that any person who communicates information or a document under the ARCPB incurs no civil liability for doing so.[11]

Expropriation and land reserve

Under Bill 62 and for the purposes of developing, maintaining and managing the immovable assets of public bodies, the Société québécoise des infrastructures may now acquire by expropriation, on its own behalf or on behalf of a public body, any immovable in whole or in part, or any real right.[12] This expropriation power is much greater than that set forth in current legislation, which limits this right to acquisitions by agreement. A similar power is also granted under Bill 61 in favour of Mobilité Infra Québec, which is required, upon request by the government of Québec, to work with the Société québécoise des infrastructures to carry out a major transport infrastructure project.

Lastly, Bill 62 stipulates that the Société québécoise des infrastructures may, on the conditions determined by the government, establish a land reserve for the carrying out of future public infrastructure projects.[13]

Conclusion

Bill 62 is a major development in Québec legislation governing major public infrastructure projects. The bill as tabled now needs to be studied before it can be passed. We will keep you informed of any developments tied to Bill 62 in the coming months.

In the meantime, we invite you to check out our related article on Bill 61.

If you have any questions about the above, please reach out to BLG's Infrastructure and Construction groups.

Footnotes

[1] Bill 62, An Act mainly to diversify the acquisition strategies of public bodies and increase their agility in carrying out infrastructure projects – National Assembly of Québec (assnat.qc.ca).

[2] See, in particular, (i) Bill 61 (2024), *An Act enacting the Act respecting Mobilité Infra Québec and amending certain provisions relating to shared transportation*; and (ii) Bill 12 (2022, chapter 18), *An Act mainly to promote Québec-sourced and responsible procurement by public bodies, to reinforce the integrity regime of enterprises and to increase the powers of the Autorité des marchés publics*.

[3] Ss. 1 and 18, Bill 62.

[4] S. 1, Bill 62.

[5] S. 4, Bill 62.

[6] S. 1, Bill 62.

[7] Chapter V, ss. 18–21, ARCPB.

[8] S. 2, Bill 62.

[9] S. 11, Bill 62.

[10] *Ibid*.

[11] *Ibid*.

[12] S. 28, Bill 62.

[13] *Ibid*.

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