



## Call for Tenders: Notes to Bidders

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The call for tenders is frequently used in Quebec to award construction contracts. This process, by which the awarding authority invites contractors to bid, is intended to execute the contract at the best possible cost. Whether the call for tenders is voluntary or required by law, the contractor who wishes to submit a bid must consider the various rules governing this mechanism. This article, while not exhaustive, examines a few important principles in light of recent case law.

In accordance with the equality principle between bidders, the contracting authority may only award the contract to a bidder who submits a compliant bid<sup>1</sup>. This obligation arises as soon as bids are submitted when a contractual relationship is established between the contracting authority and each tenderer<sup>2</sup>. Courts recognized that the person calling for tenders may include a privilege clause, allowing them to reject all bids or to evaluate bids on more than just price. However, while they have some latitude in analyzing the compliance of bids, they cannot favour a bid that does not meet the mandatory requirements of the call for tenders<sup>3</sup>.

### Key elements to keep in mind

To avoid having its bid rejected, the bidder must therefore be particularly attentive to the eligibility requirements outlined in the tender documents. In the case of *Eurovia Québec Grands Projets inc. c. City of Montreal*, the contractor, whose bid was rejected due to insufficient experience, filed an injunction against the City of Montreal. Since an experience clause had been included in the call for tenders and

the bidder was unable to provide the relevant documentation to establish that this condition was met, the action was dismissed by the Superior Court<sup>4</sup>.

The contractor submitting a bid must also ensure that it complies with any implied requirements arising from the tender. Failure to comply with a legal requirement, such as licensing, may render the bid ineligible, even if not explicitly stated in the tender<sup>5</sup>. Indeed, complying with applicable laws and regulations is essential to the formation and validity of contracts. In *Agences Robert Janvier Itée v. Société québécoise des infrastructures*, the Superior Court concluded that a bid from a tenderer who did not hold a locksmith licence should have been rejected by the contracting authority, since such a licence was required to perform the contract in accordance with the eligibility requirements of the call for tenders<sup>6</sup>.

A bidder who is uncertain about the requirements or the manner in which the work will be performed should seek clarification from the awarding authority before submitting a bid. By submitting a bid, they agree to abide by the terms of the tender if awarded the contract<sup>7</sup>. If the contractual terms are clearly defined, it will be more difficult for the bidder to obtain subsequent compensation for additional costs incurred during construction. For example, in the recent case of *Pointe-Claire (City of) v. Groupe Serpone, syndic de faillite inc.*, the Court of Appeal dismissed the action brought by the contractor's trustee, who claimed the costs associated with filling trenches with crushed stone<sup>8</sup>. In overturning the trial judgment, the Court of Appeal found that the contractual documents issued by the City described with sufficient precision the work to be performed and the backfill material to be used.

### **In the event of an unawarded tender**

A contractor who considers that their bid was wrongfully rejected can sue the client for loss of profits that would have resulted from the performance of the contract, had it been awarded to them. The Court of Appeal recently reiterated that the burden of proof is on the contractor alleging loss profits<sup>9</sup>. It states that the courts will grant the claimed lost profit "if there is sufficient and conclusive evidence to that effect and, failing that, they will assess the average profit based on the company's previous yearly profits"<sup>10</sup>. The submitted proof must meet the best evidence rule<sup>11</sup>. A contractor who is unable to substantiate the amounts claimed with the relevant documentation risks having its action dismissed. For example, in *Catalogna & Frères Itée v. Construction DJL inc. et al.* the Superior Court dismissed the action of a contractor who had not put in evidence the invoices and other necessary documents to justify the amounts he was claiming.

## Conclusion

When submitting a bid, the contractor must keep in mind the importance of complying with the conditions set out in the call for tenders, as well as any applicable laws. This includes having the necessary permits, licenses and certifications to perform the work. If the awarding body is unable to answer your questions, it is preferable to consult an attorney. We will be pleased to assist you in the preparation of tender documents or in the event of a claim, so that you can be sure to preserve your rights.

**The information and commentary set forth herein are for the general information of the reader and are not intended as legal advice or as an opinion to be relied upon in relation to any particular circumstances.**

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<sup>1</sup> *Tapitec inc. c. Ville de Blainville*, 2017 QCCA 317.

<sup>2</sup> *Municipalité de Val-Morin c. Entreprise TGC inc.*, 2019 QCCA 405.

<sup>3</sup> *Id.*

<sup>4</sup> *Eurovia Quebec Grands Projets inc. c. Montréal (Ville de)*, 2018 QCCS 4524.

<sup>5</sup> *Maria (Office municipal d'habitation de) c. Construction LFG inc.*, 2014 QCCA 2034.

<sup>6</sup> *Agences Robert Janvier Ltée c. Société québécoise des infrastructures*, 2019 QCCS 46.

<sup>7</sup> *Municipalité de Val-Morin c. Entreprise TGC inc.*, préc., note 2.

<sup>8</sup> *Pointe-Claire (Ville de) c. Groupe Serpone, syndic de faillite inc.*, 2019 QCCA 1278.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Art, 2860 C.c.Q. ; *Catalogna & Frères Ltée c. Construction DJL inc.*, 2018 QCCS 1918 (désistement au stade de l'appel).