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Bill 26's voluntary reimbursement Program: What is it?

Abstract:

Put forward in the wake of the revelations of the Charbonneau Commission, the voluntary reimbursement program (hereinafter the "**Program**") provided for in *An Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts* (hereinafter the "**Act**") came into force on November 2, 2015. For a period of 2 years, the rules provided for in the Act to facilitate legal action against enterprises or individuals are suspended in order to allow them to avail themselves of the Program. The Program's rules are simple: they provide a confidential process where the director of the Program and the Minister of Justice have a central role. The Program may be tempting for many. In the event of an agreement, the participant could receive a global release binding many public bodies.

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On March 24, 2015, the National Assembly unanimously adopted Bill 26, entitled *An Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts* (hereinafter the "**Act**").

By this Act, the legislator aimed to implement two specific measures, namely:

(1) the establishment of rules that facilitate legal action against enterprises that have committed fraud or fraudulent practices in connection with public contracts;

(2) a fixed-term voluntary reimbursement program.

As part of this newsletter, we deal specifically with the voluntary reimbursement program (hereinafter the "**Program**"). The Program is inspired in some way from settlement conferences which generate a significant settlement rate and is similar amongst others to voluntary disclosure programs implemented by provincial and federal tax authorities.

Contrary to popular belief, the Program applies not only in the field of construction, but to all public contracts, be it in the course of the tendering process, the awarding process or the administration of a public contract, and therefore to all enterprises or individuals who have obtained contracts from public bodies, regardless of the object of the contract.

In particular, the Program allows to set up a system allowing many enterprises which have obtained public contracts during the last twenty (20) years, to come clean and reach a settlement with all public bodies that would have been subject to fraudulent tactics in the awarding or management of a contract.

The Program is therefore aimed at all enterprises or individuals who have an interest in showing transparency towards the public, their shareholders or their investors.

This program, which came into force on November 2, 2015, suspends for a period of two (2) years, more precisely until November 2, 2017, any possibility for a public body to take legal action against an enterprise that could be prosecuted under the provisions of the Act, unless otherwise authorized by the Minister of Justice. According to the information we have, at the end of 2015, only two (2) cases had been allowed to proceed under the Act.

Following the two (2) years moratorium, it is important to emphasize that the Act will give the opportunity to take legal action against the enterprises as well as the directors and officers in office at the time of the fraudulent activities, and that for incidents that occurred since 1996.

In order to avail themselves of the Program, enterprises have one year from said Program's implementation, or more precisely until November 1, 2016 to file a notice of intent. Following the notice of intent, enterprises have an additional year to reach a settlement.

The Honorable Justice Rolland, former Chief Justice of the Superior Court, was appointed director of the Program. His two main responsibilities are:

(1) to ensure the confidentiality of the process even in the event where the public bodies do not come to an agreement with the enterprises that filed a proposal;

(2) to analyze the proposals and counter-proposals with the assistance of a team of forensic accountants.

In order to achieve the Program's objective, Justice Rolland has put in place a number of steps to be followed within a specific timeframe with a view to enable enterprises, individuals and public bodies to have all the information they need to make informed decisions and to allow satisfactory settlements for the Program participants.

First, an enterprise wishing to use the Program must, before November 1, 2016, file a notice of intent containing the list of public bodies to which it intends to submit a settlement proposal. That list may include several public bodies, in which case the Minister of Justice will himself forward a notice to the public bodies that will receive a settlement proposal.

Then, thirty (30) days following the notice of intent, the enterprise must file a proposal in the form of an offer. This period may be extended for another thirty days by Justice Rolland in certain circumstances. The proposal must be accompanied by a cheque for an amount representing 2% of said proposal.

The director of the Program will then analyze the proposal with a team of forensic accountants and then make a recommendation to the Minister, the whole within one hundred and twenty (120) days of the notice of intent.

The public body then has sixty (60) days to evaluate the proposal and provide an answer. In case of a refusal, the public body must justify its refusal and file a counter-proposal.

Should the counter-proposal not be accepted by the enterprise, the director of the Program may then convene a mediation session. At the end of that session, the director of the Program will issue a final recommendation to the Minister of Justice.

The Minister of Justice will present the final recommendation of the director of the Program to the concerned public bodies. Following this final recommendation and in case of a refusal by one or more public bodies, the overall proposal will be voted on by all public bodies. In the event of a favorable vote of 2/3 of the public bodies concerned by the proposal, each holding voting rights proportional to their respective claims, the proposal is deemed accepted by all.

Once the proposal is accepted, if it is, a release with respect to the entire proposal, binding all concerned public bodies, will be signed by the Minister of Justice following the full payment of the accepted proposal or at any previous time, insofar the Minister of Justice is satisfied with the guarantees issued by the enterprise.

The Program therefore has some advantages in that it allows, following an accepted proposal, an enterprise to obtain a global release for all public contracts that were awarded to it since 1996.

Also, the enterprise availing itself of the Program will have the opportunity of having one single interlocutor representing all public bodies, namely the Minister of Justice, who is not compellable in any way because of the immunity he has.

The program is completely confidential, both with respect to the participation in the Program and to the settlement amount, unless the enterprise itself wishes to make public its participation in the Program. The director of the Program, the Minister of Justice, the public bodies or the Program participants cannot be compelled to disclose any information before ordinary or administrative courts.

Only one exception to confidentiality exists in the Act. Indeed, in the event that the enterprise which has submitted a proposal wishes to obtain a release with regards to all public bodies, including bodies with respect to which it no longer holds the necessary information to enable it to determine whether a proposal should be made to it or not or even if any contract was granted to it by that body, the director of the Program will publish a public notice to all bodies that may be concerned and will inform the Minister of Justice of the publication of such notice. The public bodies will then have ninety (90) days to manifest their claim.

This aspect involves a certain risk for the enterprise which seeks a global release, since public bodies may revise contracts awarded to it since 1996, therefore allowing to arise additional claims related to contracts that escaped the attention of the enterprise wishing to make a proposal. Review of obtained contracts and risk assessment are considerations that are not to be taken lightly. Thus, the decision of whether to participate or not in the Program must be analyzed in light of the enterprise's position in order to assess the risk, the potential consequences and the benefits which participating in this Program may offer.

The enterprise that decides to participate in the Program after a risk assessment process and a comprehensive analysis of the situation could also avoid long and costly litigation and the draconian penalties provided for in the Act if convicted.

Our recent inquiries with the Office of the director to the Program revealed that many notices of intent have been filed recently. That being said, we don't know if any settlement was concluded yet since none of the enterprises that filed notices of intent waived their right to the confidentiality of their participation in the Program.

For more information, please contact:

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