

Original : Français

November 12, 2012

Mr. Irvin Pelletier
Chair
Committee on Public Finance
Hôtel du Parlement
1045, rue des Parlementaires
RC, bureau RC.73
Québec (Québec) G1A 1A4

Subject: Bill 1 – *Integrity in Public Contracts Act*

Mr. Chair:

The Québec Ombudsman reviews all bills tabled in the National Assembly and, when it deems necessary, intervenes under section 27.3 of its constituting act, which empowers it to call the attention of a chief executive officer of a public body or the government to legislative, regulatory or administrative reforms it deems to be in the public interest.

I read Bill 1, the *Integrity in Public Contracts Act*, introduced in the National Assembly by the Minister responsible for Government Administration and Chair of the Conseil du trésor on November 1, 2012. The following analysis takes into account the fact that in carrying out its mission, the Québec Ombudsman sees to the rights of enterprises as much as to those of natural persons, both groups considered citizens within the meaning of its constituting act.¹

¹ *Public Protector Act* (R.S.Q., c. P-32).

I would begin by saying that the Québec Ombudsman fully endorses the government's resolve to fight corruption and enhance integrity in public contracts. The public interest requires that there be rigorous measures surrounding the awarding of public contracts, thereby fostering public confidence and the fair treatment of enterprises.

The Québec Ombudsman's comments on Bill 1 will be limited to two general aspects of the proposed reform.

The importance of prompt decision-making and effective collaboration among public bodies

The new authorization procedure proposed in Bill 1 will apply to all enterprises and natural persons operating a sole proprietorship wishing to enter into contracts with a public body or municipality.² The mechanism contemplated will require ongoing coordination among several public bodies, primarily, the Autorité des marchés financiers (AMF) and the Associate Commissioner for Audits of the Unité permanente anticorruption (UPAC). In addition to working together closely, as part of their respective mandates these two bodies will have to interact with several other bodies, the main ones being police services and municipalities and the Commission de la construction, Agence du revenu and Conseil du trésor.

Given this context, the Québec Ombudsman considers it important that there be mechanisms for ensuring effective and rapid circulation of information among these players called upon to work together closely.

In the course of its interventions, the Québec Ombudsman has often seen that faulty collaboration and circulation of information among the various public bodies can have injurious consequences for citizens. The importance of the reform proposed in Bill 1 in terms of the magnitude of the public interest and the scope involved compel us to reiterate our concern that citizens not suffer harm due to deficient collaboration or lack of coordination among the public bodies in question.

² Section 21.17 of the *Act respecting contracting by public bodies* (R.S.Q., c. C-65.1), introduced by section 10 of Bill 1.

For past bills, the Québec Ombudsman proposed measures aimed at ensuring that decision-making about citizens is prompt and effective.³ For example, when a new administrative service was created, the Québec Ombudsman proposed that the bill prescribe a maximum amount of time for examining an application.⁴

I understand that pursuant to section 35 of the *Act respecting the Autorité des marchés financiers*,⁵ AMF decisions regarding authorizations will be subject to sections 2 to 8 of the *Act respecting administrative justice*,⁶ notably, the obligation to act promptly and demonstrate diligence in decision-making.⁷

However, no maximum amount of time is specified for the advisory opinion that UPAC must provide. Proposed section 21.28⁸ only says that UPAC's Associate Commissioner for Audits must provide the enterprise concerned with an advisory opinion "as soon as possible," but no time limit is indicated. Furthermore, the bill does not specify a time limit for AMF to render a decision on applications for authorization.

I believe and recommend that the best way to guarantee that citizens' applications for authorization are handled promptly is for the legislation to provide for a time limit for the AMF to render a decision. Exceptions could be made and the limit extended in certain cases deemed more complex.

As for the celerity of decision-making, the members of the Committee on Public Finance will surely have to consider the challenges posed by the current time limits for enterprises to tender bids and the added obligation for them to obtain prior authorization from AMF to bid.

³ See the Québec Ombudsman's brief to the Commission on Institutions as part of the special consultations and public hearings on Bill 64, *An Act to promote access to justice in family matters*, Québec City, May 22, 2012.

⁴ *Ibid.*, Recommendation 3, page 10.

⁵ R.S.Q., c. A-33.2.

⁶ R.S.Q., c. J-3

⁷ *Ibid.*, section 4.

⁸ Introduced by section 10 of Bill 1.

The need for administrative review

The discretionary power conferred upon AMF with regard to the authorization to bid on public contracts pursuant to sections 21.25 and 21.26 of the bill, albeit very broad, is necessary to prevent delinquent enterprises from taking advantage of loopholes and to provide contract rules compliance monitors with leeway. On the other hand, such sweeping discretionary power must be offset by sufficient procedural guarantees and recourse for individuals and enterprises whose rights would be violated if the wrong administrative decision is made.

As presented in Bill 1, AMF decisions on applications for authorization are final, are not subject to administrative review, and cannot be brought before an administrative tribunal for appeal. The only recourse available to enterprises denied authorization is to petition the Superior Court of Québec for a judicial review. This costly and complex procedure does nothing to keep relations between the government and its citizens out of the courts. In the case of this bill, the lack of administrative recourse is troubling, especially in terms of the impact on the protection of the rights of smaller businesses unjustly or mistakenly denied authorization by AMF.

The consequences of refusal of authorization to contract with public bodies or municipalities for the health of public markets in Québec and the ability of its players to compete could be considerable, especially since the bill provides that an enterprise denied authorization cannot reapply until a year has elapsed.⁹

Given the scope of the new mechanism for authorizing enterprises wishing to enter into contracts with public bodies or municipalities, and the reach of the discretionary power granted the AMF in considering the factors indicated in sections 21.25 and 21.26, it seems to me that administrative review of decisions rendered on applications for authorization is necessary. I also believe that in order to ensure equitable respect of the rights of every enterprise and to rectify the harmful administrative errors bound to be made in some cases, such reviews must be carried out by an instance other than the one that made the initial decision.

⁹ Subparagraph 2 of section 21.23, introduced by section 10 of Bill 1.

The imperatives of celerity and efficiency inherent in the awarding of public contracts and the context contemplated by the bill impel me to formally recommend establishment within AMF of an administrative process for reviewing applications for authorization initially turned down. The reviews would be carried out by authorities distinct from those who rendered the initial decision. In my opinion, section 35.1 of the *Act respecting the Autorité des marchés* (R.S.Q., c. A-33.2) would allow development of such a process within AMF.

In closing, I would reaffirm that I subscribe to the goal of Bill 1 with regard to the public interest and emphasize that the purpose of my recommendations is to strengthen the proposed reform and public confidence in it. By guaranteeing a credible and just process, the inclusion of mechanisms that enable equitable protection of the rights of all contributes to achievement of the objective of the bill.

Yours truly,

[French original signed by]

Raymonde Saint-Germain
Ombudsperson

c.c.: Stéphane Bédard, Minister responsible for Government Administration and
Chair of the Conseil du trésor
Stéphane Bergeron, Minister of Public Security
Robert Dutil, Official Opposition House Leader
Gérard Deltell, Leader of the Second Opposition Group
Mario Albert, President and CEO, Autorité des marchés financiers
Robert Lafrenière, Anti-Corruption Commissioner
Yves Ouellet, Secretary, Conseil du trésor
Martin Prud'homme, Deputy Minister of Public Security
Émilie Bevan, Secretary, Committee on Public Finance
Anik Laplante, Secretary, Committee on Institutions