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Autorité des marchés publics Has New Powers to Oversee Public Contracts

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The provisions respecting the processing of complaints, communication of information and disclosure of wrongdoing to the Autorité des marchés publics (AMP) came into force on May 25, 2019. An interested person or partnership wishing to file a complaint with the AMP or provide information to the AMP about a public contract or the tendering process for a public contract can now do so by following the procedure set out in the *Act respecting the Autorité des marchés publics*¹ (AAMP).

The AMP's Mission

Following the Charbonneau Commission's first recommendation, the AMP was created on January 25, 2019, and most of the functions given to the Autorité des marchés financiers in the *Act Respecting Contracting by Public Bodies*² were transferred to the AMP at that time.

As of May 25, 2019, the AMP's mission includes oversight of any contracting process determined by the government.³ To perform its mission, the AMP will henceforth have the following additional functions:

- to examine the tendering or awarding processes for public contracts following a complaint or communication of information;
- to examine the performance of a public contract following a communication of information;
- to ensure coherence is maintained in the examination of tendering and awarding processes for public contracts and in the examination of the performance of such contracts; and
- to monitor public contracts particularly for the purpose of analyzing procurement trends and public bodies' contracting practices and identifying problematic situations that affect competition.⁴

Public bodies will be required to send the AMP all the documents and information it considers necessary to exercise its functions.⁵

Complaint Mechanisms

As of May 25, 2019, any interested person or partnership (or its representative) may file a complaint⁶ with the AMP regarding the following:

- the tendering or awarding process for a public contract;
- a public body's decision regarding the awarding of a public contract; or
- an amendment made to tender documents.

When a complaint to the AMP pertains to the tendering process, the complainant must first file a complaint about the issue with the public body.

After receiving the public body's decision and depending on the type of complaint, the complainant generally has three days to file a complaint with the AMP.⁷

Although the processing of a complaint by the AMP does not prevent the complainant from filing a civil action based on the same facts,⁸ the complaint could be dismissed if the complainant pursues a judicial remedy based on the same facts.⁹

Persons or partnerships may file a complaint with the AMP if they believe they are the victims of a reprisal to make them refrain from filing a complaint or because they have communicated information in good faith or cooperated in an audit by the AMP.¹⁰

Communication of Information

A person may also communicate information to the AMP regarding, among other things, the tendering or awarding process for a public contract or the performance of such a contract, if the public body in question does not appear to be acting in compliance with the normative framework in respect of the process or contract.

This applies despite legal provisions that would normally limit the communication of information to third parties, including professional secrecy (other than between a lawyer or notary and a client) or the duty of confidentiality or loyalty of an employee toward an employer.¹¹

AMP's Power to Intervene

As part of monitoring public contracts, the AMP may collect, compile and analyze information about public contracts and inform public bodies of the resulting findings.¹²

When an audit or investigation ends, the AMP may order the public body not to follow up on its intention to enter into a public contract by mutual agreement if the AMP is of the opinion that a complainant that has expressed interest is capable of carrying out the contract; in that case the public body must issue a public call for tenders if it intends to enter into the contract.¹³

The AMP is also authorized to suspend, examine, cancel and review a tendering and awarding process for a public contract or order a public body to amend its tender documents following a complaint when the public body concerned does not appear to be acting in compliance with the normative framework in respect of the process or contract.¹⁴

New Provisions for Municipalities

In addition, as of May 25, 2019, municipalities will be required to publish a notice of intention on the Government of Québec's electronic tendering system website at least 15 days before entering into a contract by mutual agreement with a single supplier for an expenditure above the threshold determined by order.¹⁵

For the City of Montréal, most of the functions and powers normally devolved to the AMP are exercised by its Inspector General.¹⁶

Impact of AMP's New Functions in the Future

The AMP's new powers will allow parties wishing to enter into contracts with public bodies to make representations to ensure tenderers are treated honestly and fairly; the AMP is then authorized to intervene when necessary. These new mechanisms represent a significant change in enabling parties to contest the tendering or awarding process for a public contract in Québec, which until now was limited to recourse to the courts.

As a result of these changes, parties to public contracts can expect a possible slowdown in the tendering or awarding process for public contracts in the coming months. An eligible complaint could lead to a postponement of the tender submission deadline while the public body or the AMP conducts its audit and renders a decision.

Other provisions involving the AMP will come into force at a date to be determined by government order. According to those provisions, the AMP will be responsible for keeping summaries of contractor performance evaluations and making them available to public bodies.¹⁷

¹ CQLR, c A-33.2.1.

² CQLR, c C-65.1.

³ Section 19, para 2, AAMP.

⁴ Section 21, paras 1 (1), (2), (3), (5), (7) and para 2, AAMP.

⁵ Section 34, AAMP.

⁶ A complaint must be filed electronically using the AMP complaint form, which should be available on its website soon.

⁷ Sections 37, 38, 39 and 40, AAMP.

⁸ Section 52, para 2, AAMP.

⁹ Section 46, para 1(7), AAMP.

¹⁰ Sections 51, 63, 64 and 65, AAMP.

¹¹ Section 56, AAMP.

¹² Section 31, para 1 (7), AAMP.

¹³ Section 29, para 1 (2), AAMP.

¹⁴ Section 29, AAMP.

¹⁵ Section 13.1, *Act Respecting Contracting by Public Bodies*, CQLR, c C-65.1; s. 573.3.0.0.1, *Cities and Towns Act*, CQLR, c C-19; s. 938, *Municipal Code of Québec*, CQLR, c C-27.1; s. 112.5, *Act Respecting the Communauté métropolitaine de Montréal*, CQLR, c C-37.01; s. 105.5, *Act Respecting the Communauté métropolitaine de Québec*, CQLR, c C-37.02

¹⁶ Section 68, AAMP.

¹⁷ Section 129, *An Act to facilitate oversight of public bodies' contracts*, SQ, 2017, c 27.

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