

CRT-Hamel c. Société de transport de Montréal, 2017 QCCS 1711

On April 27, 2017, the Superior Court of Quebec was asked to render a decision regarding a dispute between the parties concerning a public contract that was awarded, by way of a provisional injunction.

The Applicant, CRT-Hamel ("Hamel"), is seeking the issuance of a provisional injunction in order to suspend the execution of a contract awarded by the defendant, Société de Transport de Montréal ("STM"), to EDT GCV Civil s.e.p ("EDT"), for the excavation and concrete work related to the construction of the Côte-Vertu garage, which will be used to store a portion of the metro trains ("Contract").

Hamel submits that EDT's tender does not meet the mandatory requirements of the *Act respecting contracting by public bodies* ("ACPB") and those stipulated in the tender documents, particularly the necessity to obtain prior authorization from the *Autorité des marchés financiers* (the "Authority") to enter into a contract with a public body.

On the merits, Hamel is seeking to declare EDT's tender inadmissible, to invalidate the contract awarded by the STM to the latter, to declare Hamel to be the lowest bidder in conformity and to order the STM to award the contract to Hamel.

THE PARTIES

Hamel is a general partnership engaged primarily in the field of civil engineering works and marine infrastructure works.

The STM is a legal person constituted by virtue of the *Act respecting public authorities* (L.R.Q., chapter S-30.01) and is therefore subject to the application of the provisions of the ACPB, specifically those regarding the procurement of a prior authorization from the Authority in order to enter into a contract with a public body.

The nature and corporate structure of EDT is subject to debate. The parties are not in agreement as to whether it is an undeclared partnership or a consortium. In either case, EDT was formed for the sole purpose of carrying out the construction work set forth in the Contract and is composed of three (3) corporate partners, which are EBC Inc., Groupe TNT Inc. and Dragados Canada Inc.

THE CONTEXT

On December 1, 2016, the STM began a call for tenders for the granting of the Contract.

The tender documents, particularly sections 9.1.3 and 9.2.3 of said documents, state that the eligibility of the bidders is subject to certain conditions, including the requirement to obtain prior authorization from the Authority, as stipulated in the ACPB.

On March 9, 2017, Hamel submits its tender in the amount of 130 805 130\$, along with its authorization from the Authority, the whole in accordance with the provisions of the ACPB hereinabove cited and the tender documents.

Yet, on April 19, 2017, Hamel learned that the STM would award the contract to EDT, who was not listed as authorized to conclude public contracts by the *Register of Enterprises*, and therefore put the STM formally on notice to relinquish granting the Contract to EDT.

On April 20, 2017, the STM confirms that it awarded the Contract to EDT which, it maintains, it did so in accordance with the applicable laws. As such, Hamel instituted its legal proceedings on April 24, 2017.

THE RULING ON THE PROVISIONAL INJUNCTION

Firstly, in order to assess the merits of the provisional injunction, the Court must analyse the following criteria:

1. Is there a serious issue to be tried?
2. Will the applicant suffer irreparable harm if the injunction is not granted?
3. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits?
4. Is there urgency?

For the reasons hereinafter exposed, the Court concluded that the criteria was not met, and that, consequently, that there is no reason to order the suspension of the execution of the Contract.

1) Serious Issue to be Tried

For the Court, both at the provisional stage and on the merits, the crux of the dispute revolves around the interpretation of sections 21.17 and 21.18 of the ACPB, on whether there is a distinction to be made between the requirements applying to an undeclared partnership and to a consortium.

Sections 21.17 and 21.18 of the ACPB provides the following:

“21.17. An enterprise that wishes to enter into a contract with a public body involving an expenditure equal to or greater than the amount determined by the Government must obtain an authorization for that purpose from the Autorité des marchés financiers (the Authority). The amount may vary according to the category of contract.

An enterprise that wishes to enter into a subcontract that involves an expenditure equal to or greater than that amount and that is directly or indirectly related to a contract described in the first paragraph must also obtain such an authorization. Such subcontracts are public subcontracts.

For the purposes of this chapter, “enterprise” means a legal person established for a private interest, a general, limited or undeclared partnership or a natural person who operates a sole proprietorship.

21.18. *An enterprise that enters into a contract with a public body or that enters into a public subcontract must hold an authorization on the date the contract or subcontract is entered into. In the case of a consortium, every enterprise in the consortium must hold an authorization on that date.*

Moreover, an enterprise that responds to a call for tenders for a public contract or subcontract must hold an authorization on the date it submits its bid, unless the call for tenders specifies a different date which precedes the date the contract is entered into.” (Emphasis Added)

Hamel argues that as an undeclared partnership, EDT was required to obtain prior authorization from the Authority in accordance with the requirements of section 21.17. Thus, given EDT’s failure to obtain said authorization, its bid was therefore not in compliance with the mandatory standards of the ACPB and the tender documents.

On the other hand, the STM and EDT submit that it is not section 21.17 that is applicable in this instance but rather section 21.18. EDT, being a consortium, would not be required to procure an authorization from the Authority however, each corporation composing the consortium would, as was the case at hand. Consequently, the STM and EDT submit that the Contract was validly awarded to EDT.

The Court, however, at first glance, has difficulty in reconciling the respective positions put forth by the parties. As was pointed out by the Court, the notion of a “consortium” is nowhere defined in the ACPB nor the *Civil Code of Quebec*. Therefore, the Court undertakes to define the term consortium and it concludes that it is an innominate contract that would arise from an occasional and momentary necessity following a call to tenders issued by a client for the construction of a

large scale project.¹ Reiterating the opinion of Me Vincent Karim, the Court maintains that a consortium is not an undeclared partnership.²

Recalling the purpose of the ACPB, which is to determine the conditions relevant to entering into public contracts with a public body, the Court determined that the interpretation of sections 21.17 and 21.18 of the ACPB are not clear on whether or not, in the case of an undeclared partnership which is also a consortium, that in addition to the individual authorization required by each of the corporate partners, an authorization for the undeclared partnership itself is also mandatory.

As a result, the Court concludes that the seriousness of Hamel's case is not clear, but rather doubtful, and recalls that when it comes to calling into question a decision made by a public body, as is the case with the STM, this criteria is held to a more rigorous application and a higher standard and therefore, it requires a strong *prima facie* case, which was not the case in the present instance.

2) Serious and irreparable harm

In its application, Hamel submits that, in the event that EDT's tender was to be declared inadmissible, the Contract would be awarded to it.

For the Court, this is not an established fact at the provisional injunction stage, as it is always possible for the STM to avail itself of a clause enabling it to award the Contract to none of the tenders.

Furthermore, the Court declares that should Hamel possibly suffer an injury, it would be possible to be compensated by way of the awarding of damages.

3) The Balance of Convenience

With regards to this criteria, the Court comes to the determination that the STM will suffer the greater harm should the court grant Hamel's provisional injunction.

In the eyes of the Court, meeting the deadlines set forth for the completion of the project is paramount, especially considering the affidavit of the director of the STM, to the effect that due to the increase in ridership, the number of trains required for the operation of the orange line of the Montreal metro system creates an urgent need to build an area where said trains can be parked.

¹ Vincent KARIM, *Le consortium d'entreprises, joint venture: nature et structure juridique: rapports contractuels, partage des responsabilités, règlement des différends*, 2e éd. (2016), par 51.

² *Id.*

Moreover, the Court is of the opinion that the Contract was concluded to improve the Montreal transit system and its surroundings and is therefore in the public interest. As such, the suspension of the Contract would deeply disadvantage and affect the users of the transit system.

4) Urgency

Without going any further, the Court maintained that there was urgency.

CONCLUSION

In conclusion, the Court rejects Hamel's application for a provisional injunction. The Court determined that Hamel did not demonstrate a strong *prima facie* case in support of its position that EDT itself should have obtained a prior authorization from the Authority, despite the fact that each of the corporate partners of the undeclared partnership and/or consortium had each obtained their individual authorization. Furthermore, the Court is of the opinion that Hamel has failed to demonstrate its irreparable harm and also, that it would suffer a greater harm than the STM in the event that the suspension of the Contract would not be granted.