

***Construction GCP inc. c. Ville de Saint-Jean-sur-Richelieu, 2017 QCCQ 12279 (CanLII)***

On February 25<sup>th</sup>, 2015, the City of Saint-Jean-sur-Richelieu (the "City") launched a public offering for the extensive construction works to be performed on the service building Poste Gouin (the "Project").

Since the costs associated to the Project exceed \$100,000, the City must proceed through a public offering in accordance with the procedure established by the *Cities and Towns Act* ("L.C.V.").

At the opening of the tenders, Construction G.C.P. Inc. ("G.C.P.") is the lowest bidder, however the City awards the contract to the second lowest conforming bidder citing a major irregularity in G.C.P.'s tender.

According to the City, G.C.P. had not respected and therefore modified the terms of the tender documents by changing the price type for certain items, which disqualified it.

On the other hand, G.C.P. submits that the inclusion of a fixed price rather than a unit price had no impact on the total price of the tender and therefore, did not affect the principle of equality among bidders. At most, it is a minor irregularity that does not allow for the rejection of its tender.

Consequently, G.C.P. is claiming the sum of 42,092.37\$ from the City for loss of profit as well as for the fees and costs it incurred to prepare its bid.

**LAW**

In the case at bar, the Court had to determine the following : in the event that a contractor submits a bid which indicates pricing on a fixed price basis contrary to a unit price, as stipulated in the tender documents, does this constitute a minor or major irregularity?

In order to assess the merits of G.C.P.'s claim, the Court recalls certain fundamental principles that govern the bidding process, namely the principle of equality among bidders.

The Court, citing *Me Jasmin Lefebvre*, reiterates that the principle of the equality among bidders is undoubtedly the most fundamental principle in matters of public offering because it ensures that all bidders must fulfill the same requirements in order for there to

be a healthy competition between them.<sup>1</sup> Furthermore, the Court states that the violation of this principle of equality among bidders shall be the determining factor as to whether or not an irregularity is major or minor.

Thus, any non-conformity will not necessarily result in the rejection of a bid. A distinction must be made between a minor irregularity, which does not affect the objectives of a public offering and a major irregularity, which concerns an essential element or affects the fundamental objectives of the public offering.

Moreover, the Court revisits the Supreme Court decision *M.J.B. Entreprises*<sup>2</sup>, which states that the adjudication of a contract to the lowest compliant bidder is the rule and that the client can not derogate from said rule without legitimate reason or grounds to do so.

That being said, the conformity of the bid to the tender documents is key.

Finally, the Court states that the matter put before it must be examined in light of the tender documents for the Project and the other tenders received by the City, and therefore each case is a case in point.

## **DECISION**

In the analysis of the case at bar, the Honorable Justice Monique Dupuis J.C.Q. analyzes the provisions and requirements of the tender documents for the Project and takes into consideration clause 11.1 which provides that only the actual quantities will be paid to the Contractor. However, in the case of a fixed price contract, article 2109 of the *Civil Code of Québec* ("C.c.Q") would apply and thus prevent the City from claiming a price reduction:

« 2109. Where the price is fixed by the contract, the client shall pay the price agreed, and may not claim a reduction of the price on the ground that the work or service required less effort or cost less than had been foreseen.

Similarly, the contractor or the provider of services may not claim an increase of the price for the opposite reason.

Unless otherwise agreed by the parties, the price fixed by the contract remains unchanged notwithstanding any modification of the original terms and conditions of performance. »

[We emphasise]

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<sup>1</sup> *Les exigences des tribunaux quant à la conformité des soumissions sont-elles en processus d'érosion? Le point suite à la décision dans Structures GB inc. c. Ville de Rimouski, Revue du Barreau*, 168, printemps 2009, p. 254.

<sup>2</sup> *M.J.B. Enterprises Ltd. c. Construction de Défense (1951) Ltée*, [1999] 1 R.C.S. 619.

As such, the Court concluded that the fixed price submitted by G.C.P. would preclude the application of Clause 11.1 during the execution of the Contract since the City would now be required to pay the fixed price submitted by G.C.P., even if the actual quantities were less than those provided in the tender documents.

Furthermore, G.C.P. voluntarily modified the tender documents by entering a fixed price rather than a unit price as stipulated and, as a result, it modified the conditions of the tender documents for the Project. In addition, the Court recalls that a contractor can not negotiate with the client at the stage of "Contract A", formed by the public offering process, since this would be contrary to the principle of equality between bidders.

### **CONCLUSION**

For these reasons, the Court finds that G.C.P.'s bid was not in conformity with the tender documents because it submitted a fixed price for certain items of the tender documents which required a unit pricing and this constitutes a major irregularity. The Court finds that the City was justified in excluding G.C.P.'s bid, and therefore dismisses G.C.P.'s claim with costs.

This recent decision by the Court of Quebec demonstrates how important it is for contractors to pay particular attention to the requirements of the tenders documents, especially those regarding pricing methods, since this may result in the disqualification of their tender.